

# Arrangements for Gestational Surrogacy Based on Health Laws in Indonesia Are Reviewed Based on the Principles of Benefit and Legal Protection

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**Abstract.** Technological developments are predicted to be able to overcome infertility problems, one of which is by means of gestational surrogacy. Whereas Article 127 (1) of the Health Law does not legalize the practice of gestational surrogacy in Indonesia. Even though gestational surrogacy has been legalized in various countries such as the United States and the United Kingdom because it has many benefits. Moreover, there are illegal practices that can endanger the safety of surrogate mothers. The formulation of the research is the difference between gestational surrogacy and traditional surrogacy and the arrangements for gestational surrogacy based on the Health Law in Indonesia in terms of the principle of benefit and legal protection.

**Keywords:** gestational surrogacy; traditional surrogacy; Health Act

## 1. Introduction

Alluding to Article 28B section (1) of the 1945 Constitution (hereinafter alluded to as the "1945 Constitution") expresses that everybody has the option to shape a family and continue posterity through a legitimate marriage. In any case, tragically, barrenness is normal, influencing even 80 million couples of regenerative age around the world. In Indonesia alone, this figure means 21.3% of couples [1]. Fruitlessness is a condition where a couple can't have kids despite the fact that they have had sex 2-3 times each week in the span of 1 year without utilizing any type of contraception [2]. This is certainly dangerous because it can affect the rate of population growth in Indonesia. Each action and work to work on the most significant level of general wellbeing is done in view of non-oppressive, participatory, defensive, and supportable standards which are vital for the arrangement of Indonesia's HR, expanding the country's flexibility and seriousness, as well as public turn of events.

Fortunately, there are technological developments that can overcome infertility problems, including external uterine fertilization or In Vitro Fertilization (IVF). Technologies that constitute artificial reproduction are techniques for manipulating oocytes before being transferred as oocytes or embryos. Meanwhile, if the problem is caused by the wife's womb not functioning properly due to conditions that do not allow it, surrogacy can be taken.

The term surrogacy implies a type of outsider regenerative practice in which guardians expect to get a substitute mother to bring forth a youngster [3]. Surrogacy offers an elective technique for origination for ladies who can't imagine youngsters normally. The interaction

includes a lady (gestational transporter) conveying a youngster for someone else or accomplice (charging individual/couple) and in light of an understanding that the child will be given over to the individual/couple giving the task after birth.

Normal signs for involving surrogacy for the purpose of imagining are brought about by the shortfall of an uterus, rehashed disappointment of in vitro preparation (IVF), ailments in which pregnancy is contraindicated (eg, serious thrombophilia, antiphospholipid condition, end-stage renal sickness or vasculitis), and so on. Surrogacy is partitioned into two sorts, for example, conventional surrogacy which implies the surrogacy gives the egg and the imminent dad gives the sperm and gestational surrogacy which implies the surrogacy conveys the pregnancy however the hereditary material, for example, sperm and egg is given by the giver.

Although this practice of surrogacy can help infertile couples in having children, the practice of surrogacy has not been legalized in Indonesia. Alluding to Article 127 passage 1 of Regulation Number 36 of 2009 concerning Wellbeing (hereinafter alluded to as the "Wellbeing Regulation") expresses that endeavors to get pregnant external the regular way must be done by legitimately wedded couples gave that (a) the consequences of sperm preparation and the ovum of the husband and spouse being referred to is embedded in the uterus of the wife where the ovum starts, (b) did by wellbeing laborers have the skill and authority for that reason, (c) and at specific wellbeing administration offices. In this manner, the Wellbeing Regulation just permits the technique for preparing sperm and ovum from a legitimate a couple which is embedded in the spouse's uterus where the ovum comes from, known as the IVF strategy. This raises a question mark related to the ratio of regulations that prohibit the practice of surrogacy, especially related to gestational surrogacy. Despite the fact that gestational surrogacy has been legitimized in different nations, for example, the US and the Assembled Realm since it has many advantages.

Even though the practice of surrogacy is not legalized in Indonesia, the fact is that there is illegal surrogacy that is being carried out. For example, in 2009 it was reported that a woman rented a uterus for IVF from a husband and wife in exchange for a car and Rp. 50 million from renting the uterus [4]. The absence of a legal umbrella for the practice of surrogacy weakens the position of surrogate mothers. The surrogate mother does not have legal protection, for example about compensation because the legal basis in the form of an agreement will be declared null and void based on Article 1320 of the Indonesian Civil Code (hereinafter referred to as the "KUHPer"). Especially if the practice of surrogacy turns out to harm the mother's health, such as causing death during childbirth. It is important to examine the existing rules regarding surrogacy in Indonesia.

Based on the background described above, the formulation of the research problem is as follows:

- a. How is gestational surrogacy different from traditional surrogacy?
- b. How are gestational arrangements surrogacy under the Health Law in Indonesia in the principle of benefit and legal protection?

## **2. Research Methodology**

The kind of exploration led in this examination is standardizing regulation examination, where this paper conducts library research. Alluding to Peter Mahmud Marzuki's assertion, characterizing regularizing legitimate exploration is a stage to tracking down a law and order, lawful standards, and legitimate regulation to answer the legitimate issues confronted [5].

Therefore, this research will utilize legal principles and legal doctrine to study the regulation of gestational surrogacy based on the Health Law in Indonesia.

In obtaining data through literature studies, this research conducted a study of legal science materials consisting of primary, secondary, and tertiary legal materials [6]. The primary legal materials studied in this research are domestic legal materials, international regulations, and instruments. The secondary legal materials studied in this paper consist of legal and medical publications such as textbooks and expert views. While tertiary legal materials consist of dictionaries.

The methodology taken in this study is legal and reasonable. The legal methodology is done by assessing the principles and guidelines connecting with existing lawful issues. Therefore, the author will review the relevant regulations regarding surrogacy in Indonesia. While the conceptual approach is carried out by studying understand the nature of surrogacy in medical science to obtain an understanding of the law in reviewing related rules.

### **3. Discussion**

#### **3.1 Difference between Gestational Surrogacy and Traditional Surrogacy**

Customary surrogacy and gestational surrogacy are two distinct techniques for proxy pregnancy (uterine rental). Traditional surrogacy involves a surrogate mother conceiving and delivering babies to couples who are unable to have children naturally. This surrogate mother will use her eggs or eggs from a sperm donor, either from someone else's sperm donor or a sperm donor from the infertile partner's biological father, which is then fertilized. In traditional surrogacy, surrogacy is biologically related to the baby being born. Meanwhile, gestational surrogacy has a more complex process. Eggs from the birth mother or donor and sperm from the biological father are combined in an IVF laboratory, and the resulting embryos are then implanted into a surrogate uterus. Thus, the child does not have any genetic relationship with the surrogate mother because the eggs come from the biological mother.

Nevertheless, various issues are feared to arise from the practice of surrogacy as follows [7]:

- a. The problem is related to the status of children born from the practice of surrogacy, whether to follow the lineage of a surrogate mother or a biological mother, especially since Indonesia still does not legalize this practice.
- b. Concerns whether the practice of surrogacy can increase the potential for abnormalities in children.
- c. Concern over the long-term effects on children born as a result of surrogacy.
- d. Many religious views oppose the practice of surrogacy. For example, Islamic law does not allow sperm donation unless it is between a wife and a legal husband because of fears of confusion over blood ties.
- e. It is unethical because usually surrogate mothers are women with economic difficulties and low education who are persuaded to get money.
- f. Expenses are quite expensive including medical costs, legal costs, compensation costs for surrogate mothers, and psychological costs.

Most of the major issues associated with surrogate motherhood are related to traditional surrogacy and legal issues. The issue of ownership of babies carried by surrogate mothers is the most debated. This can happen if the surrogacy process is not supervised by related experts such as doctors, psychological counselors, and lawyers. Despite the issues posed, the number of complications arising from the gestational surrogacy setting is extremely low. In research

conducted by Peter R.Brinsden, over a period of 15 years, no serious clinical, ethical, or legal problems arose due to the practice of gestational surrogacy.

Moreover, according to a recent journal published in the International Journal of Gynecology and Obstetrics, gestational surrogacy is becoming more popular than traditional surrogacy because gestational surrogacy provides a higher success rate and there is less conflict in terms of family rights given that surrogate mothers are not genetically related. on the child. It should be noted that the success of gestational surrogacy reached 66.66% in nine patients with ages ranging from 27-43 years. Even higher success ratios were seen in couples using donor eggs. So this practice is the answer for couples in Indonesia who want offspring.

### **3.2 Gestational Surrogacy Arrangements Based on Health Law in Indonesia**

In Indonesia, it is in accordance with Article 127 section (1) of the Wellbeing Regulation that endeavors to get pregnant external the regular way must be completed by lawfully wedded couples. Or on the other hand, in contrario, it doesn't permit the act of surrogacy or leasing an uterus. This standard is likewise explained in Unofficial law Number 61 of 2014 concerning Conceptive Wellbeing (hereinafter alluded to as "PP 61/2014") expressing that:

#### **Article 40**

Passage (1): Multiplication with help or pregnancy outside the normal way must be done in wedded couples who are lawfully hitched and experience fruitlessness or barrenness to deliver posterity.

Passage (2): Multiplication with help or pregnancy outside the normal way as alluded to in section (1) is done by utilizing the aftereffects of sperm and ovum creation from the couple concerned and embedded in the uterus of the spouse where the ovum starts.

Furthermore, the rules prohibiting surrogacy are emphasized in Article 43 (3) PP 61/2014 which states that excess embryos are prohibited from being implanted in other women's wombs. Aside from being directed at the Public authority Guideline level, comparable principles are expressed in the Guideline of the Pastor of Wellbeing Number 039/Menkes/SK/2010 concerning the Execution of Helped Conceptive Innovation Administrations (hereinafter alluded to as "Permenkes 039/2010").

While the disallowance is established in Article 72 (B) of the Wellbeing Regulation which decides regenerative life and is liberated from separation, pressure, and additionally viciousness that regards respectable qualities that don't disparage human pride as per strict standards. This is additionally expressed in PP 61/2014 which expresses that propagation with help or pregnancy outside the regular way as alluded to in section (1) is done by logical and mechanical turns of events and doesn't struggle with strict standards.

The strict standards alluded to here can be deciphered as the Fatwa of the Indonesian Ulema Gathering (MUI) on May 26, 2006, which expresses that IVF from a couple depended by one more spouse's uterus (for instance, from the subsequent wife shared with the principal wife) is ill-conceived in view of Islamic standards. Miserable Az-shari'ah, on the grounds that this will lead to confounded issues about legacy issues (particularly between youngsters brought into the world to moms who have ovum and moms who are pregnant then bring forth them, as well as the other way around. The above assessment is upheld by the Gathering of Islamic Regulation Article 99 which expresses, a genuine youngster is:

- a. Children born in or as a result of legal marriages.
- b. The consequence of the activities of a legitimate a couple outside the belly and brought into the world by the spouse.

Alluding to Article 5 of the Law of the Republic of Indonesia Number 12 of 2011 concerning Arrangement of Regulation In shaping Regulation jo. Law of the Republic of

Indonesia Number 13 of 2022 Concerning the Second Revision to Regulation Number 12 of 2011 Concerning the Arrangement of Regulation (hereinafter alluded to as "UU 12/2011 jo. UU 13/2022") should be done in view of the guideline of Development of Guidelines Great regulation, which incorporates ease of use and adequacy, and that implies that every Regulation is made on the grounds that it is required and helpful in controlling the existence of society, country, and state.

The principle of expediency in law according to experts is a principle that prioritizes the public interest or society in making decisions or making laws. This concept comes from the legal philosophy of utilitarianism which states that the actions or policies taken must provide the greatest benefit to society. In the legal context, the principle of expediency serves as a guide in establishing public policies or making laws. Laws that are made must provide maximum benefits for the community and not only fulfill the interests of certain groups. the definition of the principle of expediency is as follows Satjipto Rahardjo implies that a legal regulation must be directed to create maximum benefits for society [8]. Meanwhile, Jimly Asshiddiqie stated that the principle of expediency implies that every law and regulation must be beneficial to the public interest [9]. In all of these definitions, the principle of benefit has emphasized the importance of the public interest or society. Thus, every regulation or legal policy must be directed at creating maximum benefits for society and achieving the goals of justice and prosperity in society.

That surrogacy, especially gestational surrogacy, brings many benefits as follows:

**Table of Benefits and Losses if Gestational Surrogacy Is Legalized**

Advantage	Disadvantage
In connection with the ratio with the prohibition of surrogacy in religious norms, namely the issue of child status is irrelevant for gestational surrogacy because there is no genetic relationship with the surrogate mother so blood and inheritance ties are linked to the biological mother's father or sperm and egg cell donors in gestational surrogacy.	Negative sentiment from the public regarding the surrogacy procedure.
The success rate of gestational surrogacy reached 66.66% in nine patients of various ages between 27-43 years. Even higher success ratios were seen in couples using donor eggs.	Ethical issues and religious norms view the practice of surrogacy as before God's authority.
Over a period of 15 years, no serious clinical problems have arisen due to the practice of gestational surrogacy. So the potential for abnormalities in children at birth and in the long term is tiny.	There is a possibility that women with less education may become targets for surrogate mothers, which could endanger the mother's health. The surrogate mother is also potentially not given appropriate compensation.
Protecting surrogate mothers because they have the legality of an agreement that fulfills Article 1320 of the Civil Code, namely the halal clause.	Medical risks in the form of: Pregnancy risks: Pregnancy risks such as miscarriage, premature birth, preeclampsia, and gestational diabetes can still occur in surrogate mothers. Mental health risks: Pregnancy and delivery of twins can be a significant stressor for a surrogate mother and lead to mental health problems such as postpartum depression.

Advantage	Disadvantage
	Pregnancy complications: The surrogate mother may experience pregnancy complications such as an ectopic pregnancy or multiple pregnancies where one or more of the fetuses do not develop properly or have health problems detected. Risk of infection: The embryo transfer procedure may increase the risk of infection, although this risk is small. Risks of surgery: If the surrogate has to have a cesarean section to deliver the baby, there is a risk of complications from the surgery. Risk of medical error: There is a risk of medical error during an in vitro fertilization (IVF) procedure or embryo transfer procedure that could affect the success of the pregnancy.
Becoming a new accept for hospitals, doctors and surrogate mothers.	

Whereas the main disadvantage in the practice of gestational surrogacy based on the table above is that there is a possibility that women with less education may become targets for surrogacy which can endanger the mother's health. The surrogate mother is also potentially not given appropriate compensation. That this paper argues that if the practice of gestational surrogacy is strictly regulated, it protects surrogate mothers.

This is by Article 2 passage (8) of the Wellbeing Regulation which puts together the law with respect to the guideline of security, implying that wellbeing improvement should have the option to give insurance and legitimate sureness to suppliers and beneficiaries of wellbeing administrations. As indicated by Philipus M. Hadjon, legitimate security is the insurance of poise, as well as the acknowledgment of common liberties claimed by lawful subjects in light of legitimate arrangements of mediation [10].

M. Hadjon recognized the legitimate assurance given to people in general into two sorts, in particular preventive lawful security (counteraction) and abusive legitimate assurance (pressure). Preventive lawful security is a type of legitimate security where individuals are permitted to submit protests or feelings before an administration choice gets a conclusive structure. In the interim, severe legitimate security is a type of lawful insurance that is pointed toward settling debates. In accordance with the above idea, M. Hadjon likewise made sense of two kinds of lawful insurance offices, in particular:

a. Preventive Legal Protection Facility

Through preventive lawful security, legitimate subjects are permitted to present their complaints or conclusions before an administration choice gets an authoritative structure. The objective is to keep debates from happening. Preventive legitimate security affects government activities in view of opportunity of activity in light of the fact that, with the presence of preventive lawful assurance, the public authority is urged to be more cautious in simply deciding. As of not long ago, Indonesia actually doesn't have explicit game plans in regards to preventive legitimate security.

Whereas matters that need to be regulated in laws and regulations to provide legal protection for surrogate mothers:

- 1) Provide requirements for surrogate mothers such as minimum age
- 2) The obligation to have a medical check-up before the surrogacy procedure;
- 3) Regulating the minimum compensation given to surrogate mothers;

- 4) Provide psychological counseling during surrogacy procedures;
- 5) Provide adequate health care and support services during and after pregnancy;
- 6) Regulates the minimum rights and obligations in the surrogacy agreement, and regulates custody rights, children's rights, financing, and legal security for all parties involved. These regulations must also ensure that surrogacy is only carried out in ethical and safe circumstances.
- 7) Regulate administrative procedures for Birth Certificates explaining that the child was born from a surrogate mother

With the existence of the rules above, it is expected to protect all parties, especially surrogate mothers.

b. Repressive Legal Protection Facility

Abusive legitimate assurance is pointed toward settling questions. Debate goal through the extent of the General Courts and Managerial Courts in Indonesia is remembered for this class of lawful security. The rule of legitimate insurance against government activities lays on and begins from the idea of acknowledgment and assurance of common liberties coordinated at impediments and putting commitments on society and the public authority.

Whereas until now there has been no repressive legal protection in Indonesia because based on the author's research there have been no disputes in court regarding protection for surrogate mothers if the mother does not receive appropriate surrogacy or compensation procedures.

Furthermore, it ought to be noticed that PP 61/2014 concerning Regenerative Wellbeing states that to give legitimate assurance, and lawful security, and coordinate ideas connected with the law administering helped proliferation, fetus removal in light of health related crisis signs, and assault in early termination, administrations maternal wellbeing and the execution of pregnancy outside the regular way so it goes as per the standards that exist in Indonesian culture that have confidence in the Unrivaled God regarding religion, morals, ethics, as well as the development of science and technology. Considering that it is based on science and technology, gestational surrogacy provides many benefits compared to the resulting disadvantages. Thus gestational surrogacy should be legalized in Indonesia.

#### 4. Conclusion

Conventional surrogacy and gestational surrogacy are two distinct techniques for substitute pregnancy (uterine rental). Traditional surrogacy means that the surrogate mother uses her eggs which are then fertilized by the biological father's sperm. In traditional surrogacy, surrogacy is biologically related to the baby being born. Meanwhile, gestational surrogacy occurs when an egg from a biological mother or a donor and sperm from a biological father are combined in an IVF laboratory, and the resulting embryo is then implanted into a surrogate uterus. Thus, the child does not have any genetic relationship with the surrogate mother because the eggs come from the biological mother.

In Indonesia, in line with Article 127 paragraph (1) of the Health Law and PP 61/2014, it does not allow the practice of surrogacy or renting a uterus. That the prohibition is rooted in Article 72 (B) of the Health Law which determines their reproductive life is not against religious norms. Even though gestational surrogacy is by the principle of forming a law, namely the principle of expediency as follows:

- a. There is no genetic link to the surrogate mother;
- b. Very high success rate;
- c. Historical research has shown no serious clinical problems in children;
- d. Provide a legal umbrella for procedures and compensation to surrogate mothers.

Whereas the main disadvantage in the practice of gestational surrogacy based on the table, there is a possibility that women with less education may become targets for surrogacy which can endanger the mother's health. The surrogate mother is also potentially not given appropriate compensation. That the paper argues that if the practice of gestational surrogacy is strictly regulated, it protects surrogate mothers.

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