



## The Legality of the Surrogate Mother Agreement Reviewed from Indonesian Civil Law

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**Abstract.** This research explores the legality of surrogate mother (uterus rental) agreements under Indonesian civil law, particularly given the absence of clear regulations governing such arrangements. The study aims to examine both the legal status of surrogate mother agreements and the legal status of children born through surrogacy, based on the provisions of the Indonesian Civil Code. This is a normative legal study employing a statutory approach, with secondary data collected through literature review and analyzed using descriptive-analytical methods. The findings indicate surrogate mother agreements are not legally valid under Indonesian civil law, as they fail to meet the essential requirements for a valid contract. The legal status of children born from such agreements depends on specific conditions. If the intended (biological) parents wish to establish a legal relationship with the child, they must go through an adoption process. Furthermore, the marital status of the surrogate mother determines the child's legal status: (a) if the surrogate mother is legally married, the child is presumed to be the legitimate child of the surrogate and her spouse; (b) if the surrogate mother is unmarried or widowed, the child is considered to be born out of wedlock.

**Keywords:** Surrogate Mother, Uterus Rental Agreement, Civil Law, Legal Status of Child.

**Abstrak.** Penelitian ini mengkaji legalitas perjanjian ibu pengganti (sewa rahim) berdasarkan hukum perdata Indonesia, terutama mengingat belum adanya peraturan perundang-undangan yang jelas yang mengatur pengaturan tersebut. Penelitian ini bertujuan untuk mengkaji status hukum perjanjian ibu pengganti dan status hukum anak yang lahir melalui surrogasi, berdasarkan ketentuan Kitab Undang-Undang Hukum Perdata Indonesia. Penelitian ini merupakan penelitian hukum normatif dengan pendekatan perundang-undangan, dengan data sekunder dikumpulkan melalui kajian pustaka dan dianalisis menggunakan metode deskriptif-analitis. Temuan penelitian menunjukkan bahwa perjanjian ibu pengganti tidak sah secara hukum berdasarkan hukum perdata Indonesia, karena tidak memenuhi syarat-syarat pokok suatu perjanjian yang sah. Status hukum anak yang lahir dari perjanjian tersebut bergantung pada kondisi-kondisi tertentu. Jika calon orang tua (biologis) ingin menjalin hubungan hukum dengan anak tersebut, mereka harus melalui proses adopsi. Lebih jauh lagi, status perkawinan ibu pengganti menentukan status hukum anak: (a) jika ibu pengganti menikah secara sah, anak tersebut dianggap sebagai anak sah dari ibu pengganti dan pasangannya; (b) jika ibu pengganti tidak menikah atau janda, anak tersebut dianggap lahir di luar nikah.

**Kata kunci:** Ibu Pengganti, Perjanjian Sewa Rahim, Hukum Perdata, Status Hukum Anak.

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## 1. Introduction

Having children is a fundamental hope for many married couples and is recognized as a human right under Article 28B Paragraph (1) of the Indonesian Constitution. However, infertility, caused by the inability to produce healthy sperm or eggs, prevents some couples from conceiving naturally.<sup>1</sup> In response, many seek alternative methods such as adoption, In Vitro Fertilization (IVF), or surrogacy.<sup>2</sup> IVF involves fertilizing an egg and sperm in a laboratory and implanting the embryo into the woman's uterus, addressing problems like poor sperm quality or blocked fallopian tubes.<sup>3</sup> Surrogacy, where another woman carries a child on behalf of the couple, is a newer option.<sup>4</sup> Although it offers hope, surrogacy presents complex legal, ethical, and social challenges. In Indonesia, the absence of specific laws results in the practice often being conducted secretly, raising uncertainties about its legality and protection under civil law. For instance, Law Number 36 of 2009 and Minister of Health Regulation Number 43 of 2015 only regulate In Vitro Fertilization (IVF), not surrogacy.

According to Krestianto,<sup>5</sup> a surrogate mother agreement involves a woman who agrees to carry a child conceived through the fertilization of a married couple's egg and sperm, implanted into her uterus. After giving birth, the child is handed over to the couple based on a prior agreement. This is commonly referred to as a "gestational agreement".<sup>6</sup> Such arrangements usually arise when a wife is unable to conceive due to uterine issues, and the role of pregnancy is transferred to another woman, sometimes with compensation.<sup>7</sup> The surrogate mother agreement may be either voluntary or a commercial contract.<sup>8</sup> In 2015, a gynecologist at Telegorejo Hospital, Semarang, publicly acknowledged assisting in a surrogate birth, suggesting other unreported cases exist to protect the involved parties. These

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<sup>1</sup> Diantika Palma Sari, "Perjanjian Sewa Rahim (Surrogate Mother) Menurut Kajian Hukum Islam dan Hukum Perdata di Indonesia," (PhD diss., Universitas Sriwijaya, 2021), 32.

<sup>2</sup> Zetria Erma et al., "Keabsahan Perjanjian Sewa Rahim (Surrogate Mother) Ditinjau Dari Pasal 1320 KUH Perdata," *Jurnal Teknologi Kesehatan Dan Ilmu Sosial (TEKESNOS)* 3, no. 2 (2021): 34.

<sup>3</sup> Brian Makatika, "Akibat Hukum Sewa Rahim Ditinjau Dari Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan," *Lex Privatum* 11, no. 2 (2023): 3.

<sup>4</sup> Muhammad Ali Hanafiah Selian, "Surrogate mother; Tinjauan hukum perdata dan Islam," *Jurnal Yuridis* 4, no. 2 (2017): 133.

<sup>5</sup> Indra Krestianto, "Perjanjian Surrogate Mother di Indonesia Ditinjau dari Aspek Syarat Sah Perjanjian," *Hukum Pidana dan Pembangunan Hukum* 3, no. 1 (2020): 7.

<sup>6</sup> Richard Kennedy, "Diskursus Hukum dan Etika Tentang Praktik Ibu Pengganti sebagai Perwujudan Hak Bereproduksi," (PhD diss., UNIKA Soegijapranata Semarang, 2019), 42.

<sup>7</sup> Desriza Ratman, *Surrogate Mother dalam Perspektif Etika dan Hukum: Bolehkah Sewa Rahim di Indonesia?* (Jakarta: PT. Elex Media Komputindo, 2017), 55.

<sup>8</sup> Said Aqil Husin Al Munawar, *Hukum Islam & pluralitas social* (Jakarta: Penamadani, 2004), 19.

practices continue to raise legal, ethical, and religious concerns due to the lack of clear regulation in Indonesia.

Initially, surrogate mother agreements were generally accepted by the public. However, over time, their use began to shift from medical necessity to cosmetic and lifestyle motivations, reflecting a shift in social values. While some couples still seek surrogacy for legitimate health reasons, others now pursue it for non-medical reasons. In contrast, women, particularly those from economically disadvantaged backgrounds, have started to view womb rental as a means of income, turning it into a commercial activity.<sup>9</sup> This shift has raised critical debates surrounding women's dignity, ethics, legality, and social norms. Globally, some countries support surrogacy under regulation, while others strongly oppose it due to ethical and legal concerns. In Indonesia, the practice exists but often occurs covertly in certain regions. This lack of transparency and regulation has led to unresolved legal and ethical issues, sparking broader discussions about the protection of women and the need for comprehensive legal frameworks.

Despite progress in global surrogacy research, many important issues remain unclear in Indonesia, especially in legal, ethical, and social aspects. Ebrahimi and Ghodrati<sup>10</sup> explain that the absence of specific laws leads to secret practices without legal oversight. This raises doubts about the legal validity of surrogate mother agreements under Article 1320 of the Civil Code.<sup>11</sup> Heriyanto and Gasimzadeh<sup>12</sup> note that surrogacy is not allowed in Indonesia due to Islamic concerns about lineage. However, they do not clearly explain how these agreements relate to the legal requirement of having a "halal cause".<sup>13</sup>

Prastiyo and Swardhana<sup>14</sup> compare Indonesia's surrogacy ban under Law No. 36 of 2009 with countries like India. Yet, their study does not explore how such

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<sup>9</sup> Yuri Hibino, "Ongoing Commercialization of Gestational Surrogacy due to Globalization of the Reproductive Market before and after the Pandemic," *Asian Bioethics Review* 14, no. 4 (2022): 351.

<sup>10</sup> Abed Ebrahimi and Fatemeh Ghodrati, "Comparative Investigation of Surrogacy Laws in Asian Islamic Countries: A Narrative Review," *Journal of Midwifery & Reproductive Health* 13, no. 1 (2025): 4526.

<sup>11</sup> Mega Dewi Ambarwati and Ghina Azmita Kamila, "The Evaluation of Surrogacy's System in Indonesia as Comparison to India's Legislation," *Lentera Hukum* 6, no. 3 (2019): 254.

<sup>12</sup> Dodik Setiawan Nur Heriyanto and Ulvi Gasimzadeh, "A Prophetic Law Approach to Reconciling Indonesia's Uneasy Relationship with Cross-border Surrogacy," *Prophetic Law Review* 6, no. 1 (2024): 3.

<sup>13</sup> Zulfahmi et al., "A Review of Islamic Law on the Practice of Tumpang Rahim Based on Maqāṣid al-Syarī'ah and Contemporary Scholars," *MAQASIDI: Jurnal Syariah dan Hukum* 4, no. 2 (2024): 232. See also, Idha Aprilyana Sembiring et al., "The Legal Study of Inheritance Rights for Children of Surrogate Mother," *Jurnal Pembaharuan Hukum* 11, no. 3 (2024): 516.

<sup>14</sup> Wawan Edi Prastiyo and Gde Made Swardhana, "The Opportunities for Surrogacy Legalization Between the Right to Have Children and A Loophole of Trafficking," *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 10, no. 2 (2023): 197.

agreements could work under Indonesia's unique laws and social norms.<sup>15</sup> On the ethical side, Rizqi<sup>16</sup> warns that surrogacy may shift from medical need to business, especially hurting poor women. Still, we lack enough field studies on the social effects of surrogacy, such as stigma or mental stress.<sup>17</sup> Bennett and Pangestu<sup>18</sup> discuss global reproductive travel, but local effects of surrogacy inside Indonesia are not well studied.<sup>19</sup>

Another key issue is the unclear legal status of children born through surrogacy. Sembiring et al.<sup>20</sup> talk about inheritance rights, but there is little research on whether these children should be seen as legitimate, adopted, or born out of wedlock.<sup>21</sup> Though global experts call for clear rules,<sup>22</sup> not many studies offer solutions that fit Indonesia's values, especially those that protect women, children, and local customs.<sup>23</sup> Even though many international scholars explore surrogacy's problems,<sup>24</sup> Indonesia's religious and cultural setting requires specific research about public opinion and proper legal reforms.<sup>25</sup> The current lack of detailed and

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<sup>15</sup> Fatemeh Ghodrati, "A comparative study of surrogacy rights in Iran and European countries, a review article," *Ethics, Medicine and Public Health* 27, no. 4 (2023): 102.

<sup>16</sup> Muhammad Fatkhur Rizqi, "Analisa Yuridis Terhadap Perjanjian Sewa Rahim Dalam Perspektif Hukum Perdata Dan Hukum Islam," *Dinamika* 26, no. 5 (2020): 652.

<sup>17</sup> Paola Frati et al., "Bioethical issues and legal frameworks of surrogacy: A global perspective about the right to health and dignity," *European Journal of Obstetrics & Gynecology and Reproductive Biology* 258, no. 2 (2021): 3. See also, Silvia Zullo, "Dal divieto alla regolamentazione a contratto della gestazione per altri: Ragioni normative a confronto," *Biolaw Journal* 2, no. 3 (2024): 119.

<sup>18</sup> Linda Bennett and Mulyoto Pangestu, "Regional reproductive quests: Cross-border reproductive travel among infertile Indonesian couples," *Asia Pacific Viewpoint* 58, no. 2 (2017): 164.

<sup>19</sup> Claire Fenton-Glynn, "Outsourcing ethical dilemmas: regulating international surrogacy arrangements," *Medical law review* 24, no. 1 (2016): 61.

<sup>20</sup> Sembiring et al., "The Legal Study of Inheritance Rights," 521.

<sup>21</sup> Bríd Ní Ghráinne and Aisling McMahon, "A Public International Law approach to safeguard nationality for surrogate-born children," *Legal studies* 37, no. 2 (2017): 326. See also, Putu Nita Yulistian, "Hak Waris Anak Yang Dilahirkan Melalui Perjanjian Surogasi," *Jurnal Interpretasi Hukum* 2, no. 1 (2021): 204.

<sup>22</sup> Louise Anna Helena Ramskold and Marcus Paul Posner, "Commercial surrogacy: how provisions of monetary remuneration and powers of international law can prevent exploitation of gestational surrogates," *Journal of Medical Ethics* 39, no. 6 (2013): 397.

<sup>23</sup> Patricio López Turconi, "Assisted Regulation: Argentine Courts Address Regulatory Gaps on Surrogacy," *Health and Human Rights* 25, no. 2 (2023): 16.

<sup>24</sup> Svetlana M. Sylkina et al., "Surrogacy: An international comparative analysis of the fundamental legislative principles of Ukraine," *Medicine, Science and the Law* 60, no. 1 (2020): 38. See also, Elena Mitryakova and Amanda Boniface, "Legal Regulations of Surrogate Motherhood in Russia and South Africa: Similarities and Differences," *BRICS Law Journal* 12, no. 1 (2025): 21.

<sup>25</sup> Olga S. Jovic, "Surrogate motherhood as a medical treatment procedure for women's infertility," *Medicine and Law* 30, no. 1 (2011): 25. See also, Zulfahmi et al., "A Review of Islamic Law," 236.

relevant research shows the need to build a legal model that protects everyone involved and follows ethical standards.<sup>26</sup>

Thus, this study fills the gap by examining the legal validity of surrogate mother agreements in Indonesia, which has been under-researched despite ethical, religious, and civil law concerns.<sup>27</sup> It also explores whether the rights and obligations within such agreements are being violated and clarifies the legal status of children born from them under Indonesian civil law. Article 1338 of the Civil Code regulates the freedom of contract, granting parties the right to form agreements according to their will, regardless of the content or form: “All agreements made lawfully are valid for the parties who make them.” However, this principle of contractual freedom must still comply with the validity requirements outlined in Article 1320 of the Civil Code, namely: mutual consent between the parties, legal capacity of the parties, a clear object of the agreement, and a lawful purpose.<sup>28</sup>

This study is important because it explores a rarely discussed legal issue in Indonesia: the legality of surrogate mother agreements. It examines whether such agreements fulfill the legal requirements of consent, object, capacity, and lawful cause under Indonesian civil law.<sup>29</sup> The study also evaluates whether the rights and obligations of the parties have been violated and investigates the legal implications of the uterus lease agreement. Finally, it aims to determine the legal status of children born from such agreements.

## 2. Research Methods

This research is normative legal research using a statutory (legislative) approach. It is conducted based on primary legal materials by examining relevant theories, concepts, legal principles, and applicable laws and regulations. The sources of legal materials in this study consist of secondary data, which include primary, secondary, and tertiary legal materials. The primary legal materials are laws and regulations. The secondary legal materials include legal literature such as books

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<sup>26</sup> Nensi Sinanaj, “The Right to Dignity of the Surrogate Mother,” *University of Bologna Law Review* 6, no. 2 (2021): 263. See also, Ariel Porat and Stephen Sugarman, “Limited Inalienability Rules,” *Georgetown Law Journal* 107, no. 3 (2018): 704.

<sup>27</sup> Nehaluddin Ahmad et al., “Law of assisted reproductive surrogacy in Malaysia: a critical overview,” *Commonwealth Law Bulletin* 42, no. 3 (2016): 355.

<sup>28</sup> Apriyodi Ali et al., “Kepastian hukum penerapan asas kebebasan berkontrak dalam sebuah perjanjian baku ditinjau berdasarkan pasal 1338 kitab undang-undang hukum perdata,” *SENTRI: Jurnal Riset Ilmiah* 1, no. 2 (2022): 270-278.

<sup>29</sup> Natalia M. Ochoa Ruiz, “The proposal for a regulation on the recognition of parenthood: An attempt to recognize surrogacy in the European Union?,” *Cuadernos de bioética: revista oficial de la Asociación Española de Bioética y Ética Médica* 35, no. 114 (2024): 157.

and other legal writings relevant to the formulation of the problem. These are obtained from the opinions of legal experts, foundations, and theories found in books, scholarly articles, and online sources. Tertiary legal materials consist of definitions taken from legal dictionaries, laws, and regulations. The results of this study provide a detailed juridical analysis of the legality of surrogate mother agreements under the Indonesian Civil Code by analyzing relevant laws, regulations, and legal doctrines related to the issues at hand.

### 3. Results and Discussion

#### 3.1. Legality of Surrogate Mother Agreements Under the Indonesian Civil Code

Surrogate mother rental agreements have been widely carried out by people in all parts of the world. However, the existence of this surrogate mother rental agreement has actually reaped many pros and cons.<sup>30</sup> Where initially it was done for medical reasons, over time it has shifted towards social purposes and the exploitation of the womb.<sup>31</sup> Each country has different policies and views on the existence of surrogate mother agreements.<sup>32</sup> Countries like India, the United Kingdom, Thailand, and Australia have legalized surrogacy with specific regulatory frameworks. India permits altruistic surrogacy under the 2019 Surrogacy Regulation Bill, banning commercial arrangements to curb exploitation.<sup>33</sup> The United Kingdom allows altruistic surrogacy through the Surrogacy Arrangements Act 1985, amended by the Human Fertilization and Embryology Act 2008,

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<sup>30</sup> Kévin Lavoie et al., "Pourquoi devrais-je adopter mon propre enfant? Le recours à l'adoption par consentement spécial pour établir la filiation d'un enfant né d'une grossesse pour autrui au Québec," *Enfances Familles Générations. Revue interdisciplinaire sur la famille contemporaine* 45, no. 2 (2024): 7.

<sup>31</sup> Ida Bagus Abhimantara, "Akibat Hukum Anak yang Lahir dari Perjanjian Surrogate Mother," *Jurnal Universitas Airlangga Notaire* 1, no. 4 (2018): 43. See also, Rizqi, "Analisa Yuridis Terhadap Perjanjian Sewa Rahim," 656.

<sup>32</sup> A. den Exter, "Surrogacy reforms in the Netherlands," *Ethics, Medicine and Public Health* 33, no. 2 (2025): 101133. See also, Bayu Sujadmiko et al., "Surrogacy in Indonesia: The comparative legality and Islamic perspective," *HTS Teologiese Studies/Theological Studies* 79, no. 1 (2023): 5; Fenton-Glynn, "Outsourcing ethical dilemmas," 63.

<sup>33</sup> Britta van Beers and Laura Bosch, "A revolution by stealth: a legal-ethical analysis of the rise of pre-conception authorization of surrogacy agreements," *The New Bioethics* 26, no. 4 (2020): 353. See also, Ambarwati and Kamila, "The Evaluation of Surrogacy's System," 256.



requiring court approval for parental orders.<sup>34</sup> Thailand and Australia also permit altruistic surrogacy with strict oversight to protect all parties.<sup>35</sup>

In contrast, Iran legalizes surrogacy under Shia jurisprudence, though it lacks explicit civil law codification, allowing conditional agreements.<sup>36</sup> Similarly, countries like Ukraine and Russia have liberal regulations, permitting commercial surrogacy with defined contractual requirements.<sup>37</sup> Conversely, nations such as Germany, France, Switzerland, Italy, and Libya prohibit surrogacy, reflecting ethical, religious, or cultural objections.<sup>38</sup> Germany and Switzerland ban all forms of surrogacy, with courts recognizing only foreign judicial decisions for parentage, often requiring adoption for intended mothers.<sup>39</sup> France and Italy enforce strict prohibitions, viewing surrogacy as contrary to public policy and women's dignity.<sup>40</sup> Libya, along with other Islamic countries like Indonesia, Malaysia, Pakistan, and Turkey, deems surrogacy haram due to concerns over lineage confusion and moral norms.<sup>41</sup>

In Indonesia, surrogate mother rental agreements have occurred a lot and are carried out in several regions. However, the existence of this practice is difficult to prove because it is done secretly and in a family way. This is done because in Indonesian medical practice there is no clear regulation that specifically and strictly regulates the rental of a uterus (surrogate mother). Table 1 shows some cases of surrogate mother that have been carried out by Indonesian citizens.

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<sup>34</sup> Mathabo Baase, "The Ratification of Inadequate Surrogate Motherhood Agreements and the Best Interest of the Child," *Potchefstroom Electronic Law Journal* 22, no. 1 (2019): 3. See also, Sujadmiko et al., "Surrogacy in Indonesia," 3.

<sup>35</sup> Jeremy Feiglin and Julian Savulescu, "A New Ethical Model of Commercial Surrogacy Arrangements for Australia," *Journal of Law and Medicine* 25, no. 4 (2018): 920. See also, Bennett and Pangestu, "Regional reproductive quests," 166

<sup>36</sup> Ghodrati, "A comparative study of surrogacy rights," 106. See also, Ebrahimi and Ghodrati, "Comparative Investigation of Surrogacy Laws," 4527.

<sup>37</sup> Emilia Sarnacka and Ivan Demchenko, "Legal Regulation of Surrogacy in Poland and Ukraine: A Comparative Analysis," *Review of European and Comparative Law* 57, no. 2 (2024): 227. See also, Mitryakova and Boniface, "Legal Regulations of Surrogate Motherhood," 23.

<sup>38</sup> Valeria Piersanti et al., "Surrogacy and procreative tourism: What does the future hold from the ethical and legal perspectives?," *Medicina* 57, no. 1 (2021): 10.

<sup>39</sup> Elmar Buchstatter and Marianne Roth, "Legal Controversies in Cross-Border Surrogacy: A Central European Perspective on the Recognition of Legal Parenthood through Surrogacy Established Abroad," *Access to Just. E. Eur.* 7 no. 4 (2024): 180.

<sup>40</sup> Dalla Costa et al., "O-223 Reproductive rights denied in Italy: legal discrimination against single women, same-sex couples, transgender individuals, and the global controversy of surrogacy—a comparative perspective," *Human Reproduction* 40, no. 1 (2025): 100. See also, Zullo, "Dal divieto alla regolamentazione," 120; Frati et al., "Bioethical issues and legal frameworks," 5.

<sup>41</sup> Heriyanto and Gasimzadeh, "A Prophetic Law Approach," 7. See also Zulfahmi et al., "A Review of Islamic Law," 237; Ebrahimi and Ghodrati, "Comparative Investigation of Surrogacy Laws," 4528.

**Table 1.** Cases of Surrogate Mother Agreements Involving Indonesian Citizens.

No	Case	Year	Location	Information
1	The Case of Zarima Mansur	2009	Jakarta	It is denied that the surrogate mother rental agreement was never carried out.
2	The case of a married couple in the customs of the Key Tribe	2009	Mimika Papua	The agreement is carried out in a family manner, where the wife's brother becomes the surrogate mother.
3	The case of an Indonesian couple who rented a uterus abroad	2005	Amerika Serikat	This married couple found a surrogate mother in the United States.
4	The case of Surrogate Mother by a mother with the initials EY	2004	Surakarta	EY decided to rent a uterus after several attempts at the IVF program but failed.

Some of the cases that have been mentioned show that the practice of surrogate mothers already exists in Indonesia.<sup>42</sup> However, currently, Indonesia does not have a regulation that specifically regulates surrogate mother agreements. Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that Indonesia is a state based on law, which means that every action must be regulated by law to ensure order. Therefore, considering the practice of surrogate mothers in the community, clear rules are needed as guidelines for its implementation to ensure legal certainty and provide information about the validity of surrogate mother agreements according to the Civil Code.<sup>43</sup>

The aspect of the agreement in the practice of surrogate mothers refers to the law of legal agreements in Indonesia based on the national covenant law, namely the Civil Code.<sup>44</sup> In this agreement, there are two parties that are mutually binding: one party (surrogate mother) provides services or achievements, while the other

<sup>42</sup> Abiade Olawanle Abiola et al., "Perspectives on Surrogacy Practices and Law in Nigeria: A Call for Policy Intervention," *Women's Reproductive Health* 11, no. 4 (2024): 988. See also, Sinanaj, "The Right to Dignity of the Surrogate Mother," 266.

<sup>43</sup> Asher Bashiri et al., "Surrogacy: An important pathway to parenthood. A call for international standardization," *Journal of Reproductive Immunology* 163, no. 2 (2024): 104247. See also, Abiola et al., "Perspectives on Surrogacy Practices," 993; Prastiyo and Swardhana, "The Opportunities for Surrogacy Legalization," 201; Turconi, "Assisted Regulation: Argentine Courts," 17.

<sup>44</sup> Susanna Marinelli et al., "The newly enacted Italian surrogacy law: Effects on reproductive tourism," *Journal of Assisted Reproduction and Genetics* 5, no. 2 (2025): 6. See also, Ebrahimi and Ghodrati, "Comparative Investigation of Surrogacy Laws," 4531; Bennett and Pangestu, "Regional reproductive quests," 161.



party or biological parents provide material payments or rewards.<sup>45</sup> The agreement is based on services provided by the surrogate mother, who receives the embryo from the biological parents and agrees to conceive and deliver the baby to be born to the biological parents.<sup>46</sup>

According to Article 1313 of the Civil Code, which states that “an act in which a person or several persons bind themselves to someone or several other persons,” surrogacy practices can be considered a type of agreement. In this context, one party (the biological parent) makes a promise to the other party (surrogate mother), or both parties commit to each other to do something (embryo transfer). Thus, there is a legal relationship between the two parties called an engagement. So, this agreement is a form of alliance between the two parties.<sup>47</sup>

The practice of surrogate mothers in Indonesia is considered to violate moral values because it is contrary to moral norms, customs, or general habits of society, as well as to certain religious beliefs because it involves elements that are considered haram, such as adultery.<sup>48</sup> In addition, this practice is considered a violation of public order because it can cause controversy in the community, which has the potential to make surrogate mothers be excluded. This exclusion reflects the view of Indonesian society that considers the practice of surrogate mothers to be contrary to the nature of women and Eastern cultural values, so surrogate mothers often receive negative stigma from society.<sup>49</sup> It is argued that the uterus lease agreement cannot be considered valid because it does not meet the legal requirements of the agreement stipulated in Article 1320 of the Civil Code, especially related to the agreement, capacity, and clear object. The surrogate mother agreement also fails to meet the fourth condition, namely “valid reasons,” so the agreement is declared null and void according to the law. This cancellation makes the agreement considered to have never existed or returned to its original condition

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<sup>45</sup> Dwi Arini Zubaidah, “Surrogate Mothers in a Multidimensional Perspective of Legal Regulations in Indonesia,” *Posita: Jurnal Hukum Keluarga Islam* 2, no. 2 (2024): 59. See also, Krestianto, “Perjanjian Surrogate Mother,” 9; Abhimantara, “Akibat Hukum Anak,” 45.

<sup>46</sup> Labuschaigne et al., “Surrogate motherhood regulation in South Africa: Medical and ethico-legal issues in need of reform,” *South African Journal of Bioethics and Law* 17, no. 3 (2024): 106. See also, Ambarwati and Kamila, “The Evaluation of Surrogacy's System,” 259; Sembiring et al., “The Legal Study of Inheritance Rights,” 516.

<sup>47</sup> R. Febrina Andarina Zaharnika, “Analisis Hukum Terhadap Pelaksanaan Perjanjian Sewa Rahim (Surrogate Mother) Ditinjau Menurut Perspektif Hukum Positif,” *Jurnal Hukum Mimbar Justitia* 7, no. 2 (2021): 129. See also, Ratman, *Surrogate Mother dalam Perspektif Etika*, 46.

<sup>48</sup> Sembiring et al., “The Legal Study of Inheritance Rights,” 529. See also, Zulfahmi et al., “A Review of Islamic Law,” 232; Sylkina et al., “Surrogacy: An international comparative analysis,” 39; Mitryakova and Boniface, “Legal Regulations of Surrogate Motherhood,” 27.

<sup>49</sup> Nurul Mujahidah et al., “The Legality of Surrogate Mothers from the Islamic Law Perspective,” *Al-Risalah Jurnal Ilmu Syariah dan Hukum* 2, no. 1 (2022): 48. See also, Ramskold and Posner, “Commercial surrogacy: how provisions of monetary remuneration,” 340.

before the agreement was made.<sup>50</sup> Thus, it can be concluded that the uterus lease agreement cannot be enforced because it does not meet the legal requirements of the agreement in Indonesia, and therefore, the agreement is legally null and void and has no legal force.<sup>51</sup>

This shows that the government has a very important role in law enforcement efforts in Indonesia. The role of the government generally appears in various forms, such as the regulatory function, the policy formulation function, the service function, the law enforcement function, and the function of maintaining public order and security.<sup>52</sup>

Regarding surrogate mother rental agreements, there are several regulations that prohibit such agreements, including the Regulation of the Minister of Health on the Implementation of Assisted Reproductive Technology Services Number 039/Menkes/SK/2010, which explicitly states that surrogacy in any form is prohibited.<sup>53</sup> Therefore, the government clearly opposes the use or practice of surrogate mothers in Indonesia. However, as the policy developed, a new regulation was introduced, namely, the Regulation of the Minister of Health Number 43 of 2015 concerning the Implementation of Assisted Reproductive Services or Pregnancy Outside the Natural Way. This regulation, however, does not address uterus rental at all; rather, it only regulates the use of IVF involving the uterus from which the ovum originates.

In addition, the regulations related to the prohibition are still incomplete. This is evident in Article 43 paragraph (3) letter b of Government Regulation Number 61 of 2014 concerning Reproductive Health, which states that the implantation of embryos into the uterus of another woman is prohibited. However, there is no further explanation provided regarding this article, meaning there is no clear definition or clarification of the term 'woman' referred to in the regulation.<sup>54</sup>

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<sup>50</sup> Muhammad Akbar et al., "Tinjauan Yuridis Perjanjian Sewa Rahim Ditinjau Dari Hukum Perdata," *Judge: Jurnal Hukum* 5, no. 02 (2024): 112. See also, Sylkina et al., "Surrogacy: An international comparative analysis," 40; Mitryakova and Boniface, "Legal Regulations of Surrogate Motherhood," 30.

<sup>51</sup> Ambarwati and Kamila, "The Evaluation of Surrogacy's System," 257. See also, Ebrahimi and Ghodrati, "Comparative Investigation of Surrogacy Laws," 4531; Heriyanto and Gasimzadeh, "A Prophetic Law Approach," 6; Prastiyo and Swardhana, "The Opportunities for Surrogacy Legalization," 205; Zulfahmi et al., "A Review of Islamic Law," 239.

<sup>52</sup> Sondang P. Siagian, *Administrasi Pembangunan: Konsep, Dimensi dan Strateginya*, (Jakarta: Bumi Aksara, 2016), 32.

<sup>53</sup> Valentia Berlian Ayu Febrianti and Budiarsih Budiarsih, "Rekomendasi Kebijakan Sewa Rahim Dari Perspektif HAM di Indonesia," *Bureaucracy Journal: Indonesia Journal of Law and Social-Political Governance* 2, no. 2 (2022): 879. See also, Ruiz, "The proposal for a regulation," 158; Costa et al., "O-223 Reproductive rights denied in Italy," 103.

<sup>54</sup> A. Ramadani et al., "Efektivitas Peraturan Pemerintah Nomor 61 Tahun 2014 Tentang Kesehatan Reproduksi Mengenai Aborsi Akibat Tindak Pidana Pemerkosaan," *Journal of Lex*

Moreover, there is also Law Number 36 of 2009 concerning Health and Government Regulation Number 61 of 2014 concerning Reproductive Health. However, these regulations do not contain firm and clear sanctions for parties who violate them.<sup>55</sup> Due to the lack of specific and strict legal provisions in Indonesia regulating surrogate mother agreements, some married couples who wish to engage in such agreements choose to do so secretly or within family arrangements.<sup>56</sup>

### **3.2. Rights and Obligations in Surrogate Mother Agreements**

Article 1233 of the Civil Code stipulates that an agreement can arise from an agreement or a law. Agreements as the source of the agreement can be written or unwritten documents, and can be derived from laws or human actions. In the context of surrogacy, an engagement occurs when the biological parents make an agreement with a woman to conceive and give birth to their child. According to Articles 1313 and 1233 of the Civil Code, everything agreed upon in the agreement is valid as law for the parties involved. It covers various elements of the agreement, such as the achievements to be performed, the rights and obligations of each party, the form and content of the agreement, the purpose and duration of the agreement, and certain conditions that are part of the agreement. An example is in the case of surrogate mothers

A clear example of a private legal arrangement can be seen in surrogate motherhood agreements. In such cases, the surrogate mother is responsible for conceiving, carrying the pregnancy to term, giving birth, and then handing the baby over to the biological parents. These agreements outline the rights and obligations of both parties. Typically, the responsibilities of the surrogate mother correspond to the rights of the biological parents, and vice versa.<sup>57</sup> For instance, the surrogate

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*Philosophy (JLP)* 3, no. 1 (2022): 59. See also, Piersanti et al., "Surrogacy and procreative tourism," 11.

<sup>55</sup> Ernawati et al., "Implementasi Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan oleh Instansi Kesehatan Terhadap Pelayanan Pengguna BPJS dan Non BPJS di Puskesmas Rensing Kecamatan Sakra Barat Lombok Timur," *J-CEKI: Jurnal Cendekia Ilmiah* 3, no. 5 (2024): 3692. See also, Ratman, *Surrogate Mother dalam Perspektif Etika*, 57; Ghodrati, "A comparative study of surrogacy rights," 108; Ebrahimi and Ghodrati, "Comparative Investigation of Surrogacy Laws," 4529.

<sup>56</sup> Bennett and Pangestu, "Regional reproductive quests," 168. See also, Ambarwati and Kamila, "The Evaluation of Surrogacy's System," 253; Zulfahmi et al., "A Review of Islamic Law," 240; Sembiring, et al., "The Legal Study of Inheritance Rights," 521; Turconi, "Assisted Regulation: Argentine Courts," 21; Abiola et al., "Perspectives on Surrogacy Practices," 989. Marinelli et al., "The newly enacted Italian surrogacy law," 6.

<sup>57</sup> Rafael Adven Arya Widodo, "Pengaturan Hukum Terhadap Perjanjian Surrogacy Menurut Perspektif Hukum Perdata di Indonesia," *Jurnal Pengembangan Ilmu Pengetahuan* 5, no. 4 (2024): 50. See also, Ebrahimi and Ghodrati, "Comparative Investigation of Surrogacy Laws," 4534; Heriyanto and Gasimzadeh, "A Prophetic Law Approach," 10; Prastiyo and Swardhana, "The Opportunities for Surrogacy Legalization," 203.

mother is obliged to maintain the pregnancy until birth and deliver the baby as agreed. In return, the biological parents are required to compensate the surrogate mother for medical expenses, living costs during pregnancy, and her services.<sup>58</sup>

The agreement may be either written or unwritten, though it is generally formalized in writing to ensure clarity and legal certainty.<sup>59</sup> The contents often include the amount and terms of compensation, the timing of baby handover, whether immediately after birth or following a breastfeeding period, and details about the birth certificate process, which may involve listing the biological parents or adoption procedures. Additional conditions often include medical examinations, marital status, and health history of the surrogate mother.<sup>60</sup>

Article 1234 of the Civil Code stipulates that an agreement in the case of a surrogate mother is categorized as a service agreement, which involves the implementation of certain actions. The article states: “every covenant is to give something, or not to do something,” so that the achievement in this agreement can be in the form of goods or services.<sup>61</sup> The conditions for the validity of an agreement described in Article 1320 of the Civil Code include four aspects related to the parties involved and the content of the agreement, namely:

1. The Binding Agreement

The parties to the agreement have the freedom to agree to the terms voluntarily without coercion from the other party, and they must execute the agreement in good faith. Article 1338 of the Civil Code paragraph (3) emphasizes that approval must be made in good faith. Everyone is free to make an agreement with the desired content, because consent means that both parties have agreed to the terms listed in the contract. Article 1338 paragraph (1) of the Civil Code states that all valid agreements shall be valid as law for the parties who make them. The Agreement cannot be cancelled unless there is an agreement between the two parties or the reasons provided by law.<sup>62</sup>

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<sup>58</sup> Alifia Qintarawati, “Perlindungan terhadap Ibu Pengganti (Surrogate Mother) dalam Prespektif Hukum Hak Asasi Manusia di Indonesia,” *Birokrasi: Jurnal Ilmu Hukum dan Tata Negara* 1, no. 4 (2023): 32. See also, Sembiring et al., “The Legal Study of Inheritance Rights,” 316; Zullo, “Dal divieto alla regolamentazione,” 521.

<sup>59</sup> Annisa Ayu Martiana, “Asas Kebebasan Berkontrak dalam Perjanjian Surogasi di Indonesia dari Perspektif Hukum Perdata dan Etika,” *Perspektif Hukum* 24, no. 2 (2024): 313. See also, Ghráinne and McMahon, “A Public International Law approach,” 327.

<sup>60</sup> Hugo Alexander Garces Garces and Diana Carolina Gaona Garcia, “Aspects of the Effectiveness of the Surrogacy Contract regarding the Obligations of the Surrogate Mother during the Gestation Period,” *Rev. Bioetica & Derecho* 61, no. 3 (2024): 179. See also, den Exter, “Surrogacy reforms in the Netherlands,” 101134.

<sup>61</sup> Kenyatun Kenyatun, “Tinjauan Yuridis terhadap Perjanjian Surrogate Mother yang Tertuang dalam Akta Notaris di Indonesia,” *Lex Renaissance* 5, no. 4 (2020): 980.

<sup>62</sup> Nia Susanti, “Kepastian Hukum Penerapan Asas Kebebasan Berkontrak Dalam Sebuah Perjanjian Baku Ditinjau Berdasarkan Pasal 1338 Kitab Undang-Undang Hukum Perdata,” *Indragiri*

In the agreement, the principle of consensualism is applied, which states that an agreement becomes binding once both parties have agreed on its essential elements, namely, goods and services. The mutual agreement between the parties reflects their freedom to determine the content of the contract, with each party expecting the same outcome from the arrangement. Therefore, it can be concluded that a lease agreement has been validly formed.<sup>63</sup>

The parties to the uterus rental contract consist of a married couple as a tenant and a surrogate mother as a uterus rental service provider. Based on the provisions of Article 1320 of the Civil Code regarding consent, the uterus rental agreement between a husband and wife and a surrogate mother must be based on an agreement made voluntarily, without coercion, error, or fraud.<sup>64</sup>

## 2. Ability to Make a Legal Agreement

The second condition is the ability to make an agreement, which means that in a surrogate mother contract, both the husband and wife must have legal capacity.<sup>65</sup> In addition to meeting the set age limit, surrogate mothers must also meet the criteria as a married surrogate mother. In this context, the surrogate mother may be married or not. If the surrogate mother is married, then she is considered to have the legal capacity to make an agreement.<sup>66</sup> According to the American Society for Reproductive Medicine, surrogate mothers need to undergo medical examinations to ensure that they are able to have a healthy pregnancy.<sup>67</sup> The organization recommends testing for infectious diseases such as syphilis, gonorrhea, chlamydia, HIV, cytomegalovirus, as well as hepatitis B and C. In addition, surrogate mothers

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*Law Review* 2, no. 2 (2024): 35. See also, Baase, "The Ratification of Inadequate," 17; Labuschaigne et al., "Surrogate motherhood regulation," 109.

<sup>63</sup> Raida Rhumaisha, "Fenomena Sewa Rahim (Surrogate Mother) dalam Perspektif Hukum dan Hak Asasi Manusia di Indonesia," *J-CEKI: Jurnal Cendekia Ilmiah* 3, no. 4 (2024): 1662. See also, Makatika, "Akibat Hukum Sewa Rahim," 4.

<sup>64</sup> Reni Novita Anggriani Sitompul, "Status Kewarisan Anak Hasil Perjanjian Surogasi Dalam Prespektif Hukum Islam," *Al-Ulum Jurnal Pemikiran dan Penelitian ke Islaman* 8, no. 2 (2021): 203. See also, Krestianto, "Perjanjian Surrogate Mother," 12; Abhimantara, "Akibat Hukum Anak," 46.

<sup>65</sup> Lintang Wistu Malindi, "Perlindungan Hukum Terhadap Ibu Pengganti (Surrogate Mother) Yang Mengikatkan Diri Dalam Perjanjian Sewa Rahim (Surogasi) Di Indonesia," *Jurnal Hukum dan Pembangunan Ekonomi* 8, no. 1 (2020): 45. See also, Buchstatter and Roth, "Legal Controversies in Cross-Border Surrogacy," 178.

<sup>66</sup> Titania Hamdani, "Kajian Yuridis Kedudukan Anak yang Dilahirkan dari Sewa Rahim Wanita Lain oleh Pasangan Suami Isteri," *Jurnal Ilmiah Mahasiswa Hukum* 3, no. 4 (2023): 300. See also, Bahraen Raehanul, *Fiqih Kontemporer Kesehatan Wanita* (Jakarta: Pustaka Imam Asy Syafi'i, 2017), 19; Al Munawar, *Hukum Islam & pluralitas sosial*, 67.

<sup>67</sup> Peter R. Brinsden, *Reproductive Medicine: From A to Z* (Oxford: Oxford University Press, 1998), 53.

must also prove that they have given birth to a healthy baby and do not have any mental health problems.

Based on the above explanation, it can be concluded that for unmarried surrogate mothers, the minimum age must be 21 years in accordance with Article 330 of the Civil Code, which states that a person is considered an adult at the age of 21 or after marriage. In addition, surrogate mothers must also be in good health both physically and mentally.<sup>68</sup>

3. A Certain Thing

The third condition in the agreement is that the object of the agreement must be sufficiently clear and specific, and this is an inseparable aspect. In the context of a surrogate mother agreement, the agreed object must be a tradable item. Although the uterus lease agreement involves a woman's uterus, the uterus itself cannot be considered the object of the agreement because it is more concerned with services, not goods.<sup>69</sup> Article 1332 of the Civil Code states that only tradable goods can be the subject of an agreement.

The author argues that the female uterus should not be considered an object or item that can be traded or rented. The womb is a gift from God that is inherent in humans from birth and is an integral part of life, not an object that can be owned or rented.<sup>70</sup> Although the uterus can be physically felt, it does not fall under the category of goods as stipulated in Article 499 of the Civil Code.

In the uterus rental agreement, the object of the agreement is actually the services provided by the surrogate mother, namely the rental of the uterus for the process of conceiving, giving birth, and handing over the baby to a married couple.<sup>71</sup> Article 1234 of the Civil Code explains that the object of the agreement can be in the form of the giving or delivery of goods, the execution of an action, or the abandonment of an action. Based on this, it can be concluded that the clear object requirements in the surrogate mother agreement are fulfilled because the object is the services provided by the

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<sup>68</sup> Umi Enggarsasi et al., "Legal Protection for Children Born Out of Wedlock: An Islamic Justice Perspective," *Lex Publica* 11, no. 1 (2024): 142.

<sup>69</sup> Dewi Ayu Rahayu, "Surrogate Mother (Ibu Pengganti) Dalam Perspektif Hukum Di Indonesia," *Jurnal Panorama Hukum* 7, no. 1 (2022): 8. See also, Buchstatter and Roth, "Legal Controversies in Cross-Border Surrogacy," 179; Malindi, "Perlindungan Hukum Ibu Pengganti," 49.

<sup>70</sup> Mahboubeh Taebi et al., "The experiences of surrogate mothers: A qualitative study," *Nursing and Midwifery Studies* 9, no. 1 (2020): 54. See also, Ghráinne and McMahon, "A Public International Law approach," 329; Turconi, "Assisted Regulation: Argentine Courts," 28.

<sup>71</sup> Ondřej Doskočil, "Any surrogate mothers? A Debate on surrogacy in internet discussion forums," *Human Affairs* 30, no. 1 (2020): 16. See also, Hamdani, "Kajian Yuridis Kedudukan Anak," 302; Al Munawar, *Hukum Islam & pluralitas sosial*, 62; Martiana, "Asas Kebebasan Berkontrak," 314.



surrogate mother in conceiving and giving birth to embryos implanted by a married couple.<sup>72</sup>

4. A halal or valid reason

The fourth condition relates to the existence of a valid reason, namely that an agreement made in good faith must be based on a valid substance and not affected by inappropriate impulses or causes. The agreement must be intended for the right purpose and not for the wrong purpose. If the object or material of the agreement does not exist or is not in good faith, then the agreement is automatically considered null and void under law. There are two concepts of cancellation in the agreement:

- a. Null and Void: This refers to a situation in which an agreement from the beginning is considered invalid or never existed, if the objective conditions are not met. In this case, the agreement is legally void and is considered to have never existed, so there is no legal obligation applicable between the parties involved.<sup>73</sup>
- b. Voidable: If one of the subjective conditions is not met, the agreement is not automatically legally void, but either party has the right to apply for a cancellation. The agreement remains binding on both parties until there is a judge's decision regarding the cancellation requested by the party entitled to submit the application.<sup>74</sup>

In the case of surrogate mothers, the subjective aspect has been fulfilled through agreement between the authorities and the ability to carry out the content of the agreement.<sup>75</sup> However, in terms of objective aspects, surrogate practices face challenges to the fourth condition, namely "the existence of legitimate reasons," because there are several reasons why the agreement in the case of surrogate mothers must be declared legally null and void after a court decision. In this case,

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<sup>72</sup> Erma et al., "Keabsahan Perjanjian Sewa Rahim," 35. Selian, "Surrogate mother; Tinjauan hukum," 135.

<sup>73</sup> 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): 479. See also, Makatika, "Akibat Hukum Sewa Rahim," 5.

<sup>74</sup> Rizky Arie Sandhy Kurnia Prastiono, "Tinjauan Yuridis terhadap Kedudukan Sewa Rahim dalam Hukum Perdata di Indonesia," (PhD diss., Universitas Islam Sultan Agung, 2018), 66. See also, Salsabila, "Status Hukum Anak Hasil Sewa Rahim," 6779.

<sup>75</sup> Porat and Sugarman, "Limited Inalienability Rules," 706. See also, Frati et al., "Bioethical issues and legal frameworks," 10; Sinanaj, "The Right to Dignity of the Surrogate Mother," 270.

the situation will return to its original state, where the agreement was considered non-existent.<sup>76</sup>

Failure to meet these requirements is related to violations of laws and regulations (positive law) regulated in Article 127 paragraph (1) of Law Number 36 of 2009 concerning Health which states that “efforts to conceive outside the natural way can only be carried out by legal married couples,” Regulation of the Minister of Health Number 73/Menkes/PER/II/1999 concerning the Implementation of Artificial Reproductive Technology Services and the Decree of the Director General of Medical Services of the Ministry of Health of the Republic of Indonesia in 2000 concerning Guidelines IVF Services in Hospitals.<sup>77</sup>

### 3.3. Legal Status of Children Born from Surrogacy Agreements

In Indonesian law, the definition of a child varies slightly depending on the legal reference. According to Article 330 of the Civil Code, a child is someone who has not yet reached the age of 21 and is not married. Meanwhile, Law Number 23 of 2002 on Child Protection defines a child more narrowly as an individual under 18 years of age, including a fetus still in the womb. The legal status of children in Indonesia is categorized into three main types: legal children, out-of-wedlock children, and adopted children.<sup>78</sup>

Legal children are those born from a valid marriage, as regulated in Article 42 of the Marriage Law. These children have clear legal status and full legal protection.<sup>79</sup> Article 250 of the Civil Code adds that a legitimate child is one who is born or conceived during a marriage and recognized by the husband as his own. Out-of-wedlock children are born from relationships outside of legal marriage and only receive civil status through their mother.<sup>80</sup> Adopted children are those whose custody and responsibility are legally transferred from their biological parents or

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<sup>76</sup> Abdul Kahar Maranjaya, “Ketentuan Tentang Jeratan Hukum Terhadap Orang Maupun Fasilitas Pelayanan Kesehatan Menurut Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan,” *Jurnal Medika Hutama* 1, no. 3 (2020): 128.

<sup>77</sup> Ahsana Aqiel Azizi, “Kajian Yuridis Mengenai Perjanjian Sewa Rahim (Surrogate Mother) Menurut Asas Kebebasan Berkontrak,” (PhD diss., Universitas Islam Sultan Agung, 2023): 76. See also, Kenyatun, “Tinjauan Yuridis terhadap Perjanjian Surrogate,” 982.

<sup>78</sup> Juswito Satrio, *Hukum Perlindungan Anak* (Jakarta: Citra Aditya Bakti, 2005), 31. See also, Porat and Sugarman, “Limited Inalienability Rules,” 708.

<sup>79</sup> Asmuni and Agus Firman, “Analisis Politik Hukum Islam Berbasis Maqoshid Syari’Ah (Studi Terhadap Konsep Anak Sah Dalam Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan),” *Jurnal Hukum & Pembangunan* 52, no. 3 (2022): 736. See also, Zullo, “Dal divieto alla regolamentazione,” 123; Frati et al., “Bioethical issues and legal frameworks,” 7.

<sup>80</sup> Muhammad Habibi Miftakhul Marwa, “Problematisasi Hak Anak Luar Kawin: Tinjauan Kitab Undang-Undang Hukum Perdata,” *Media of Law and Sharia* 4, no. 3 (2023): 245. See also, Enggarsasi et al., “Legal Protection for Children,” 144; Prastiyo and Swardhana, “The Opportunities for Surrogacy Legalization,” 204.

guardians to foster parents through a court decision, giving them a new legal identity within their adoptive family.<sup>81</sup>

The definition of a legal child in both laws is based on the result of a natural sexual relationship between a married couple who are bound by a legal marriage. Aspects involving medical interventions, such as physician assistance for infertile couples, had not been considered by lawmakers at the time. Therefore, Article 4 paragraph (2c) of Law Number 1 of 1974 concerning Marriage gives the court the authority to allow the husband to marry more than once if the wife is unable to bear children. With the existence of IVF technology and the Surrogate Mother program, the provisions in Article 4 paragraph (2c) of Law Number 1 of 1974 need to be updated.<sup>82</sup>

Biologically, a child born to a surrogate mother through a womb rental program is the child of a married couple, even if the baby was born to another woman. Legal issues arise because the child was born of a legal marriage, but the seed comes from the donor's parents. As a result, there are two types of recognized fathers: juridical fathers and biological fathers.<sup>83</sup>

The legal status of the child from the rental uterus is unclear, whether the child is recognized as a child of surrogate parents or of donor parents.<sup>84</sup> The legal regulations in Indonesia regarding legal children are regulated in Article 42 of the Marriage Law, which states that a legal child is a child born of a legal marriage. Meanwhile, Article 43 of the Marriage Law explains that children out of wedlock only have a legal relationship with their mother and their mother's family. The status of children from Surrogate Mother can be categorized into the following categories:<sup>85</sup>

1. Children Born to Married Mothers

The child is considered the legal child of the married couple. Regarding inheritance rights, if a child is born to a married surrogate mother (in a legal marriage), then the child is recognized as a legitimate child. This is in

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<sup>81</sup> Juswito Satrio, *Hukum Keluarga tentang Kedudukan Anak dalam Undang-Undang*, (Bandung: PT Citra Aditya Bakti, 2005), 18.

<sup>82</sup> Gusti Ayu Ade Diah Gamatri et al., "Kedudukan Hukum Anak yang Dilahirkan Diluar Perkawinan Sah Menurut Undang-undang Nomor 1 Tahun 1974," *Jurnal Konstruksi Hukum* 4, no. 3 (2023): 286.

<sup>83</sup> Muhammad Bai'atnur Ridlwan, "Tinjauan Yuridis Terkait Rahim sebagai Objek Sewa Menyewa," (Bachelor diss., Universitas Negeri Semarang, 2017), 44. See also, Salsabila, "Status Hukum Anak Hasil Sewa Rahim," 6777; Hamdani, "Kajian Yuridis Kedudukan Anak," 304.

<sup>84</sup> Meiliyana Sulistio, "Status Hukum Anak yang Lahir dari Surrogate Mother (Ibu Pengganti) di Indonesia," *Jurnal Education and Development* 8, no. 2 (2020): 141. See also, Porat and Sugarman, "Limited Inalienability Rules," 710; Prastiyo and Swardhana, "The Opportunities for Surrogacy Legalization," 207.

<sup>85</sup> Fazalia Putri Salsabila, "Status Hukum Anak Hasil Sewa Rahim di Indonesia Ditinjau dari Perspektif Hukum Perdata," *Dinamika* 29, no. 1 (2023): 6766.

accordance with: (1) Article 42 of Law No. 1 of 1974 concerning Marriage, which states that “A legitimate child is a child born of a valid marriage.” (2) Article 250 of the Civil Code, which states that “Children born or raised during a valid marriage are recognized as children of the husband.” Thus, the child is entitled to the full inheritance of the surrogate mother and her husband.<sup>86</sup>

## 2. Children Born to Unmarried Mothers

In terms of inheritance rights, if the child born from the womb rental program is the result of a mother who is a girl or widow, then the child is considered an out-of-wedlock child. Based on: (1) Article 43 paragraph (1) of Law No. 1 of 1974 concerning Marriage, which states that “A child born out of wedlock only has a civil relationship with his mother and his mother’s family.” (2) Article 287 of the Civil Code, which states that “The child cannot claim a legal relationship with his biological father because of his status as an adulterous child.” Therefore, the child is only entitled to receive inheritance from his mother and his mother’s family, and does not have inheritance rights from his biological father.

In a surrogacy agreement, the surrogate mother is required to relinquish custody of the child and sign a contract surrendering her maternal rights, in accordance with the initial agreement between both parties.<sup>87</sup> If the genetic parents (donors) wish to establish a legal relationship with the child, they must go through the adoption process, making the child their legally adopted child. Juridically, the child born from the womb is considered the child of the surrogate mother and her husband, while genetically, the child is the biological child of the donor parents.

This showed that the legal status of children born through surrogacy in Indonesia depends on the marital status of the surrogate mother. This is based on Article 42 and Article 43 of the Marriage Law.<sup>88</sup> If the surrogate mother is married, the child is seen as legitimate. This gives the child inheritance rights from the surrogate mother and her husband, according to Article 250 of the Civil Code. However, if the surrogate mother is not married, the child is considered born out

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<sup>86</sup> Sara Hutapea et al., “Analisis Yuridis Kedudukan Anak dalam Perkawinan Siri Ditinjau dari Undang Undang Nomor 1 Tahun 1974 tentang Perkawinan,” *Aufklarung: Jurnal Pendidikan, Sosial Dan Humaniora* 2, no. 4 (2022): 359. See also, Ghráinne and McMahon, “A Public International Law approach,” 329; Kenyatun, “Tinjauan Yuridis terhadap Perjanjian Surrogate,” 989.

<sup>87</sup> Adinda Akhsanal Viqria, “Analisis sewa rahim (surrogate mother) menurut hukum perdata dan hukum islam,” *Dharmasysya: Jurnal Program Magister Hukum FHUI* 1, no. 4 (2021): 16.

<sup>88</sup> Nurantiana Nurantiana et al., “Status Kewarisan Anak Yang Lahir Dari Hasil Sewa Rahim (Surrogate Mother) Menurut Hukum Perdata dan Kompilasi Hukum Islam,” *Journal of Lex Generalis (JLG)* 1, no. 4 (2020): 575. See also, Sembiring et al., “The Legal Study of Inheritance Rights,” 519.

of wedlock. In this case, the child's inheritance rights are limited only to the mother's family.<sup>89</sup> This creates a legal gap, especially because Indonesian law does not automatically recognize the intended (biological) parents, even if the child shares their DNA. To be legally recognized as the child's parents, they must go through an adoption process, which can be long and difficult.<sup>90</sup> This situation shows how current laws are not ready to handle Assisted Reproductive Technologies (ART) such as In Vitro Fertilization (IVF) and surrogacy.<sup>91</sup>

Surrogacy is not officially permitted in Indonesia. Law Number 36 of 2009 on health indirectly prohibits it. This law follows Sunni Islamic teachings, which forbid surrogacy because it may lead to confusion about family lineage and is considered ethically problematic.<sup>92</sup> This is different from the situation in countries like Iran, where Shia Islamic law allows surrogacy, even though it is not yet written into civil law.<sup>93</sup> Because surrogacy is restricted in Indonesia, many couples go overseas to seek surrogacy services. This is known as reproductive tourism. However, having children through surrogacy abroad creates more legal problems, especially when trying to register the child's parentage in Indonesia.<sup>94</sup> For example, Ukraine and South Africa have clear surrogacy laws that allow the intended parents to be recognized legally. But Indonesia does not recognize such arrangements, which may leave the child stateless.<sup>95</sup>

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<sup>89</sup> Nur Intan, "Hak Waris Anak yang Dilahirkan dari Seorang Ibu Pengganti Menurut Kitab Undang-Undang Hukum Perdata," (PhD diss., Universitas Kristen Indonesia, 2022): 14. See also, Baase, "The Ratification of Inadequate," 7.

<sup>90</sup> Cindy Yulia Putri and Sulhi M. Daud Abdul Kadir, "Perspektif Hukum Islam Terhadap Anak Yang Dilahirkan Melalui Ibu Pengganti (Surrogate Mother)," *Zaaken: Journal of Civil and Business Law* 4, no. 2 (2023): 262. See also, Ghráinne and McMahon, "A Public International Law approach," 328; Turconi, "Assisted Regulation: Argentine Courts," 22.

<sup>91</sup> Luthfia Rizky Amanda Tjoei and Vika Jeny Putri Anastasya, "Teknologi Reproduksi: Bayi Tabung dan Peran Rahim Pengganti," *Detector: Jurnal Inovasi Riset Ilmu Kesehatan* 2, no. 4 (2024): 46. See also, Ambarwati and Kamila, "The Evaluation of Surrogacy's System," 252.

<sup>92</sup> Nova Arikhman, "Tinjauan Sosial, Etika Dan Hukum Surrogate Mother di Indonesia," *Jurnal Kesehatan Medika Saintika* 7, no. 2 (2021) 145. See also, Heriyanto and Gasimzadeh, "A Prophetic Law Approach," 12; Zulfahmi et al., "A Review of Islamic Law," 241.

<sup>93</sup> Made Dinda Saskara Putri and Marzyadiva Camila Mashudi, "Komparasi Praktik Sewa Rahim di Indonesia dan Iran dalam Perspektif Hukum Perdata dan Hukum Islam," *Ranah Research: Journal of Multidisciplinary Research and Development* 7, no. 4 (2025): 2428. See also, Sujadmiko et al., "Surrogacy in Indonesia," 8110; Ebrahimi and Ghodrati, "Comparative Investigation of Surrogacy Laws," 6.

<sup>94</sup> Muhammad Reza Syariffudin Zaki and Alma Dwi Ramadiani, "Status Kewarganegaraan Anak Dari Hasil Ibu Pengganti (Surrogate Mother) Antara Amerika Serikat Dan India: Citizenship Status of the Child of Surrogacy Between United States and India," *Res Nullius Law Journal* 4, no. 2 (2022): 130. See also, Bennett and Pangestu, "Regional reproductive quests," 170; Buchstatter and Roth, "Legal Controversies in Cross-Border Surrogacy," 178.

<sup>95</sup> Sylkina et al., "Surrogacy: An international comparative analysis," 39. See also, Mitryakova and Boniface, "Legal Regulations of Surrogate Motherhood," 27.

Because Indonesia does not yet have a clear legal framework for surrogacy, there is a risk of abuse. This includes possible human trafficking or exploitation of surrogate mothers, especially since these agreements often take place in secret or without oversight.<sup>96</sup> Other countries like the UK, Greece, and India have developed regulations that aim to reduce such risks. For example, they require approval from courts before surrogacy can happen and have rules to protect the rights of the child, surrogate, and intended parents.<sup>97</sup> South Africa's Children's Act Number 32 of 2005 is a good example. It focuses on the best interest of the child and requires that a court approve the surrogacy agreement before the procedure takes place.<sup>98</sup> Similarly, in the Netherlands, the government is working on reforms that will make surrogacy agreements more legally secure by introducing a system for parentage registration and requiring pre-birth contracts.<sup>99</sup> These steps help ensure everyone's rights are protected and that legal uncertainty is reduced.

Another important issue is how to balance the rights and autonomy of the surrogate mother with the best interests of the child. In places like Quebec, Canada, legal parentage is established through special adoption. However, this process can create emotional stress for both the surrogate and the intended parents.<sup>100</sup> In Indonesia, the lack of regulation means there are no safeguards to ensure that surrogates give informed consent or are protected from unfair agreements.<sup>101</sup> This

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<sup>96</sup> Ni Nyoman Putri Purnama Santhi, "Surrogasi rahim: Perbandingan praktik hukum di berbagai negara yang melegalkan-Implikasi global dan lokal," *Innovative: Journal of Social Science Research* 3, no. 6 (2023): 1050. See also, Pratiyo and Swardhana, "The Opportunities for Surrogacy Legalization," 209.

<sup>97</sup> Shelun Tsai et al., "Surrogacy laws in the United States: What obstetrician-gynecologists need to know," *Obstetrics & Gynecology* 135, no. 3 (2020): 720. See also, Sujadmiko et al., "Surrogacy in Indonesia," 5; den Exter, "Surrogacy reforms in the Netherlands," 101135.

<sup>98</sup> Donrich Thaldar, "Performing IVF for surrogacy before confirmation of the surrogacy agreement by the court: A critical analysis of recent case law in South Africa," *Humanities and Social Sciences Communications* 10, no. 1 (2023): 5. See also, Baase, "The Ratification of Inadequate," 11; Labuschaigne et al., "Surrogate motherhood regulation," 107.

<sup>99</sup> Jaden Blazier and Rien Janssens, "Regulating the international surrogacy market: the ethics of commercial surrogacy in the Netherlands and India," *Medicine, Health Care and Philosophy* 23, no. 4 (2020): 627. See also, Ghráinne and McMahon, "A Public International Law approach," 330; den Exter, "Surrogacy reforms in the Netherlands," 101136.

<sup>100</sup> Stefanie Carsley, *Surrogacy in Canada: Lawyers' experiences, practices and perspectives* (Montreal: McGill University Canada, 2020): 267. See also, Lavoie et al., "Pourquoi devrais-je adopter mon propre enfant," 8.

<sup>101</sup> Niken Amalya Putri, "Tinjauan Yuridis Perjanjian Sewa Rahim Dilihat dari Perspektif Hukum Perdata di Indonesia," *Sakato Law Journal* 2, no. 2 (2024): 89. See also, Abiola et al., "Perspectives on Surrogacy Practices," 990; Sinanaj, "The Right to Dignity of the Surrogate Mother," 264.



opens the door to exploitation. In some cases, surrogacy has even been linked to human trafficking, as seen in reports from Indonesia and the Philippines.<sup>102</sup>

Looking at international practices, many scholars argue that there should be a global legal framework to regulate cross-border surrogacy. Some experts suggest that a Hague Convention on international surrogacy agreements could help solve problems like statelessness and legal uncertainty.<sup>103</sup> Such a convention could help standardize the rules about who is legally the parent and protect the rights of the child, based on international agreements like the 1989 Convention on the Rights of the Child.<sup>104</sup> In countries where there is no clear law, like Argentina, courts have had to step in to protect the child's best interests.<sup>105</sup> However, depending on courts alone is not enough. In China, for instance, courts have started to treat surrogacy as illegal, leading to more confusion and uncertainty for families.<sup>106</sup>

In Indonesia, creating clear and complete laws is necessary to solve these problems. A strong legal framework should define who the legal parents of surrogate-born children are, allow for the proper transfer of parentage, and ensure that the rights of both surrogate mothers and intended parents are protected. Indonesia can learn from countries like South Africa and the Netherlands, which use systems like pre-conception court approval and required counseling to make sure surrogates are giving informed consent and are not being exploited.<sup>107</sup> Also, aligning Indonesian law with international human rights principles will help protect children from becoming stateless and support the dignity of everyone involved.<sup>108</sup>

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<sup>102</sup> Dustine Marlee Juan et al., "Legal Narratives of the Effects of Surrogacy Agreements Under a Child's Rights Lens," *International Research Journal of Multidisciplinary Scope* 5, no. 4 (2024): 346. See also, Prastiyo and Swardhana, "The Opportunities for Surrogacy Legalization," 206.

<sup>103</sup> Ramskold and Posner, "Commercial surrogacy: how provisions of monetary remuneration," 399. See also, Bashiri et al., "Surrogacy: An important pathway to parenthood," 104249.

<sup>104</sup> Marc Buyse et al., "Surrogacy beyond prognosis: the importance of "trial-level" surrogacy," *The Oncologist* 27, no. 4 (2022): 269. See also, Ghráinne and McMahon, "A Public International Law approach," 331.

<sup>105</sup> Adan Nabel et al., "A Nationwide Survey Assessing the Predisposition Towards Gestational Surrogacy (GS) Among Reproductive Age Women in Argentina," *Fertility and Sterility* 120, no. 4 (2023): 213. See also, Turconi, "Assisted Regulation: Argentine Courts," 25.

<sup>106</sup> Yongping Xiao et al., "Surrogacy in China: A dilemma between public policy and the best interests of children," *International Journal of Law, Policy and the Family* 34, no. 1 (2020): 7.

<sup>107</sup> Fatima Ebrahim, "A surrogate mother's post-birth contact with the family formed through surrogacy: a missed opportunity for South Africa or opening pandora's box?" (PhD diss., University of the Western Cape, 2023): 65. See also, Labuschaigne et al., "Surrogate motherhood regulation," 109.

<sup>108</sup> Muh Endriyo Susila and Kirthie Rubini Morgan, "Comparative Legal Analysis of Surrogacy Between Indonesia and India," *Jurnal Bina Mulia Hukum* 7, no. 1 (2022): 116. See also, Frati et al., "Bioethical issues and legal frameworks," 7; Sinanaj, "The Right to Dignity of the Surrogate Mother," 264.

#### **4. Conclusion**

The uterus rental agreement in Indonesia is considered invalid and cannot be legalized. This is based on Article 1320 of the Civil Code regarding the conditions for the validity of an agreement, where the objective condition, namely the *halal* cause, is not met. The uterus rental agreement is also contrary to morality because it is not in accordance with the moral norms and customs of the Indonesian people. In addition, this agreement is also contrary to public order, because it can cause gossip in the community that causes surrogate mothers to be excluded. With the absence of clarity regarding Indonesian legal rules that specifically and strictly regulate the surrogate mother agreement, the government as a regulator has the role and authority to pursue regulations and policies in the form of the application of laws and laws. This needs to be done so that there is no confusion in Indonesian society. When viewed from civil law, the legal status of children resulting from Surrogate Mother is classified into the following categories: (1) If the surrogate mother is bound by a legal marriage, then the child from the uterus is said to be the legal child of the married couple (2) If the surrogate mother is not bound by marriage or is already a widow, then the child from the uterus is said to be an out-of-wedlock child (3) If the donor parents want to have a legal relationship with the resulting child From the uterus rent, they must adopt the child from a surrogate mother or surrogate parent.

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