

CHAPTER I

INTRODUCTION

1.1. Background

Alluding to Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the "1945 Constitution") states that everyone has the right to form a family and continue offspring through a legal marriage.¹ However, based on recent data², infertility is likely happening in society as infertility is affecting 80 million couples of reproductive age worldwide. WHO recently issued a report that stated around one in six adults globally has experienced infertility at least once in their life.³ In Indonesia alone, this figure translates to 21.3% of couples.⁴ Infertility is a condition in which a husband and wife are unable to have children even though they have had sexual intercourse 2-3 times a week within 1 year without using any form of contraception.⁵

¹ Article 28 B paragraph (1) 1945 Constitution

² Masoumi, S. Z., Poorolajal, J., & Keramat, A. (2013). Prevalence of Depression among Infertile Couples in ,UDQ \$ 0HWD-Analysis Study, 42(5), 458±466.

³ Barratut Taqiyah Rafie, "WHO: 1 dari 6 Orang Dewasa Secara Global Mengalami Kemandulan", <https://internasional.kontan.co.id/news/who-1-dari-6-orang-dewasa-secara-global-mengalami-kemandulan>. Last accessed on August 8, 2023.

⁴ Achmad Kemal Harzif, Victor Prana Andika Santawi, Stephanie Wijaya, "Discrepancy in perception of infertility and attitude towards treatment options: Indonesian urban and rural area." *Reproductive Health*, Vol. 16, No. 1, August 2019, p.1

⁵ Djuantono, T., "Panduan Medis Tepat dan Terpercaya untuk Mengatasi Kemandulan Hanya 7 Hari, Memahami Infertilitas", Refika Aditama, 2008, p. 1

Infertility may cause advantages and disadvantages. The disadvantages are it may affect the rate of population growth in Indonesia. A high infertility rate can contribute to a decline in the population growth rate which can lead to an aging population and potential demographic challenges, such as a shrinking workforce, increased burden on social security systems, and limited economic growth.⁶ With a shrinking workforce, there may be labor shortages and a decreased ability to meet the demands of various industries.⁷ This can hinder economic growth and development, impacting sectors such as manufacturing, healthcare, and agriculture.⁸

Further, high infertility rates can have social implications, including increased stress and emotional distress for individuals and couples experiencing infertility.⁹ It may also impact family dynamics, societal expectations, and cultural norms related to family and childbearing.¹⁰ Even worse, in some cases, countries with low birth rates and high infertility rates may become more reliant on immigration to sustain their population and labor force.¹¹ This can bring its own challenges, such as cultural integration, workforce competition, and potential strain on social

⁶ American Fertility Society, “Report of the Ethics Committee of the American Fertility Society”, *Fertil Steril*; Birdsall Nancy and Steven Sinding, *Population Matters: Demographic Change, Economic Growth, and Poverty in the Developing World*. (New York: Oxford University Press, 2003), p. 5

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Danielle Griffiths, “The (Re)Production of the Genetically Related Body in Law, Technology and Culture: Mitochondria Replacement Therapy”, *Health Care Analysis*, Vol. 24, July 2016, p.196-209. See also Carol Smart, “Family Secrets: Law and Understandings of Openness in Everyday Relationships”, *Journal of Social Policy*, Vol.38, No.4, October 2009, p.551-567. (2009).

¹⁰ *Ibid.*

¹¹ *Ibid.*

services. Having establish that the infertility rate may become serious threat to any state, therefore it is important to solve such problem.¹²

However, infertility also provides advantages such as generating revenue from infertility treatments and Assisted Reproductive Technologies (ART) which contribute to the healthcare industry, including medical clinics, pharmaceutical companies, and specialized medical professionals.¹³ Further, infertility can lead some individuals and couples to consider adoption as an alternative means of building a family. This indirectly supports the adoption industry and provides homes for children in need.¹⁴

There are several medical interventions to solve infertility problems, one of them is ART.¹⁵ ART includes several techniques and procedures aimed at helping individuals or couples achieve pregnancy. These techniques may include (a) In Vitro Fertilization (IVF), which involves the retrieval of eggs from the woman's ovaries, fertilization of the eggs with sperm in a laboratory, and the transfer of resulting embryos into the woman's uterus, (b) IntraCytoplasmic Sperm Injection (ICSI) which is a procedure where a single sperm is injected directly into an egg to facilitate fertilization in cases of male factor infertility, and (c) Gamete or embryo freezing which allows for the preservation of eggs, sperm, or embryos for future use.

¹² *Ibid.*

¹³ Lisa L. Behm, "Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States", *DePaul Journal Health Care Law*, Vol.2, Issue 3, November 2015, p.557-578.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

IVF itself is technologies which constitute artificial reproduction that includes techniques for manipulating oocytes before being transferred as oocytes or embryos.¹⁶ Meanwhile, if the problem is caused by the wife's womb not functioning properly due to conditions that do not allow it, surrogacy can be done. The term surrogacy means a form of third-party reproductive practice in which parents intend to contract a surrogate mother to give birth to a child.¹⁷ Surrogacy offers an alternative method of conception for women who are unable to conceive children naturally. The process involves a woman (gestational carrier) carrying a child for another person or partner (commissioning person/couple) and based on an agreement that the offspring will be handed over to the person/couple giving the assignment after birth.¹⁸

Common reasons of having surrogacy are medical condition and marital status. As for medical condition, surrogacy provides a viable option for individuals or couples who are unable to conceive due to infertility issues, such as blocked fallopian tubes, severe endometriosis, or male infertility problems.¹⁹ Another reason is some individuals experience multiple miscarriages or pregnancy losses. Surrogacy can be a solution to ensure a healthy pregnancy and reduce the emotional toll of recurrent loss.²⁰ Further, women who have undergone a hysterectomy or have medical conditions affecting the uterus, making it impossible to carry a pregnancy,

¹⁶ *Ibid.*

¹⁷ United Nation, "Surrogacy Special Rapporteur on the sale and sexual exploitation of children", <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy>. Last accessed on August 8, 2023.

¹⁸ Amrita Pande, "It May Be Her Eggs but It's My Blood: Surrogates and Everyday Forms of Kinship in India", *Qualitative Sociology*, Vol.4, Issue 4, December 2009, p.379.

¹⁹ *Ibid.*

²⁰ *Ibid.*

may opt for surrogacy.²¹ Last, individuals with serious medical conditions (such as heart disease, cancer, or severe diabetes) that could be exacerbated by pregnancy may choose surrogacy to avoid putting their health at risk.²² While as for marital status, some individuals or couples might delay marriage due to career or other personal reasons, leading to age-related fertility challenges. In addition, surrogacy also provides option for same-sex couples to have biological children.

Surrogacy is divided into two types, the first being traditional surrogacy which means the surrogate mother provides the egg while the prospective male parent provides the sperm. The second type of surrogacy is called gestational surrogacy, in which the surrogate carries the pregnancy but the genetic material such as sperm and egg is provided by the donor.²³

As surrogacy procedure requires a third party that is surrogate mother, the practice leads to pros and cons. It is important to note that the stance on surrogacy varies greatly from country to country. Some countries have banned or strictly regulated surrogacy, while others have enacted laws to govern and protect the rights of all parties involved. There are several common arguments for surrogacy in various countries. For India, the reason to allow surrogacy is due to custom and religious value. Surrogacy has been deep-rooted in Indian custom since primal times where a childless king or even an ordinary would have sexual intercourse

²¹ *Ibid.*

²² *Ibid.*

²³ Surrogate, “Traditional vs Gestational Surrogacy-What’s Best for My Family”. <https://surrogate.com/about-surrogacy/types-of-surrogacy/traditional-vs-gestational-surrogacy-whats-best-for-my-family/> Last accessed on 3 January 2024

with other women to procreate an offspring.²⁴ This is because motherhood is glorified in India and infertile couples (especially the women in such couples) are often stigmatized; local people, therefore, tend to sympathize with what they see as the plight of childless couples, irrespective of their country of origin, and may be prepared to help where possible.²⁵ Furthermore, within a certain religious context, helping infertile couples might also provide good karma for surrogates.²⁶

As the result local government in India provide several facilitations such as special visas and medical visas.²⁷ Prior to Surrogacy Bill, 2019 rent a womb in India has provided state income annually in the amount of US\$ 445 million or around Rp. 4,000,000,000,000.00. Women in India rent wombs to improve the family economy.²⁸ However, currently India has issued new regulation that give more protection to the surrogate mother through Surrogacy Bill, 2019 that does not allow payment for renting womb.²⁹

Meanwhile, the UK allows gestational surrogacy as UK consider the arrangement as a private matter, as long as it is in line with the legal framework.³⁰ UK regulations are designed to protect the rights and well-being of surrogate

²⁴ Yogita Dogra, Hitesh Chawla, Surrogacy Milieu in India: A Legislative Vacuum, *Journal ScienceRise: Juridical Science* No. 3(17)2021, <https://media.neliti.com/media/publications/528714-surrogacy-milieu-in-india-a-legislative-90d59775.pdf>. Last accessed on August 8, 2023.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Ratman, Dezriza, *Surrogate Mother Dalam Perspektif Etika dan Hukum; Bolehkah Sewa Rahim di Indonesia?*, (Jakarta: PT. Media Elex Komputindo, 2012), p. 23

²⁸ Mukherjee Ritika and T V Sekher, "Women at Risk in the Unregulated Surrogacy "Industry": Evidence from a Study of Commercial Surrogates in Kolkata." *Economic and Political Weekly*, Vol. 50, no. 26/27,(2015) page 83–89.

²⁹ PRS Legislative Research, "The Surrogacy (Regulation) Bill, 2019".

<https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019>, Last Accessed on 3 January 2024

³⁰ Warnock, M., (2002) *Making Babies: Is There a Right to Have Children?* (Oxford: Oxford University Press), 91

mothers and children.³¹ It ensures that surrogate mothers provide informed consent and are not exploited or coerced into the arrangement.³² It also establishes the legal rights and responsibilities of the intended parents, providing them with legal recognition as the child's parents. The UK follows an altruistic model of surrogacy, where the focus is on the welfare and well-being of all parties involved rather than financial gain. Allowing only reasonable expenses for surrogates helps prevent commercialization and potential exploitation. While other countries, such as United States merely highlights market approach or commercialization of surrogate mother.³³

Specifically in Indonesia, the practice of surrogacy has not been legalized. Referring to Article 127 paragraph 1 of Law Number 36 of 2009 concerning Health (hereinafter referred to as the "Health Law") states that efforts to get pregnant outside the natural way can only be carried out by legal married couples provided that (a) the results of sperm fertilization and the ovum of the husband and wife in question is implanted in the uterus of the wife where the ovum originates, (b) it is carried out by health workers who have the expertise for that purpose, (c) and at certain health service facilities. Thus, the Health Law only allows the method of fertilizing sperm and ovum from a legal husband and wife which is implanted in the wife's uterus where the ovum comes from, known as the IVF method.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

This raises a question mark related to the regulations that prohibit the practice of surrogacy, especially related to gestational surrogacy. Specifically in Indonesia, the regulations are influenced by religion value which is in line with first value of Pancasila that is belief in the one and only God. Surrogacy is viewed as conflicting with religious values and societal norms regarding marriage, parenthood, and the sanctity of the family unit.

It is important to be highlighted that every regulation in Indonesia shall considered religious norm. In Indonesia, the relationship between laws and religious norms is influenced by the country's philosophical foundation, Pancasila. Pancasila is the official state ideology of Indonesia, which encompasses several principles, including belief in the one supreme God. As such, there is a constitutional recognition of the importance of religious norms in the legal framework. Surrogacy deems as practice that precede God's will; hence it contradicts with religious norm that is recognized in Indonesia.

Even though the practice of surrogacy is not permitted in Indonesia, the fact is that surrogacy is still being practiced illegally. For example, in 2009 it was reported that a woman rented a uterus for IVF from a husband and wife in exchange for a car and Rp. 50 million from renting the uterus.³⁴ Other reported case, precisely in Mimika-Papua, a husband and wife do not have children because of disturbances in the wife who is unable to conceive, but the eggs are still being produced. On the

³⁴ Detik Health, "Sewa Rahim di Indonesia Dilakukan Diam-Diam", <https://health.detik.com/ibu-dan-anak/d-1370505/sewa-rahim-di-indonesia-dilakukan-diam-diam> Last accessed on August 8, 2023.

advice of doctors at Dr. Hospital. Soetomo Surabaya, he rented a womb, in this case the wife's sister who became a surrogate mother.³⁵ Despite the fact that illegal surrogacy is still occurring in Indonesia, no legal framework has been put in place to safeguard the interest of any parties involved.

In the absence of a legal umbrella for the practice of surrogacy, it brings concern to all related parties. First, the position of surrogate mothers becomes weak. The surrogate mother does not have legal protection, for example in relation to compensation because the legal basis in the form of an agreement will be declared null and void based on Article 1320 of the Indonesian Civil Code (hereinafter referred to as the "KUHPer"). Especially if the practice of surrogacy turns out to have a negative effect on the mother's health, such as causing death during childbirth. Further, surrogate mothers involved in illegal arrangements may experience significant emotional and psychological distress. They may face feelings of abandonment, betrayal, or exploitation, leading to long-term psychological consequences.

Not only the surrogate mother, parent who intended to conduct surrogacy may also be concerned. First, illegal surrogacy may involve unregulated or unscrupulous individuals or agencies, increasing the risk of financial exploitation. Intended parents may be at risk of losing significant amounts of money without any recourse or legal means to recover their funds. Second, in illegal surrogacy arrangements, intended parents may not have any legal protections or rights over the child. This

³⁵ Agnes Sri Rahayu, "Penerapan Hak Reproduksi Perempuan Terhadap Perjanjian Sewa Menyewa Rahim dalam Kerangka Hukum Perdata Indonesia", (Semarang: Unika Soegiapranata, 2009), p. 99

can leave them vulnerable to potential custody disputes or challenges in establishing their parental rights. Third, participating in illegal surrogacy can result in legal repercussions, including fines, penalties, and potential criminal charges. The specific legal consequences can vary depending on the jurisdiction and the laws governing surrogacy in that country or region.

Last, it also brings concern to the child resulted by surrogacy. First, the child may not have legal recognition or protection. This can lead to uncertainties regarding their legal status, citizenship, and inheritance rights. It may also create challenges in establishing a secure and stable family environment for the child. Second, the lack of legal framework and oversight in illegal surrogacy can result in disputes over custody and parental rights. The child may be caught in legal battles or subjected to the instability of contested parentage. Third, in some cases of illegal surrogacy, there may be risks of child exploitation or trafficking. The absence of proper legal regulations and safeguards can create opportunities for the child to be subjected to exploitation, abuse, or forced labor. Hence, it is important to examine the existing rules regarding surrogacy in Indonesia.

Based on the background of the problems that the writer have described above, hence it is important to examine current Indonesia laws on surrogacy in line with principle of legal protection and utility and how to give protection for surrogate mothers to be in line with Human Rights Law.

1.2. Formulation of Issues

Based on the background of the problems that the writer have described above, the writer formulates the issue as follows:

1. How does Indonesian Law regulate gestational surrogacy?
2. How does Indonesia adopt international conventions in regulating Gestational Surrogacy on the perspective of Human Rights?

1.3. Research Objectives

The writer conducted this research with the aim to:

1. Analyze how Indonesian Law regulates gestational surrogacy.
2. Analyze how Indonesia adopt family, marriage, sex and child international conventions in regulating Gestational Surrogacy on the perspective of Human Rights

1.4. Benefits of Research

The benefits of writing that the writer can explain based on the explanation that the writer has explained above are:

1.4.1. Theoretical Benefits

The writer's purpose of writing this thesis is to add to the theoretical understanding and further knowledge regarding gestational surrogacy and how it's regulated in Indonesia.

1.4.2. Practical Benefits

1. For Law Enforcement

Through this writing, the writer expects this research can provide input for law enforcers, including but not limited to advocates, prosecutors, police officers, or judges whether this is a legal issue that should be addressed.

2. For Intended Parents

In addition, the writer hopes that this research can be useful for intended parents and can help intended parents ensure compliance with local and international laws. Understanding legal requirements and restrictions helps protect the rights of all parties involved, reducing the risk of legal complications during or after the surrogacy journey. The research also enables intended parents to identify and mitigate potential risks associated with surrogacy. This includes understanding the legal implications of the process, potential obstacles, and any restrictions that may impact their ability to bring the child home.

3. For writer

The writer expects this writing will enrich its knowledge in the field of medical law and as an attempt by the writer to fulfil the requirements of completing a Bachelor of Law study at Universitas Pelita Harapan.

1.5. Framework of Writing

The thesis writer's explanation in this study is structured systematically, comprising five chapters. These chapters are as follows:

1. CHAPTER I: INTRODUCTION

This chapter describes the background of the problems, problem formulation, research objectives, research benefits, and writing systematics.

2. CHAPTER II: LITERATURE REVIEW

In the literature review chapter, the writer intends to divide this section into four sub-chapters. Initially, the author will go into detail regarding the definition of surrogacy, in conjunction with its types, history, and potential problems. Subsequently, it will be followed by the definition and requirements and motivation to be a surrogate mother. Thirdly, the writer will elaborate on the technique of surrogacy and finally, the distinction between commercial and altruistic surrogacy will be discussed.

3. CHAPTER III: LITERATURE REVIEW

This chapter describes the type of research used by the writer, data sources, data collection methods, types of

research approaches, data analysis techniques, and the location and time of research conducted by the writer.

4. CHAPTER IV: RESEARCH RESULTS AND ANALYSIS

This chapter describes the writer's efforts to answer the problem formulation that the writer has explained above, namely to analyze how Indonesian Law regulates gestational surrogacy.

5. CHAPTER V: CLOSING

This chapter contains the conclusions that the writer got from writing this thesis, the suggestions obtained based on the results of this research.

