

The Opportunities for Surrogacy Legalization Between the Right to Have Children and A Loophole of Trafficking

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Abstract

The phenomenon of producing surrogate mother facilities has been recognized in some countries, although Indonesia indirectly prohibits the practice. The practice is also feared to be a new form of human trafficking. Therefore, this study aims to evaluate the opportunities for surrogacy legalization regarding its perspectives between human rights and the loophole of trafficking. In this study, three problems were formulated: (1) the legal status of children born from a surrogate mother; (2) the legality of a surrogate mother in Indonesian law; and (3) the opportunities for surrogacy legalization in legal reform. This study is a normative juridical study that examines the differences in legal systems in various countries regarding the regulation of surrogacy. The children delivered through surrogacy were the legal offspring of surrogate mothers. They were also likely to have a legal relationship with their biological parents as adopted children. Besides from these legal statuses, Indonesian law did not support the validity of the uterine lease agreement. This was due to its inseparability from the influence of religious and cultural values, which opposed the existence of surrogacy. Women and children have the potential to become victims of exploitation, even though the practice of surrogate motherhood is very harmful to their health. The practice subsequently prioritized the opportunity to become a new form of human trafficking. Various international legal instruments that exist can be used as a reference to prohibit the existence of surrogate mothers.

Keywords: human rights, human trafficking, surrogate mother.

A. Introduction

The culture of Indonesian society considers the presence of children to be significant in a marriage. It is because humans possess a religious obligation to have children, with childbirth often observed as a worship process. It shows that heredity is the oneness of the ancestor, indicating a blood relationship between one person and another. Since two or more people are related by blood, a single ancestor is one descendant of the other.¹ Heredity also has an important interpretation in a kinship

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¹ Surojo Wignjodipuro, *Introduction and Legal Principles Adat* (Bandung: Alumni, 1979), 128.

system, where a child often becomes the family's successor. It is closely related to the inheritance system, whose law emphasizes the patterns by which the rights and obligations of a dead person's wealth are transferred to other living people.² Based on these descriptions, children often become the heirs carrying out obligations to their parents and the social environment in society. They also possess the right to own various assets from their parents.

Society's view of the importance of childbearing has implications for the immediate desire of newly married people to bear children. Infertility or infecundity is a disease of the reproductive system, which emphasize the failure to achieve a clinical pregnancy after 12 months or more of sexual intercourse without the use of contraceptives.³ Based on the World Health Organization (WHO), one in four couples in developing countries was affected by infertility.⁴ Surrogacy is also an accepted method of reproduction in scientific medicine, which provides an opportunity for childless couples to have children that are genetically related to them.⁵ Furthermore, surrogacy is an agreement between specific people and a woman willing to undergo childbearing processes, from the pregnancy to the delivery period. The commercial agreement prioritizes the payment of the surrogate mother for the womb rental service.⁶ Surrogacy also provides a solution for married couples willing to have children from their "seeds" because of the belief that children can tighten parents' relationship.

According to Selian, several reasons led to uterine leasing, including 1) The inadequate hope for a woman to normally become pregnant due to a childbearing disease or disability, 2) The surgical removal of a woman's uterus, 3) The inability of a woman to bear the burdens of pregnancy, childbirth, and breastfeeding, to maintain body beauty, 4) *Menopause*, where the women willing to have children have stopped menstruating, and 5) The renting of the uterus to others to solely earn income.⁷ Ratman also states that surrogacy was widely practiced due to the difficult economic factors in several countries, such as India, Bangladesh, Pakistan, Thailand, China, and the United States. In this case, the excuses of the tenants or source of

² Soerojo Wignjodipoero, *Position and Development Law Custom After Independence* (Jakarta: Gunung Agung, 1982), 161.

³ Anis Nur Halimah, Sri Winarni, and Dharminto Dharmanto, "Exposure Cigarettes, Nutritional Status, Workload and Reproductive Organ Infection on Woman with Problem Fertility RSI Sultan Agung Semarang," *Jurnal Health Society (e-Journal)* 6, no. 5 (2018): 202-208, <https://doi.org/10.14710/jkm.v6i5.22009>.

⁴ World Health Organization, "Global Prevalence of Infertility, Infecundity and Childlessness," accessed on September 12, 2020, <https://www.who.int/reproductivehealth/topics/infertility/burden/en/>.

⁵ Anna Arvidsson, Polly Vauquiline, Sara Johnsdotter, and Brigitta Essén, "Surrogate Mother—Praiseworthy or Stigmatized: A Qualitative Study on Perceptions of Surrogacy in Assam, India," *Global Health Action* 10, no. 1 (2017): 1328890, <https://doi.org/10.1080/16549716.2017.1328890>.

⁶ Karen Smith Rotabi and Nicole Footen Bromfield, "The Decline in Intercountry Adoptions and New Practices of Global Surrogacy: Global Exploitation and Human Rights Concerns," *Affilia* 27, no. 2 (2012): 129-141, <https://doi.org/10.1177/0886109912444102>.

⁷ Muhammad Ali Hanafiah Selian, "Surrogate Mother; Overview Law Civil and Islamic Law," *Journal Juridical* 4, no. 2 (2017): 131-147, <https://dx.doi.org/10.35586/v4i2.255>.

seeds from developed countries often revolved around various aesthetic factors regarding the fear of unattractive appearances due to childbirth.⁸

A surrogate mother also provides an opportunity for married couples to have genetically related children, although it causes new problems. These problems often prioritize the breach of the uterine lease agreement, which is the basis for the legal relationship between a married couple and a surrogate mother. In this case, the mother will likely have a changed mindset and not release the baby delivered. This condition is often observed because the prospective parents do not have the legal power to force the delivery of the baby. Another problem also emphasizes the delivery of a disabled baby, where the biological parents are unlikely to perform appropriate responsibilities, subsequently establishing an economic burden for the surrogate mother. Since the choice to have offspring is a human right, the existence of a surrogate mother is mostly observed as a violation of individual values. It explains that surrogacy tends to cause problems in society, especially between surrogate and biological parents, as well as from the child's aspect, where basic rights are often lost.⁹ Furthermore, the existence of a surrogate mother is a loophole in women and children trafficking because of the tendency of women exploitation by their families to lease the uterus to pay a specific amount of money.

In several countries, the numerous provisions of surrogate mother agreements have been banned. Article 177 of the Spanish Civil Code and the European Convention on the adoption of a minor are used to legitimate the legality of the mother's consent after six weeks of birthing. The agreement produces protection and guarantees of freedom and awareness for mothers to provide for their children. These provisions prove that the information contained should be adequately conveyed. Meanwhile, the mother bearing the child is not obligated to cancel the agreement during the pregnancy process until the baby's birth. It explains that the violation of the adoption agreement object needs to be considered null and void.¹⁰ In the United States, many state courts have officially defined the body as a "factory," with the judges allowing rented mothers to use their wombs to produce babies. Irrespective of these rulings, some states still indicated that the surrogacy agreement was a serious crime.¹¹ There are dissenting opinions about the existence of a surrogate mother.

The debate about the legality of surrogate pregnancy is still being studied from various scientific perspectives, with human rights used to defend self-determination and prevent exploitation. Child trafficking is the recruitment and movement of

⁸ Desriza Ratman, *Legal Series Surrogate Mother 's Health in Perspective Ethics and Law: Yes Rent a Uterus in Indonesia* (Jakarta: Gramedia, 2012), 3.

⁹ Nova Arikhman, "Overview Social, Ethical, and Surrogate Mother Law in Indonesia," *Jurnal Health Medicine Sainitika* 7, no. 2 (2016): 140-150, <https://dx.doi.org/10.30633/jkms.v7i2.189>.

¹⁰ Azpiroz Villar JE, "Some Considerations About the Contract of Surrogate Mother in View of the Spanish Legislation on Adoption," *Cuadernos de Bioetica : Revista Oficial de la Asociacion Espanola de Bioetica y Etica Medica* 30, no. 99 (2019): 187-198.

¹¹ Muhammad Djumhana, *Law in Development Biotechnology* (Bandung: Citra Aditya Bakti, 1995), 163.

people younger than 18 for exploitation.¹² Although the Law of the Republic of Indonesia Number 35 of 2014 on the Amendment to the Law Number 23 of 2002 on Child Protection did not explicitly regulate exploitation, the provisions of Articles 66 and 76l emphasized economic and sexual abuse. It indicates that the request for surrogacy from prospective parents often causes the exploitation of surrogate mothers by their families, regarding the outright leasing of wombs for money. Children also tend to be trafficked objects, with most experiencing economic exploitation. These conditions cause the scrutinization of commercial gestational surrogacy through the perceptions of human trafficking, especially child abuse. This immediately propels discussions on the use of assisted reproductive technologies into the realm of serious organized crime.¹³ The debate about the legality of surrogacy, on the one hand, and the prohibition of surrogacy, on the other hand, both are actually based on the view of human rights. On the one hand, everyone has the right to determine their own destiny, including the decision to become parents and the right to "rent out" their body but on the other hand, they will be faced with a prohibition on exploitation.

Indonesia does not have specific rules regarding surrogate mothers, although several related laws and regulations are observed.¹⁴ According to Article 127 of the Law Number 36 of 2009 on Health, only specific methods of artificial pregnancy were legitimized. Although the prohibition of surrogate mothers was not explicitly emphasized by this provision, it was still inseparable from religious and human values approaches. The issue of surrogacy has also become a topic of debate regarding protecting women and children, ethics, law, and society. Therefore, this study aims to evaluate the opportunities for surrogacy legalization regarding its perspectives between human rights and the loophole of trafficking. This study covers 1) The legal status of children born from surrogate mothers, 2) The legality of surrogacy in Indonesian Law, and 3) The opportunities for the legalization of surrogate mothers in legal reform.

This normative juridical experiment examines the legality of surrogate mothers in Indonesia, using a legal and human rights approach. The formulated problems are analyzed with the approach of statutory regulations, namely the contract, health, and criminal laws. It is also conducted using legal conceptual and philosophical approaches regarding the values shared in society and reflected within the principles of public regulations. Legal materials were obtained through a literature study, with the analytical processes performed qualitatively. The analysis of the legal material

¹² Livia Ottisova (et.al.), "Psychological Consequences of Child Trafficking: An Historical Cohort Study of Trafficked Children in Contact with Secondary Mental Health Services," *PLoS One* 13, no. 3 (2018): 1-14, <https://doi.org/10.1371/journal.pone.0192321>

¹³ Gloria Torres, Anne Shapiro, and Tim K. Mackey, "A Review of Surrogate Motherhood Regulation in South American Countries: Pointing to a Need for an International Legal Framework," *BMC Pregnancy and Childbirth* 19, no. 1 (2019): 1-9.

¹⁴ Muhammad Ali Hanafiah Selian, "Surrogate Mother; Overview Law Civil and Islamic Law," 2.

techniques was also performed using description, interpretation, construction, evaluation, and technical argumentation.

B. The Legal Status of Children Born from Surrogate Mother

The legal relationship in surrogate-based pregnancy is commonly carried out between the renting party and the surrogate mother. According to Ratman, a surrogate mother is an individual that replaces another person during the childbearing process.¹⁵ This emphasizes an agreement where a woman agrees to carry out childbirth procedures for prospective parents, from the stages of pregnancy to baby delivery. In this study, the emphasis on surrogacy is only limited to the gestational aspect.

Surrogacy initially occurs when married wives have difficulties in conceiving due to womb complications. These difficulties then lead to the transfer of their childbearing roles to another woman through material or voluntary rewards. Subsequent development also emphasizes a shift in interpretation and substance, from the initial medical disorder alternatives to the social and value exploitation of a uterus. In these exploitative aspects, the tenants often adopt cosmetic and aesthetic features, with the hired parties willingly using the leasing of wombs to earn a living. This is mostly observed in low-income communities, such as in India, Bangladesh, and China. These countries are adequately facilitated by their local governments through the establishment of multiple centers for womb rental models, including the arrangements of special and medical visas.¹⁶

The process of implementing surrogacy is often not performed smoothly due to various procedural problems. These conditions include the untimely resignation of the surrogate mother during pregnancy, without the release of the baby after birth. In this case, biological parents need to appropriately understand the rules and regulations of surrogacy. Another source of the problem is the sudden differences in the policies of the childbearing method. In some areas with complicated legal aspects, the legality of the legitimate relationship between biological parents and children commonly needs to pass through an adoption procedure. However, a simple "declaration of custody" is observed in other locations before the birth of the baby without undergoing an adoption process.

Based on these descriptions, biological parents and surrogate mothers should adequately understand the rules of surrogation to protect their rights. The countries legalizing surrogate pregnancy also strictly regulate the procedure of the phenomenal practice. The positive implication prioritizes the provision and supervision of good health facilities and actions by the government. The involved parties also obtain legal protection against the violation of agreements, with law enforcement officials imposing appropriate sanctions. In 1870 and 1985, the history

¹⁵ Desriza Ratman, *Legal Series Surrogate Mother 's Health in Perspective Ethics and Law: Yes, Rent a Uterus in Indonesia*, 3.

¹⁶ Desriza Ratman, 38.

of surrogacy was initially and continuously emphasized within China and the United States respectively. The first successful woman to carry out this practice from pregnancy to delivery was also observed in 1986. In this process, the first legal issue was raised, with the surrogate mother unwilling to release the baby to the genetic parents.¹⁷ Based on these issues, the developed uterine lease agreement psychologically affected the surrogation process.

Surrogation is a high-risk emotional practice, with the agreement only emphasizing the lease of the uterus, forcing the surrogate mothers to have no feelings for the baby they are carrying. Another problem is that the carriers are often worried about delivering abnormal babies, which often leads to the cancellation of the rental agreement. This condition is found to continuously focus on the legal status of the child, the surrogate mother, and the biological parents. Although an agreement is observed between the tenants (biological parent) and the carrier (surrogate mother), the case of disability is likely to cause confusion in determining the parent of the child. The combination of parents as described above will be related to the child's identity. The right to identity is a human right. The right to identity for children is an important issue to be discussed in surrogacy. International legal instruments as contained in Article 8 of the Convention on the Rights of the Child, adopted 20 November 1989 by General Assembly resolution 44/25 have regulated the right to identity.

Article 28B paragraph (1) of The Constitution of the Republic of Indonesia of 1945 states that everyone has the right to form a family and continue offspring through a legal marriage. In Indonesia, Article 42 of the Law Number 1 of 1974 on Marriage states, "A legal child is born in or as a result of a legitimate union". This shows that marital status (valid and invalid marriage) is a factor that determines the legality of a child's legal status. Article 43 of the Law Number 1 of 1974 on Marriage also stated that the legal consequence of a child not born in a legitimate union emphasizes non-civil and civil relationships with the father and mother, respectively. Based on Article 250 of the Civil Code, a legitimate child is born or raised in a legal marriage and has a civil relationship with the father. Meanwhile, an illegitimate child is related to the mother, which is not in a marriage bond. Furthermore, Article 52 paragraph (2) of the Law Number 39 of 1999 on Human Rights states that children's rights are human rights and for the sake of their interests, children's rights are recognized and protected by law even from the time they are in the womb.

This explains that the children born through surrogacy only have a direct legal relationship with the mother that birthed them. When this condition is connected to the aforementioned regulations, the following statuses are observed:

- a. When the surrogate mother already has a husband, the child born legally belongs to them.

¹⁷ Dewi Astika Tandirerung, "Analysis Agreement Innominate to Surrogate Mother in Indonesia," *Amanna Gappa* 26, no. 1 (2018): 16, <https://doi.org/10.20956/ag.v26i1.6335>.

b. When the surrogate mother is not bound by marriage, the child only legally belongs to her regarding the related rules and regulations.¹⁸

Although the child is delivered by the surrogate mother, it biologically belongs to married couples. However, several opinions are observed regarding this issue. To determine the type of child from a surrogacy case, the marital status of the surrogate woman needs to be initially explored. When the statuses of the carriers are single or widowed, the children they birth are likely to possess the status of those outside the unrecognized marriage.¹⁹ When the surrogate mother already has a husband, the child being birthed legally belongs to them.

The children born by surrogate mothers have no legal relationship with their real parents, although a new legitimate association is mostly formed through adoption. *Staatsblad* 1917 Number 129 also emphasizes the existence of *Adoptio Plena*, which is to break the civil relationship with the biological parents of the adopted child. This subsequently established a new legitimate association with the adoptive parents. In the development of adoption law, Indonesia presently adheres to the principle of *adoptio minus plena*, where adopted children still had the right to know their biological parents. Based on Article 39 paragraph (2) of the Law Number 35 of 2014 regarding Amendments to the Law Number 23 of 2002 on Child Protection, "adoption as referred to in paragraph (1) does not terminate the blood relationship between children and their biological parents". This indicated that the adoption of a child caused a severed civil relationship with the original parents, although formed another one with the new guardians. Adoption is also carried out in the best interest of the child only, regarding local customs, as well as the provisions of the applicable laws and regulations. Therefore, adoption only severed the civil relationship between the adopted child and the biological parents, not the blood association.

Besides being considered as an agreement between the involved parties, adoption should also be reviewed as an institution capable of developing a legal relationship between the adopted child and the family environment of the adoptive parents based on a court order.²⁰ This is because the court's decision indicates that the adopted child legally belongs to the adoptive parent, establishing a legal relationship between both parties.²¹ In the law of adoption, a strong reason is needed as a solid foundation against the complication of the surrogate mother's unwillingness to voluntarily release the child. Judges also need strong reasons to grant requests for adoption, while surrogate mothers are still not accepted in Indonesia.

¹⁸ Sonny Dewi Judiasih, Susilowati Suparto Dajaan, and Deviana Yuanitasari, *Aspect Law Rent the Uterus in Perspective Indonesian Law*, 18.

¹⁹ Desriza Ratman, *Legal Series Surrogate Mother 's Health in Perspective Ethics and Law: Yes Rent a Uterus in Indonesia*, 40.

²⁰ Erna Sofwan Sjukrie, *Institution Appointment Child (Adoption)* (Jakarta: Court Agung, 1992), 17.

²¹ Nur Alimah Zainuddin, Ilham Abbas, and Zainuddin Zainuddin, "Implementation Appointment Child and Consequence the Law Based on Determination of Judges," *Journal of Lex Generalis (JLG)* 1, no. 7 (2020): 959-974, <https://doi.org/10.52103/jlg.v1i7.277>.

C. The Legality of The Surrogate Mother in The Indonesian Legal System

Surrogacy is equated with the term "surrogate mother" according to Fred Ameln. This is loosely defined as a woman who bonds with another party (husband and wife) through an agreement to become pregnant after leasing the uterus for the inclusion of externally fertilized embryos (eggs and sperm cells) until delivery is achieved. After the delivery process, the baby is released to the tenants (husband and wife) with the surrogate mother obtaining a reward as initially agreed.²² In a seminar, a female activist, Agnes Widanti, stated that the practice of renting wombs had been occurring in Papua, Indonesia. These leases were never questioned because they were carried out in the family sphere. For example, a nephew hires the aunt for surrogation purposes to become a father.²³

The legal relationship between the surrogate mother and the tenant is also based on the agreement. According to Martokusumo, an agreement was a legal relationship between two or more parties to avoid or cause the legitimate consequences permitted by law.²⁴ Article 1320 of the Civil Code also states that four conditions need to be met for a valid agreement, namely: 1) Self-binding agreements, 2) The ability to make an engagement, 3) A specific subject, and 4) An unforbidden cause. In addition, Article 1321 of the Civil Code states that "no agreement is potent when provided for an error or obtained by coercion or fraud". As regulated in the Civil Code, the provision of valid agreements also applied to the lease contract. According to Article 1548 of the Civil Code, the lease was an agreement between various parties regarding the enjoyment of an item within a specific period. In this case, the leasing party is entitled to payment according to the agreed price. The elements that should exist in the lease agreement are the involved parties, price approval, and a rental object. In the surrogate mother agreement, the elements need to be generally considered, with the lease contract subsequently met. However, the legal issue encountered in this agreement emphasizes whether it is a legal action according to Indonesian law. Article 1332 of the Civil Code states, "Only tradable goods are the subject of approval." It raised a concern whether the womb and human life were tradable.

Article 1337 of the Civil Code also regulated the cause of prohibition. This stated, "A cause is prohibited when it is restricted by law or contrary to decency and public order." Based on Tandirerung, the use of the uterus for the acquisition of material gain was very unethical. This was due to the public perspective that the uterus should only be a place for embryo development and not for economic purposes. From this perspective, the dignity of women is reduced when the womb is used as a place to "rent" embryos. However, every woman has the right and the obligation to use their uterus accordingly. The general public is also closely related to local

²² Fred Ameln, *Capita Selecta Law Health, Cet. I* (Jakarta: Graphics Tama Jaya, 1991), 117.

²³ DetikHealth, "Sewa Rahim di Indonesia dilakukan Diam-diam," accessed on October 18, 2022, <https://health.detik.com/ibu-dan-anak/d-1370505/sewa-rahim-di-indonesia-dilakukan-diam-diam>.

²⁴ Sudikno Mertokusumo, *Getting to Know Law* (Yogyakarta: Liberty, 1989), 96.

customs and culture, with Eastern tradition assuming that a woman's womb needs to be respected due to being the passage to life.²⁵ The unfulfillment of lawful requirements causes the surrogate mother's agreement to be declared null and void. This declaration has a legal aspect to the agreement already developed by the parties. As regulated in Article 1338 of the Civil Code, the engagement between the parties no longer had legal consequences binding them together. In this case, the already developed agreement was invalid or never existed. This contract subsequently returned to its original state, as it was when the approval had not been implemented.²⁶ Additionally, a null and void agreement or *nietig* is retroactively applied to the point where the contract was initially established.²⁷

A surrogate mother agreement should meet several legal conditions of the contract contained in Article 1320 Indonesian Civil Code. When one reason (*halal* cause) is found to be causing agreement invalidity, a null and void contract is declared by law. This leads to the reversal of the contract to its original position, where the agreement was not observed at all.²⁸ The laws and regulations in Indonesia do not explicitly regulate the prohibition of pregnancy through surrogate mothers. However, legitimately married couples should only attempt to conceive artificially when the provided sperm and ovum are obtained from them, with the wife's womb used for the implantation processes according to Article 127 of the Law Number 36 of 2009 on Health.

This indicated that the artificial reproduction process needs to be carried out by certified health workers at the medical facilities determined by legislation. Article 40 of Government Regulation Number 61 of 2014 on Reproductive Health also regulated the process of pregnancy outside the natural pattern. This stated that reproduction by assistance or pregnancy outside the natural pattern should only be carried out on legally married couples experiencing infertility. In this case, unmarried individuals are not eligible for artificial reproductive processes. Pregnancy outside the natural pattern is carried out using the fertilization of sperm and ovum from the concerned husband and wife. This fertilization result embryo is then implanted in the wife's womb, according to the development of science and technology. Subsequently, these processes do not conflict with religious norms. In Government Regulation 61 of 2014 on Reproductive Health, the prohibition of surrogate mothers is not directly mentioned.

²⁵ Dewi Astika Tandirerung, "Analysis Agreement Innominate to Surrogate Mother in Indonesia," 12-22.

²⁶ Nanin Koeswidi Astuti, "Analysis Juridical About Agreement Declared Cancel by Law," *Journal Law T 2*, no. 1 (2016): 279, <https://doi.org/10.33541/tora.v2i1.1130>.

²⁷ Elly Erawati and Herlien Budiono, *Penjelasan Hukum Tentang Kebatalan Perjanjian* (Jakarta: National Legal Reform Program, 2010), 53.

²⁸ Filda Achmad Al Yadayny.

D. The Opportunities for Legalizing Surrogate Mothers in Legal Reform

1. Basic Considerations for Countries That Allow Surrogacy

Based on Article 16 paragraph (1) of The Universal Declaration of Human Rights, "men and women of full age had the right to marry and begin a family without any limitation due to race, nationality, or religion. This explained that they are entitled to equal rights, during marriage, and at its dissolution". Everyone also has the right to bear children (reproductive right) with the International Conference on Population and Development held in Cairo providing a definition of reproductive accessibility.

The decision to become a surrogate mother is a human right regarding the decisions made about one's body. According to Abdullah, "surrogacy is an exceptionally present issue, which involves only a very small percentage of society. This is the reason a common response to the practice prioritizes indifference or relativism. The practice is also frequently understood because of the personal decision of an independent individual toward their body and lifestyles".²⁹ However, a concept suggested that human rights were limited by morals, values, and statutory regulations. This proved that each country had its regulations, regarding the legality of surrogacy with most of them supporting and prohibiting it. Different legal rules became problems in each nation when surrogation was carried out across national borders.

In Mennesson or Labassee, Paradiso, and Campanelli, national authorities refused to record a child's birth certificate in the civil status register, arguing that such registration was against public policy.³⁰ In 2015, a health organization in India, CMR (Indian Council of Medical Research), established a provision on surrogate mothers, which contained the terms and conditions for the clinics practicing surrogation. These provisions portrayed the country as the first and largest in the development of the global surrogacy phenomenon. India is also the main milestone in the legalization of the phenomenon and is presently using uterus rental as a business field. The uterus rental business in this country was subsequently established based on the provisions in the Assisted Reproductive Technology Regulation Bill 2010, which stipulated the terms and processes for becoming a surrogate mother.³¹

In India, surrogacy is one of the strategies used by the population to save themselves from poverty, with the practice placing aside moral issues. These conditions portrayed the country as a destination for mothers to undertake commercial surrogacy. India also became the first to develop a commercial womb

²⁹ Fatma Mohamed Abdullah, "Legal and Ethical Aspects Beyond Commercial Surrogacy: Modern Form of Human Trafficking," *Journal of Legal, Ethical and Regulatory* 22, no. 1 (2019): 1-7.

³⁰ European Court of Human Rights *Cout Europeenne des Droits de L'Homme*, "Questions and Answers on the Paradiso and Campanelli v. Italy Judgment," accessed on August 18, 2022, https://www.echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf.

³¹ Risa Jaya Wulandari and I Nyoman Darmadha, "Legal Qonsequences Surrogate Mother Review From Law Criminal," *Kertha Speech: Journal of Science Law* 9, no. 1 (2019): 1-14.

rental industry with national and international standards. This is because commercial gestational surrogacy developed an obligation for the parents wishing to have children through external embryo fertilization in exchange for monetary payment. For both natives and foreigners, Russian law provided legitimacy to this pregnancy method.³² In 2011, this service was legalized in the Russian Federation (Federal Law of the Russian Federation 2011), indicating that 15-20% of the population of reproductive age were unable to conceive a child without implementing advanced technologies. Related to the low birth rate and high infertility estimation among this population, the ability to implement surrogacy as an element in demographic policy stimulated the country's natality. The representatives of legal organizations, whose roles are to provide legitimate support for commercial surrogacy services, were also experiencing the problem. In this case, several experts indicated that the liberalization of the Russian laws governing reproduction and public funding enabled the possibility to change the situation for the better.³³

2. Basic Considerations for Countries That Allow Surrogacy

Although the legality of surrogacy is a solution for parents wishing to have children and provide financial benefits for surrogate mothers, vulnerabilities are still observed toward economic exploitation. In this case, the National Rapporteur on Human Trafficking described the various prices for prospective surrogate mothers, which varied widely in each country. This caused prospective parents to select a lower price for womb rental, according to their financial condition. Subsequently, the lower prices caused the rights of surrogate mothers to be less protected and even exploitative. Although the prospective parents were unable to be blamed for the exploitation and trafficking of the person, they were still directly or indirectly involved. In this case, the Dutch government analyzed the possibility of a prohibition set to prevent the intended parents of the Netherlands from using surrogate mothers in countries where their rights were not properly safeguarded. This subsequently led to the development of exploitation risk.³⁴

According to the European Center for Law and Justice 2012, surrogacy was the exploitation of children and women due to their humiliation as objects of contracts and commodities. In this context, the goal of surrogacy emphasized the actualization of the adult's desires, not the child's interest. The practice was also used as a camouflage for human trafficking by irresponsible people. This involved the deliberate use of young women as commodity surrogate mothers for small fees, with

³² Natalia Khvorostyanov and Daphna Yeshua -Katz, "Bad, Pathetic and Greedy Women: Expressions of Surrogate Motherhood Stigma in a Russian Online Forum," *Sex Roles* 83, no. 7 (2020): 474-484.

³³ A. D. Dushina (et.al.), "The Legitimation of Commercial Surrogacy in Russia," *Russian Social Science Review* 59, no. 2 (2018): 789-815.

³⁴ National Rapporteur on Trafficking in Human Beings, *Human Trafficking for The Purpose of The Removal of Organs and Forced Commercial Surrogacy* (The Hague: BNRM, 2012), 23.

higher payments obtained from the prospective parents. From this context, the business was performed by a handful of irresponsible people through the exploitation of women.³⁵ As part of quality health services, surrogate mothers are integrated into the health law system. According to HJJ Leenen, *gezondheidsrecht* defined health law as a whole juridical activity and legal regulations in the healthcare and scientific fields. This law limited the indication that surrogate mothers were approached with criminal policy due to encompassing all legal activities in the health sector.³⁶

Article 12.1. International Covenant on Economic, Social and Cultural Rights states "the states parties to the present covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The practice of surrogate mothers, especially those carried out in secret, can endanger health. The practice of surrogate motherhood also tended to develop new forms of human trafficking. Margarita Urda made an inventory of the links between surrogacy and human trafficking, namely 1) Transferring of children born by surrogate mothers to biological parents for a fee; 2) Determining the obligation of the surrogate mother to transfer the child after giving birth or giving consent to records interested persons as the parents of this child on a replaceable or non-replaceable basis; 3) The use of surrogate assisted reproductive technology for the benefit of persons who are not entitled to use the technology, for example, single fathers; 4) Intermediary service practices.³⁷

In the surrogacy agreement, an element of the perpetrator's fault was observed. The agreement beginning with approval between the biological parent and the surrogate mother also exhibited a known intention of the parties to rent the uterus. The practice of surrogate motherhood is a new form of trafficking in women and children, an act very disastrous to human dignity. Article 6 Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979 states "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." Committee on Elimination of Discrimination against Women decried ongoing harassment and discrimination against women. One of the concerns the report highlighted was the criminalization of surrogacy in the country. Surrogacy over the last years has sparked international criticism, with children being sold to foreign parents. Surrogate mothers themselves are often victims of exploitation.³⁸

³⁵ Mimi Halimah, "Views Axiology Against Surrogate Mother," *Journal Indonesian Philosophy* 1, no. 2 (2018): 51-56, <https://doi.org/10.23887/jfi.v1i2.13989>.

³⁶ Syahrul Machmud, *Enforcement Law and Protection Law for the Suspected Doctor to do Medical Malpractice* (Bandung: Mandar Forward, 2008), 8.

³⁷ Margarita Urda, "Surrogacy and Human Trafficking: The Boundaries of What is Permitted," *SSRN 4245750* (2022): 1-4.

³⁸ Leonie Kijewski, "UN Reiterates Call to Abolish Criminalization of Surrogates," accessed on May 12, 2023, https://www.voanews.com/a/east-asia-pacific_un-reiterates-call-abolish-criminalization-surrogates/6179318.html.

The practice of surrogate motherhood is a new form of trafficking in women and children. This was in line with Article 3 (a) Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children which supplemented the United Nations Convention against Transnational Organized Crime, Adopted by General Assembly resolution 55/25 of 15 November 2000. Furthermore, exploitation involved various categories, including prostitution/sexual abuses, forced labor or services, slavery, and servitude/the harvesting of organs. According to Article 3 Annex II Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, "trafficking in persons" indicates the transportation, transfer, harboring, or receipt of individuals through coercion, abduction, fraud, deception, power, vulnerability or payments/benefits.

This was to obtain the consent of a person having control over others for the purpose of exploitation. Article 3 also enumerated three elements of this offense, namely the perpetration of (1) an 'act' (recruitment, etc.) by the use of (2) a 'means' (threat or use of force, etc.), for (3) the 'purpose' of exploitation.³⁹ Human trafficking is historically stated to be slavery due to its violation of rights. This condition often develops in weak economic communities, which lack the understanding of religion/morality and depend on economically strong groups. The reason mostly provided by the victims was that their actions were generally legal based on an agreement. Human rights violations in the form of slavery are often observed as the deprivation of freedom by strong economic groups on the weaker population.⁴⁰ This condition was found and used in analyzing the phenomenon of surrogacy, which occurs in various parts of the world.

At a meeting of the United Nations General Assembly on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material A/74/162 discussed the study on safeguards for the protection of the rights of children born from the surrogacy arrangement.⁴¹ Based on Chatterjee, surrogation occurred in countries where most of the population was poor. In these nations, the communities, middlemen, and clinics violated women's rights by leasing their uteruses for commercial purposes. In this process, substitute mothers only obtained small payments, with the intermediaries and reproductive clinics obtaining more.⁴²

Surrogation is also an opening for brokers to trade women experiencing economic difficulties. "Trafficking in persons" was previously carried out by sexual

³⁹ Nicole Siller and Kathryn E. Van Doore, "Establishing the Constituent Elements of Trafficking in Persons: Conceptualizing 'Transnationality' and 'Involvement by an Organized Criminal Group'," *The Palgrave International Handbook of Human Trafficking* 1, no. 1 (2020): 271-283.

⁴⁰ Abdul Rahman Prakoso and Putri Ayu Nurmawati, *Policy Law to Follow Criminal Trafficking in Persons* (Semarang: University Semarang State, 2018): 133-146.

⁴¹ See United Nations General Assembly Concerning Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography, and Other Child Sexual Abuse Material A/74/162.

⁴² Pyali Chatterjee, "Human Trafficking and Commercialization of Surrogacy in India", *European Researcher* 85, no. 10-2 (2014): 1835-1842, <https://doi.org/10.13187/er.2014.85.1835>.

exploitation and selling organs, although it presently involves leasing the uterus through surrogation. In this case, the uterus is considered a tradable commodity, with a young woman often having the tendency to accept coercion from the husband or family to perform surrogation for money. Besides the practice being an opening for women trafficking, it was also a clear abuse of children. The biological parents can also become the object of blackmail for the broker when the child is born. Subsequently, brokers are often unlikely to release a baby born from a surrogate mother even when they have obtained payment according to the agreement. In this case, the biological parents are often exploited and instructed to provide additional money.

Concerning child trafficking through surrogacy, Wade stated that "... commercial surrogation was unlikely to be categorized as the 'sale' of a child, although the practice was likely to be very harmful. This showed that the justification for the legislative stance against the practice was partly related to the considerations of children's welfare".⁴³ In countries with legal prohibitions, the children delivered through surrogacy often lose their identity rights. By law, the children shared adoptive and biological relationships with their real parents and surrogate mothers, respectively.⁴⁴ When a child is not born according to the expectations of the biological parents, for example in a disabled condition, they have the right to a rejection. In this case, the child is confronted with being raised or abandoned by the surrogate mother.

3. Indonesian Context

One of the problems in the health sector is the problem of reproduction, where all citizens have the right of autonomy to regulate their lives as they want. In Indonesia, the opportunity to legalize surrogacy was still beyond expectations. This was due to the influences of religious values on the country's laws, which outrightly oppose artificial births. The struggle to legalize surrogacy was also widely opposed by various groups, with the practice ethically and morally unacceptable on the basis of not performing natural fertilization. This was very contrary to the dignity of a child, which should be naturally conceived by the mother and loved by the biological parents.⁴⁵ The implementation of the surrogate mother in Indonesia is null and void, due to its violation of an agreement regulated in Article 1320 of the Civil Code. The legal requirements of the agreement were not also met, especially the conditions for specific elements and the conditions for a lawful cause. Therefore, the agreement is null and void and considered to have never existed. The efforts to legalize surrogacy

⁴³ Katherine Wade, "The Regulation of Surrogacy: A Children's Rights Perspective," *Child and Family Law Quarterly* 29, no. 2 (2017): 113-131.

⁴⁴ Gloria Torres, Anne Shapiro, and Tim K. Mackey, "A Review of Surrogate Motherhood Regulation in South American Countries: Pointing to a Need for an International Legal Framework," 1-9.

⁴⁵ Risa Jaya Wulandari and I Nyoman Darmadha, "Legal Consequences Surrogate Mother Review From Law Criminal," 1-14.

in Indonesia also clashed with several regulations, with the practice obscuring the right to identity, according to the birth certificate. This right was regulated in Article 27 of the Law Number 35 of 2014 regarding Amendments to the Law Number 23 of 2002 on Child Protection.

The recognition of protection and human rights were inseparable from the personality adopted by a nation. Based on the *Pancasila* state, Indonesia established the right to live, grow, and develop regarding the basic access that needs to be met. In any condition, this accessibility cannot be neglected, including the emergency regulated in the Law Number 39 of 1999 on Human Rights. Subsequently, this right is a foundational principle of the Law.⁴⁶ Confusion about determining identity also causes the inability of children to grow and develop properly especially mentally. As previously described, the tendency of "trafficking in persons" appears in this surrogation practice. Based on the Law Number 21 of 2007 on the Eradication of the Crime of Trafficking in Persons, any exploitative action carried out within or between countries was expressly prohibited. In the Indonesian legal reform, the practice of surrogate mothers was also expressively restricted in the Draft Law on Family Resilience.

Criminal provisions against accountable legal subjects are regulated in Article 141 of the Draft Law on Family Resilience, which states that "Any person deliberately performing surrogation for the purpose of obtaining offspring should be sentenced to imprisonment of a maximum of 5 years and/or a fine of up to IDR500.000.000,00 (five hundred million rupiahs)". In the Draft Law on Family Resilience, the surrogacy ban shows law makers are still rejecting the pregnancy method. Everyone is also obliged to participate in resilience implementation and maintain the clarity of offspring in their family. Therefore, this Draft Law needs to strictly prohibit the sale, purchase, and voluntary donations of sperm or ovum, which are often carried out independently or through an institution for obtaining offspring. The prohibition is also applied to people persuading, coercing, and/or threatening others to willingly carry out surrogacy commercially and voluntarily to earn money and offspring.⁴⁷

E. Conclusion

The debate over legalization and prohibition of surrogacy will address issues of human rights and human trafficking. In surrogacy, several relationships were observed between the child, the surrogate mother, and the biological parents. Although the child is genetically a descendant of a married couple (husband and wife), it still doesn't share a legal relationship with them. This was because the child legally belonged to the surrogate mother, either single, married, or widowed. Furthermore, the children born through surrogacy have no legal relationship with

⁴⁶ Iman Jauhari, "Comparison of Child Protection Law Between Indonesia and Malaysia," *Indonesian J. Int'l L.* 12, no. 1 (2014): 84.

⁴⁷ See the Academic Paper of the Draft Law on Family Resilience, the Drafting Team for the 2020 Family Resilience Bill.

their biological parents, except by adoption. The determination of a child's legal status was also more complicated when differences were observed in the locations of all involved parties regarding the rules and regulations.

This condition will injure the child's right to identity. This study has examined various international legal instruments and provisions in various countries. In Indonesian law, the surrogate mother agreement was null and void due to being contrary to the values in society, as well as laws and regulations. Each country also had its arrangements to legalize or prohibit surrogate mothers, by supporting or restricting the leasing of wombs, respectively. The struggle to legalize surrogacy in Indonesia required strong legal reform efforts due to its clash with religious values, as well as existing laws and regulations. To legalize surrogacy in Indonesia, several elements were considered, due to the practice being a new form of "trafficking in persons", especially for women and children exploitation. The legalization of surrogacy can be a loophole for families and intermediary services to exploit women to rent out their wombs with payment according to the agreement. This condition specifically injured human rights. In the Academic Paper of the Draft Law on Family Resilience, surrogacy was also prohibited regarding its value differences.

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