



MEDICAL, LEGAL, AND SOCIAL ASPECTS OF THE SURROGATE MOTHER PHENOMENON

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Abstract:

Uterine rental (Surrogate Mother) is where a woman makes a gestational agreement with a husband and wife. The surrogate mother is willing to bear the seeds of a married couple by receiving certain rewards. Uterine rental occurs because the wife can not conceive because of something that happened to her womb. This study uses normative law research methods using normative case studies in the form of legal behavior products by reviewing Law No. 36 of 2009 concerning Health, Government Regulation (PP) No. 61 of 2014 concerning Reproductive Health, the Civil Code, and Law No. 1 of 1974 concerning Marriage. The results of this study are 1. Uterine rental is a pregnancy outside the natural way that can only be done to married couples bound by a legal marriage and experience infertility or infertility to produce offspring 2. All forms of surrogate mother agreements in Indonesia are null and void because they contradict the existing laws and regulations. 3. A child born to a Surrogate Mother who is bound in marriage is the legal child of the woman and her husband, but if the child is born to a Surrogate Mother who is not bound by marriage, the child will be the illegitimate child of the woman. 4. Inheritance rights of children born to surrogate mothers who are bound in marriage will receive inheritance rights from the surrogate mother and her husband. If the surrogate mother is not bound by marriage, the child will only receive inheritance rights from the surrogate mother.

Keywords: Substitute Mother; Uterine Rental; Surrogate Mother.

Abstrak:

Sewa rahim (Surrogate Mother) dimana seorang wanita yang mengikat janji atau kesepakatan (gestational agreement) dengan pasangan suami-istri. Ibu pengganti tersebut bersedia mengandung benih dari pasangan suami-istri dengan menerima imbalan tertentu. Sewa rahim terjadi karena pihak istri tidak bisa mengandung karena sesuatu hal yang terjadi pada rahimnya. Penelitian ini menggunakan metode penelitian hukum normatif (normative law research) menggunakan studi kasus normatif berupa produk perilaku hukum dengan mengkaji UU Nomor 36 tahun 2009 Tentang Kesehatan, PP No 61 tahun 2014 tentang Kesehatan Reproduksi, Kitab Undang-Undang Hukum Perdata, dan UU Nomor 1 Tahun 1974 Tentang Perkawinan. Hasil dari penelitian ini adalah 1. Sewa rahim merupakan Kehamilan di Luar Cara Alami hanya dapat dilakukan pada pasangan suami isteri yang terikat perkawinan yang sah dan mengalami ketidaksuburan atau infertilitas untuk memperoleh keturunan 2. Segala bentuk perjanjian surrogate mother di Indonesia batal demi hukum, karena bertentangan juga dengan peraturan perundang-undangan yang ada. 3. Anak yang dilahirkan dari wanita Surrogate Mother yang terikat dalam perkawinan berkedudukan sebagai anak sah dari wanita tersebut dan suaminya, namun apabila anak itu lahir dari wanita Surrogate Mother yang tidak terikat dalam perkawinan, maka anak tersebut akan berkedudukan sebagai anak luar kawin dari wanita tersebut. 4. Hak waris anak yang dilahirkan oleh surrogate mother yang terikat dalam perkawinan akan mendapat hak waris dari ibu pengganti dan suaminya. Apabila ibu pengganti tidak terikat dalam perkawinan maka anak tersebut akan mendapat hak waris dari ibu pengganti saja.

Kata Kunci: Ibu Pengganti; Sewa Rahim; Surrogate Mother

A. Introduction

Everyone has the same right to form a family and continue their offspring through legal marriage. However, sometimes there are various obstacles to having children in a marriage. (Santoso & Fathuri, 2019) This occurs when one or both partners, both husband, and wife, have abnormalities in their reproductive organs. So far, the way to deal with this problem is by adopting children, but in its development, the husband and wife want to have children who still have a genetic relationship. One way that is taken as a solution to overcome this problem is by renting the womb of someone who is usually called a Surrogate Mother. (Yuliana & Saputra, 2019)

Initially, uterine rental occurred because the wife could not conceive because of something that happened to her womb, so the wife's role was transferred to another woman as a mother in pregnancy and childbirth, either with material or voluntary compensation. Subsequent developments have seen a shift in substance and meaning, from the initial substance as an alternative to medical disorders due to congenital disabilities or disease, towards social exploitation of the value of a womb. The shift occurred when the tenant was no longer for medical reasons but switched to aesthetic cosmetics. Meanwhile, the hired party will use it as a means of earning a living, especially in low-income communities in India, Bangladesh, and China, which the government in those countries facilitates by setting up a center for a uterine rental model, including the processing of special visas and medical visas. (Perdata, 2015)

The issue of uterine rental is a fascinating topic of debate regarding the existence of women, viewed from medical, legal, and ethical aspects. In Indonesia, until now, the practice of renting a womb has not been formally carried out, but young women from Indonesia have stated that they are willing to become surrogate mothers.

B. Research Method

This research uses normative legal research methods or doctrinal research. Normative law research uses normative case studies as products of legal behavior, for example, reviewing laws. The subject of the study is the law which is conceptualized as a norm or rule that applies in society and becomes a reference for everyone's behavior. So normative legal research focuses on an inventory of positive law, legal principles and doctrines, legal findings in cases in concreto, legal systems, synchronization levels, legal comparisons, and legal history. (Sonata, 2015)

C. Discussion

1. The Medical Aspects of Uterine Rental

A surrogate mother is a woman who binds a promise or agreement (gestational agreement) with a husband and wife. The surrogate mother is willing to bear the seeds of a married couple by receiving certain rewards. (Taebi et al., 2020) The woman ready to have her embryo deposited is called a surrogate mother, generally with an agreement between the surrogate mother and the married couple who want to use the services of the surrogate mother, commonly referred to as the intended parent. In the contents of this agreement, costs are provided for needs during the process of carrying the child, during the delivery process, and after giving birth. After giving birth to the child, this surrogate mother must be handed over to the intended parent. There are two types of uterine rental classification: Traditional Surrogacy and Gestational Surrogacy. (Strasser, 2015)

Traditional surrogacy is a pregnancy in which a woman provides her eggs to be fertilized by artificial insemination, then bears the fetus and gives birth to her child where the ovum (eggs) comes from a woman who is pregnant and carries the baby within a period of gestation, then gives birth to a child for another couple. The child who is born has a genetic link with him. Gestational surrogacy, according to Black's Law Dictionary, is a pregnancy that originates from the egg or ovum of a woman who has been fertilized by the sperm of a man (generally the partner of the woman who has the ovum) conceived in the womb of another woman (surrogate mother) carried out through in vitro fertilization techniques (IVF) until the surrogate gives birth. The surrogate mother only lends the uterus, so it doesn't have a genetic bond with the baby. Sperm and eggs come from both tenants and donors. (Brinsden, 2003)

The requirements to become a surrogate mother are women aged 18-35 years. Ideally, 28 years old, physically and psychologically healthy, have given birth at least once to a healthy baby, and understand the health and emotional effects of pregnancy and childbirth. The family must provide approval and support, have the aim of helping other couples have children, and be responsible for raising the fetus in the womb. (Habibilah & Ain, 2015)

2. The Legal Aspects of Uterine Rental

1) Uterus Rental Arrangements in Law Number 36 of 2009 concerning Health

In Article 127 of Law Number 36 of 2009 concerning Health, it is stated that legally married couples with provisions can only carry out Efforts to get pregnant outside the natural way; the result of fertilization of sperm and ovum from the husband and wife concerned is implanted in the womb of the wife from which the ovum comes from, carried out by health workers who have the expertise and authority to do so, and at certain health service facilities.

Provisions regarding the requirements for pregnancy outside the natural way, as referred to, are regulated by Government Regulation. The article above has strictly prohibited the practice of uterine rental in Indonesia. What is permitted by Indonesian law is the method of fertilization of sperm and ovum from a legal husband and wife, which is implanted in the womb of the wife from which the ovum comes. This method is known as the IVF method. As for methods or attempts at pregnancy outside the natural way other than those regulated in Article 127 of the Health Law, including surrogate mothers or renting/custodial wombs, legally cannot be carried out in Indonesia. As a result, the objective conditions of an agreement following Article 1320 of the Civil Code cannot be fulfilled. Thus, the uterine rental agreement in Indonesia is invalid or null and void by law. This means that from the beginning, it was considered that there had never been an engagement. (Monez, 2020)

2) Uterus Rental Arrangements in Government Regulation No. 61 of 2014 concerning Reproductive Health

Article 40 of Government Regulation No. 61 of 2014 concerning Reproductive Health states that assisted reproduction or pregnancy outside the natural way can only be performed on married couples bound by a legal marriage and experience infertility or infertility to produce offspring. Reproduction with Assistance or Pregnancy Outside the Natural Way, as

referred to, is carried out by using the results of fertilization of sperm and ovum originating from the husband and wife concerned and implanted in the wife's womb from which the ovum develops. Reproduction with Assistance or Pregnancy Outside the Natural Way is carried out following the development of science and technology, does not conflict with religious norms, and must be carried out by health workers with competence and authority. (Diani, 2020)

From the article above, it can be seen that what is meant by "infertility" is a condition that occurs in a husband and/or wife unable to produce offspring after having regular sexual intercourse within 1 (one) year without contraceptive protection. Assisted Reproduction or Pregnancy Outside the Natural Way uses fertilization outside the human body (in vitro fertilization) or other technologies. In vitro fertilization, technology/fertilization outside the human body is a reproduction by bringing together the ovum with sperm cells in the laboratory until fertilization occurs and the fertilization results (embryo) are returned to the mother's womb and allowed to develop into a fetus. What is meant by "embryo" is the further development of the result of fertilization of sperm and ovum until a blastocyst is formed. In carrying out artificial reproduction, must be carried out following the development of science and is not allowed to conflict with religious norms.

Then it is further regulated in Article 41 of Government Regulation No. 61 of 2014 concerning Reproductive Health, stating that a husband and wife, as referred to in Article 39 paragraph (1), who wish to use Reproductive services with Assisted or Unnatural Pregnancy must meet the following requirements:

- 1) proper management of infertility has been carried out;
- 2) there are medical indications;
- 3) understand the general artificial conception procedures;
- 4) capable of giving informed consent;
- 5) capable of financing the procedures undertaken;
- 6) capable of paying for childbirth and raising the baby; and
- 7) mentally capable.

From the article above, it is known that not all married couples can perform reproductive services with assistance or pregnancy outside the natural way. However, it must first meet the requirements set out by Article 41 of Government Regulation no. 61 of 2014 concerning Reproductive Health. Then it is regulated in Article 43 of Government Regulation no. 61 of 2014 concerning Reproductive Health states that excess embryos resulting from fertilization outside the human body (in vitro fertilization) that are not implanted in the uterus must be stored until the birth of a baby resulting from assisted reproduction or pregnancy outside the natural way. The storage of excess embryos, as referred to, can be extended every 1 (one) year at the wish of the husband and wife for the benefit of the subsequent pregnancy.

Excess embryos, as referred to, are prohibited from implanting in the mother's womb if the father dies or divorces; or in the womb of another woman. Suppose the owner's husband and wife do not extend the shelf life of the excess embryos. In that case, the health service facility providing Assisted Reproduction or Unnatural Pregnancy must destroy the excess embryos. From the provisions of Article 43 paragraph 3 above, excess embryos may not be implanted in another woman's womb (surrogate mother) or mother's womb if

the father has died or is divorced. Then it is regulated in Article 4 of Government Regulation no. 61 of 2014 concerning Reproductive Health that assisted reproduction or pregnancy outside the natural way is prohibited from choosing the sex of the child to be born except in the case of choosing the sex of the second and subsequent children. (Arikhman, 2016)

3) Uterine Rental Arrangements in the Civil Code

According to the provisions of Article 1320 of the Civil Code, for the validity of an agreement, 4 (four) conditions are required, namely: (Rabbani et al., 2021)

1. Their agreement binds them. The existence of an agreement means that the subject (creditor and debtor) agreed by agreement, namely agreeing or regarding the main things of the agreement's contents. This means that what one party wants is also desired by the other party, and they want the same thing reciprocally.
2. The ability to make engagement, Article 1330 of the Civil Code stipulates that everyone is capable. Regarding people who are not capable of making agreements, it can be found in Article 1330 of the Civil Code.
3. A specific matter regarding this can be found in Articles 1332 and 1333 of the Civil Code, which stipulates that "only goods that can be traded can be the subject of an agreement." While Article 1332 of the Civil Code stipulates that "an agreement must have as a subject an item of at least a specified type." It is not an obstacle that the number of goods is not specific as long as the amount can be determined or calculated later.
4. There is a legal cause (legal causa). The word "causa" comes from the Latin meaning "cause." For it is something that causes people to make covenants, which prompts people to make covenants. But what is meant by a legal cause in Article 1320 of the Civil Code is not a cause in the sense that it encourages people to agree, but a cause in the sense of "the content of the agreement itself," which describes the objectives to be achieved by the parties.

The first and second conditions are subjective because legal subjects must meet both conditions. At the same time, the third and fourth conditions are called objective conditions because the object of the agreement must fulfill these two conditions. Failure to fulfill subjective conditions will result in an agreement being cancelled. The meaning is that the agreement becomes void if someone requests cancellation. At the same time, the non-fulfillment of the objective conditions will result in the agreement being null and void. This means that from the beginning, it was considered that an agreement had never been born, and there had never been an engagement. In carrying out an agreement, if there are parties who do not meet the agreement's legal requirements, then legal consequences apply. According to civil law, the agreement between the surrogate mother and genetic parents is null and void because one condition to make the agreement valid is a legal cause (*geoorloofde oorzaak*), Article 1320 of the Civil Code. This condition is not fulfilled, so a mother can't give up a baby that she gave birth to another party, based on an agreement (baring contract). (Pearce, 2009)

Therefore, a surrogate mother is more accurately said to be a surrogate mother agreement. Another polemic related to surrogate mothers is the legal

cause. Hoge Raad, since 1927 defines *causa* as something that is the goal of the party. If *causa* is defined as an agreement's purpose, a surrogate mother's purpose is to produce offspring. Article 1337 of the Civil Code states that a cause is prohibited if it conflicts with the law, decency, and public order.

4) Arrangements for Uterine Rental in Law Number 1 of 1974 concerning Marriage

If you refer to the existing laws and regulations in Indonesia, to find out whether the status of children born from the Surrogate Mother agreement, of course, you must look at the provisions in Law Number 1 of 1974 concerning Marriage (Marriage Law), especially in Article 42 which states that, "Legal children are children born in or as a result of a legal marriage." To see the class of children from the Surrogate Mother as legitimate or illegitimate, it must first be seen the marital status of the Surrogate Mother, including:

1. Children outside of marriage who are not recognized if the status of the surrogate mother is a girl or a widow, then the child born is a child outside of marriage that is not recognized, namely a child born due to adultery, which is the result of a husband or wife relationship with another man or woman.
2. Legal child, if the status of a surrogate mother is bound in a legal marriage (with her husband), then the child born is a legal child of a husband and wife who is rented by her womb until the father (husband of a surrogate mother) states "no" based on Article 251, 252, and 253 of the Civil Code with blood or DNA examination and a final decision by the court and also based on Article 44 paragraph (1) of the Marriage Law.

So it can be seen from the description above and related to the Marriage Law, it can be concluded that if the child is born to a Surrogate Mother who is bound in marriage, the child is the legal child of the woman and her husband, but if the child is born to a Surrogate Mother who is not bound in marriage, then the child will be domiciled as a child out of wedlock of the woman. In positive Indonesian law, especially regarding children born from the Surrogate Mother agreement, in terms of Law no. 1 of 1974 concerning Marriage, it can be concluded that the child born from the Surrogate Mother agreement is the legal child of the Surrogate Mother or the surrogate mother and is not the child of the parents who deposited the seeds in the Surrogate Mother's womb. So the existence of a womb rental also impacts the child being born. The legal consequences that can be imposed on the child resulting from the rental of the womb from the surrogate mother are the child's status and inheritance rights. The inheritance rights of children born to surrogate mothers who are bound in marriage will receive inheritance rights from the surrogate mother and her husband. If the surrogate mother is not bound by marriage, the child will only receive inheritance rights from the surrogate mother. In Islamic law, the inheritance rights of children born to surrogate mothers bound in marriage will only receive inheritance rights from the surrogate mother. The child is not entitled to inherit from the surrogate mother's husband because there is no kinship relationship. If the surrogate mother is not bound by marriage, the child she gives birth to will only receive inheritance rights from the surrogate mother because the child has the status of an illegitimate child.

3. The Social Aspects of Uterine Rental

Based on the moral view of the Indonesian people, a woman's womb has high honor. It is not an insult that can be rented or traded because the uterus is a human member that has a strong relationship with instincts and feelings during pregnancy, which is different from the hands and feet used for work and does not involve feeling. The womb is included in a noble environment because humans have no right to rent out their wombs, which will determine lineage. In addition, *wasilah* to have children is the right of God Almighty.

Furthermore, concerning the religious norms adopted by the Indonesian people, according to Islamic law, the consequences of children born to surrogate mothers are haram laws. Inserting seeds in other women is *haram* based on the hadith of the prophet and from a surrogate mother. It causes the loss of motherhood and destroys the order in people's lives. However, it is required that the sperm belongs to the husband and the egg belongs to the wife, and there is no third party between them. The Indonesian Ulema Council (MUI), on May 26, 2006, also issued a fatwa on the practice of transferring embryos to the womb of a child as a custodian, which is unlawful because it involves nasal and inheritance issues for the child. This is also contrary to public order because it will become gossip in the community, so the surrogate mother and children rented from the womb are likely to be ostracized from their association.

In addition, not all stories of uterine rental result in happiness, like the story of a baby from a rented womb whose parents threw it away. The baby was the result of surrogacy in Thailand. Babies born with Down syndrome were instead 'dumped' by their biological fathers and mothers in December 2013. This case eventually prompted the Thai government to ban surrogacy in 2014. The Australian Parliament also responded by reviewing the Australian law prohibiting commercial surrogacy. (Pasha, 2019)

D. Closing

- a. Uterine rental (surrogate mother) is a pregnancy outside the natural way that can only be done to a married couple who are bound by a legal marriage and experience infertility or infertility to produce offspring.
- b. According to the Civil Code, the legal aspect of a surrogate mother is based on Article 1320 of the Civil Code regarding the conditions for the validity of the agreement. Surrogate mothers do not meet the requirements regarding "halal causes" because they are contrary to regulations in Indonesia, namely Law no. 36 of 2009 concerning Health. So all forms of surrogate mother agreements in Indonesia are null and void because they contradict existing laws and regulations. The legal status of a child born from a surrogate mother is seen from the marital status of the mother who gave birth to him. If the child is born to a surrogate mother with a legal husband, the child is a legitimate child of a surrogate mother and her husband. However, if the child is born to a surrogate mother who is a widow or girl, then the child can be categorized as an illegitimate child because he was born outside of marriage until the birth of the child. Thus, the child's inheritance rights are to the parents legally, not to the surrogate mother.
- c. Social Aspects Surrogate Mothers' Moral Norms of Indonesian Society, Religious Norms, and Contrary to Public Order because it will become gossip in

the community so that the surrogate mother and children who are rented out of the womb are likely to be ostracized from their association.

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