



CIVIL LAW ANALYSIS OF THE USE OF SURROGATE MOTHER FOR IN-VITRO FERTILISATION

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Abstract

This research explores the regulations related to children born through IVF, focusing on the inheritance rights and legal position of children born through surrogacy. Using normative legal research methods, this study concludes that children born from IVF using the husband's sperm are legally recognized as legitimate children in civil law, and confer inheritance rights. Children born through IVF using donor sperm, which is permitted by the husband, are also recognized indirectly. However, this research highlights that agreements involving surrogacy in Indonesia are considered legally invalid according to Articles 1320 and 1548 of the Civil Code, as they do not comply with the Health Law, the Marriage Law, and the principles of Islamic Law. In the case of children born through surrogacy, Law No. 1/1974 on Marriage considers them to be the legitimate children of the surrogate mother, not of the biological parents. Given the widespread practice of surrogacy, this study recommends the establishment of regulations to provide guidance and ensure legal certainty in the implementation of surrogacy.

Keywords: legal aspects, in vitro fertilization, womb rental, surrogate mother, civil law perspective.

Introduction

The rapid development of technology today provides evidence that the existence of the universe did not happen by chance. Therefore, careful regulations and laws are needed to govern this phenomenon. No one accepts the concept that the universe came into existence by chance because chance events cannot produce well-structured regulations and laws. In recent decades, advances in technology and the biomedical field have unlocked the potential for significant medical benefits, which in turn has impacted ethical and legal aspects that were previously unthinkable.

Technological innovation in the field of reproduction, particularly the use of IVF methods, has been an important development. IVF is a medical procedure that involves the fusion of egg and sperm outside the womb, with the aim of forming an embryo that is then implanted back into the woman's womb (Rahayu, 2022). This method generally provides support to couples who face difficulties achieving pregnancy without medical assistance. The IVF process involves taking an egg from the woman's ovary which is then fertilized with sperm in the laboratory. The embryo that forms will be transferred back into the woman's uterus to undergo growth and development during the pregnancy period.

In contrast, a surrogate mother is a woman who agrees to carry and give birth to a child for another couple. The use of a surrogate mother may be an option to consider if the biological mother-to-be faces difficulty or inability to conceive. The surrogate mother may use her own eggs or those of a donor, depending on the situation and the agreement that has been made by all parties involved. Both IVF procedures and the use of a surrogate mother involve serious ethical and legal considerations. Therefore, it is important that there are clear agreements and regulations between all parties involved in the process, to ensure their respective rights and obligations (Hariani et al., 2021). Thus, both IVF and surrogate motherhood can be an alternative for couples who are facing difficulties conceiving and have the desire to realize their dream of having children.

From a technological and economic point of view, the use of surrogacy shows positive potential in dealing with some infertility situations. According to Khairatunnisa (2015), the practice of surrogate motherhood, which is often interpreted as surrogacy or womb rental, is a method or attempt to achieve pregnancy outside the natural course. Although

implicitly, the practice of surrogacy is not recognized in Indonesian law. Legal regulations governing the legal status of children in Indonesia have been described in the Criminal Code and Law No. 1 Year 1974 on Marriage. However, in the regulation on Marriage, there are no rules that explicitly regulate the legal position of children born through the IVF process. This is due to the absence of specific regulations regarding this issue, which may give rise to legal issues related to reproductive technology, involving health professionals such as doctors, researchers, and scientists, along with contributions from husbands, wives, sperm donors, ovum donors, surrogate mothers, and babies born through this method.

Over time, the field of artificial reproduction in Indonesia has faced a number of issues involving IVF and surrogate mothers. Uncertainty and differing views still surround these issues. Initially, in vitro fertilization and the use of surrogate mothers received widespread support from the public. However, over time, several issues have emerged that have made these programs controversial. The controversies cover aspects such as ethics, individual human rights, and legal implications (Nalin, 2021). Society is divided between those who support the advancement of reproductive technology as a solution to infertility and those who reject it on moral and religious grounds. Some see it as a positive step to give couples who are struggling to have children a chance, while others argue that it involves ethical dilemmas, particularly regarding the rights and welfare of children born through these reproductive technologies. This debate includes the responsibility of actors, such as doctors, researchers, and scientists, in maintaining the clarity and safety of the relationship between husband and wife, as well as contributors such as sperm and ovum donors, surrogate mothers, and even babies born through the IVF process, all of which are of paramount importance. This controversy demonstrates the complexity of striking a balance between technological advancement, individual freedom, and the moral values of society. There are many supporters (pro side) and opponents (con side) of these programs. Therefore, a clear regulatory framework is needed to address the various aspects and ensure ethical and compliant implementation.

Proponents of IVF and surrogate motherhood, mostly from the medical community, view reproductive technology as a solution for couples who face difficulties in achieving pregnancy naturally. They believe that

advances in the field of reproductive medicine can give infertile couples a chance. This group is concerned with the health and happiness benefits that these technologies can bring to individuals or couples who wish to have children. Opponents of the program generally come from among religious leaders. Their opposition is based on ethical principles and religious beliefs that govern human life. Some religious leaders see human intervention in the creation of life through reproductive technologies such as IVF and surrogate motherhood as violating moral and ethical values in religious teachings.

However, apart from the medical and religious aspects, legal issues also arise in relation to this program. Until now, there are no legal provisions that specifically regulate the legal status of children born through IVF and surrogacy, so there are no specific regulations regarding their legal position. The absence of clear legal provisions can lead to uncertainty in legal handling related to various aspects involving the implementation of IVF reproductive technology. Therefore, efforts need to be made to formulate regulations to balance various aspects, including those related to medical interests, religion, and legal aspects.

The legal status of children born through reproductive technologies such as IVF and surrogate mothers is a major concern. The Criminal Code and Law No. 1 Year 1974 on Marriage, as the legal basis, regulate the legal status of a child. However, there is a void in the regulations that specify the legal position of IVF children. This impacts on various legal consequences, including the rights and obligations associated with the child. Without engaging in a debate on the pros and cons, this paper will focus on the civil law aspect that focuses on the status of the child and the legal consequences arising from it. The civil law aspect emphasizes the complexity of the legal relationship between the child, biological or social parents, as well as other parties involved in the reproduction process (Warin, 2021). It is important to note that, without clear regulations, there are potential legal issues involving medical personnel, researchers, married couples, sperm donors, ovum donors, or surrogate mothers, and of course, the child. Therefore, the clarity of civil law is crucial to maintain justice and legal certainty, while preventing future legal conflicts. The purpose of this paper is to provide insight into the problems that arise along with the advancement of reproductive technology in Indonesia.

Method

The writing method is a strategy or approach used in the context of searching, obtaining, and implementing an action with the aim of achieving concrete results in writing activities. This writing is based on a legal study that applies a normative approach. The normative approach in legal studies refers to theoretical analysis and review of legal documents to understand and evaluate aspects of legal norms and principles related to the topic of study. By using this method, the study aims to describe, explain, and interpret legal provisions relevant to the issues discussed so as to achieve an understanding of the law being investigated. Thus, this method of writing becomes the basis for formulating arguments and contributing to developing legal thoughts and insights related to the topic of study, namely IVF and surrogate mother. The normative approach applied provides a basis for understanding the legal implications of reproductive technology, as well as creating a solid foundation for explaining and interpreting legal issues arising in relation to IVF and surrogate motherhood.

Result and Discussion

The legal status of children born through in vitro fertilization and surrogate mothers, and their inheritance rights, is determined by a number of key factors. Understanding the legal status of children born through IVF in Indonesia involves complex aspects that require an understanding of the applicable legal framework. According to research conducted by Salsabila (2023), in the realm of Indonesian civil law, the legal status of children born through IVF (in vitro fertilization) is strongly influenced by the use of sperm in the IVF process. Therefore, the following will describe the legal position of babies born through IVF (in vitro fertilization):

The Legal Position of Children Born Through In Vitro Fertilization Methods

The method of assisted reproduction or in vitro fertilization (FIV) is a term that has not been specifically regulated in Indonesian positive law. Currently, regulations only include provisions on the legal status of children derived from natural birth, which are regulated in the Criminal Code and Law No. 1 Year 1974 regarding Marriage. In vitro fertilization (IVF) is an issue of personal interest that requires special legal protection.

Legal protection related to the process of in vitro fertilization (IVF) involves regulation of the scope of family relationships and social interactions in society. Within this framework, family relationships include aspects such as the juridical position of children and inheritance rights. Legal protection is needed to harmonize and protect the rights of individuals involved in the IVF process as well as maintain balance and order in family relationships and social interactions. Although not yet explicitly regulated in law, it is important to create appropriate legal protection for IVF, given its private characteristics and close association with family life. This is the basis for formulating regulations that can accommodate the various aspects and interests involved in IVF in Indonesia. In Indonesia, regulations regarding medical reproduction include two main documents:

- a. Law No. 36/2009 on Health (Article 127) stipulates that attempts to achieve pregnancy outside of natural methods can only be made by legal spouses. This provision involves gametogenesis, where a sperm cell and an egg cell are combined and the egg cell is then inserted in the wife's womb to produce an egg. This process must be carried out by a skilled and authorized health professional, and carried out in a specialized health care unit. Additional requirements related to pregnancy outside of natural methods are regulated through government regulations.
- b. Minister of Health Decree No. 72/Menkes/Per/II/1999 on the implementation of Artificial Reproductive Technology regulates aspects such as general regulations, licensing, development, monitoring, and transitional disposition as well as closing provisions related to the implementation of artificial reproductive technology. This decree provides a more detailed framework regarding the implementation of artificial reproductive technology, including licensing requirements, guidance guidelines, and supervision mechanisms that must be followed by parties involved in this process.

With this regulation, the government seeks to regulate and supervise the practice of artificial reproductive technology to comply with ethical, health, and legal norms in Indonesia. An alternative document in the form of guidelines for in vitro fertilization services in hospitals, prepared by the Directorate of Specialized and Private Hospitals, Ministry of Health of the

Republic of Indonesia, details several important aspects related to artificial reproductive technology services. The guidelines stipulate various provisions that must be adhered to in IVF services.

Artificial reproductive technology services can only use the eggs and sperm of the couple. This emphasizes the importance of the couple's involvement in the fertilization process.

Artificial reproduction is considered part of infertility services, and its service approach is integrated with the overall management of infertility services. This means that it should align with the overall infertility management efforts.

At any one time, the number of embryos transferred into a woman's uterus should not exceed three, except in certain situations. This aims to control risks and ensure the success of the procedure.

The practice of surrogacy in all forms is prohibited, as is the buying and selling of embryos, ovaries and spermatozoa. The guidelines emphasize the prohibition against practices that involve the commodification of the human body.

Restrictions on the study of human embryos include a ban on the creation of human embryos exclusively for study purposes. Research or use of human embryos that reach an age of more than 14 days from fertilization is also prohibited. This emphasizes the ethical use of human embryos in the context of research.

Rules for trans-species fertilization are prohibited, unless officially recognized as a solution to human infertility. The hybrids formed must be terminated when they reach the 2-cell phase to avoid possible consequences. This emphasizes the importance of ethics and caution in cross-species experimentation.

Studies or experiments on human embryos, ovaries and/or spermatozoa are not permitted without specific consent from the egg or sperm provider. This emphasizes the need for ethics and consent in research involving human genetic material.

Inheritance Rights of Children from IVF Technology Under Civil Law

An understanding of the division of inheritance for children born through IVF technology in civil law can be described as follows:

a. Inheritance Rights for Children Born through Artificial Fertilization (IVF) with the Use of Husband's Sperm

In BW (Burgerlijk Wetboek), part of Civil Law, the main principle in the position of children related to inheritance is recognized. Although there is no regulation that specifically regulates the division of inheritance for children resulting from in vitro fertilization (IVF), BW only regulates the transfer of property to naturally born children, including children who are legitimate in marriage and children outside of marriage.

The position of children in inheritance, as outlined in the Criminal Code Article 852 BW, states that children or descendants, even if they come from a different marriage, are entitled to inherit from both parents, grandparents, or other blood relatives. Article 852 BW also confirms that in the line of descent upwards, there is no difference based on birth. Previously, it has been explained that the position of a child resulting from IVF with the use of the husband's sperm is considered a legitimate child. Therefore, children born through the IVF process are considered to be born within the bonds of a legal marriage, even though the fertilization was done artificially. Such children are treated as equal to biological children and have the right to inheritance from their biological parents. This inheritance right is regulated in Article 830 BW, where the share received is equal among heirs regardless of gender or birth order, whether male or female.

The inheritance system in Civil Law, which regulates the legal position of children, is known as the absolute share (*legitieme portie*). This provision is regulated in Article 913 of the Civil Code which explains that the unavoidable or legal part of the inheritance property includes the portion given to the heirs in the line of descent in accordance with the applicable legal provisions. The deceased is not allowed to determine matters related to the share.

b. Inheritance Rights of Children Born Through IVF Techniques with Sperm Donor

The legal position of children produced through the method of assisted reproduction (in vitro fertilization) with the use of donor sperm and the wife's egg, which is then transferred to the wife's womb, can be classified into two categories. The first is that the child can be legally recognized if

the husband gives permission to use donor sperm. The second is that the child can be considered the offspring of an illegitimate relationship if the use of donor sperm occurs without the husband's permission.

Based on Article 280 of the Criminal Code governing Civil Law, the consequences of child recognition create a legal link between the child and the recognizing parent, either the father or the mother, resulting in the child's status as a legal child. This status brings rights and obligations, including the right to use the family name. In Civil Law, there are three types of child status. First, children who are legally recognized, born in a legal marriage, in accordance with Article 250 BW. Second, children recognized outside of marriage, this recognition can be expressed by one of the parents, forming a legal relationship between the child and both, as stipulated in Article 820 BW. Third, legally legitimate children, related to children outside of marriage recognized before marriage by the parents, are recorded in the marriage certificate.

The legal explanation on the inheritance rights of legally recognized children states that the allocation of inheritance is determined in accordance with the prevailing norms (Zahra, 2022). The following are the details of the provisions on the allocation of inheritance rights: If the testator leaves legitimate descendants, the husband or wife will receive inheritance rights as much as 1/3 of the total inheritance, as stipulated in Article 863 of the Criminal Code. If the testator has no descendants, husband or wife, and bequeaths the estate to blood relatives in the line of descent upwards, including brothers, sisters, or their descendants, legally recognized children can receive half of the estate, in accordance with Article 863 BW. If there are only more remote relatives, all legal descendants will receive three-quarters of the estate, with formal recognition in accordance with Article 863 of the Criminal Code. If the testator has no legal heirs, legally recognized children are entitled to receive the entire share of the estate, in line with Article 865 BW.

In the perspective of Civil Law, children born from adulterous relationships cannot be juridically recognized. According to Article 283 of the Civil Code, children resulting from despicable acts such as adultery only have a civil relationship with their mother and their mother's family. This article confirms that children from despicable acts cannot be recognized, unless there are special provisions as stipulated in Article 273

of the Civil Code. In the rejection of recognition of adulterated children by biological fathers, the Law stipulates that children are not entitled to legally valid inheritance from parents. This is regulated in Article 867 paragraph (1) BW. In addition, the child is only entitled to receive financial support as needed, as stipulated in Article 868 BW, with the amount adjusted to the capabilities of the father or mother and related to the condition of the legal heir.

c. Inheritance Rights of Children Born Through In Vitro Fertilization Method by Utilizing Surrogate Mother

Based on BW's view, the status of children born through the process of in vitro fertilization (IVF) with the use of sperm and egg cells from a married couple, where the embryo is then transplanted into the womb of a surrogate mother, can be classified as adopted children. An adopted child can generally be described as an individual whose rights are transferred from the sphere of authority of biological parents, legal guardians, or other parties who assume responsibility for the care, education, and upbringing of the child into the sphere of his or her adoptive parents in accordance with a court decision or determination (Issalillah & Khayru, 2021).

Legal Status of Children Born Through the Process of Surrogate Mother

The potential for a unique situation to arise when a child is born through an agreement with a surrogate mother, raises the question of parental determination. Within the Indonesian legal framework, the relevant regulation is Article 42 of the Marriage Law. This article stipulates that a child is considered legitimate if born in or as a result of a legally recognized marriage.

For children born through a surrogate mother, several legal scenarios can be identified according to the regulations. If the surrogate mother is a married woman, then the status of the child born is recognized as the legitimate offspring of the couple. Meanwhile, in the second scenario, if the surrogate mother is not bound by marriage, the child born is considered an extra-marital child of the woman. Therefore, the legal status of the child in the surrogate mother's family depends on the marital status of the surrogate mother. The proposed draft configuration aims to include elements that were previously considered impossible to realize. Some of

these elements include preventing the establishment of commercial surrogacy agencies, ensuring that there is no coercion of a woman to surrender her child, stipulating that public health and social resources cannot be utilized for the benefit of commercial surrogacy, stopping the involvement of the medical and legal professions in the practice of surrogacy, and affirming that this regulation will not criminalize or victimize women or couples who make requests for surrogacy.

Surrogacy gives women the freedom to provide offspring to couples who want children. However, some individuals argue that surrogacy agreements can separate the natural relationship between a child and its biological mother into two separate entities. One solution to this problem is to give surrogate mothers the option to establish a surrogacy agreement (Sanjaya, 2016). However, it is important to note that providing this option does not completely eliminate all problems that may arise. When an ovum donor or embryo donor is used in the implantation process, the embryo may come from another woman or a fertilized ovum. In the first scenario, the husband's semen is used to implant the embryo into the surrogate woman's uterus. In the second scenario, semen from a man other than the husband is implanted with the embryo into her uterus. The existence of these various options demonstrates the complexity and variation in the surrogacy process and the use of donors in achieving pregnancy.

The situation of a child when a married woman becomes pregnant as a result of using a donor ovum or donor embryo in the implantation process creates a situation that raises legal and ethical questions. In this scenario, a human egg is fertilized by sperm from a male individual other than the woman's legal spouse, and the woman will undergo the procedure with the permission of her husband. Initially, the husband is expected to, regardless of purpose, father any children born or unborn from the pregnancy. In other words, even though the fertilization process involves a reproductive cell donor, the husband is still considered the legal father and has responsibility for any children born from the pregnancy. The man who donates sperm for the fertilization process is not expected to be the father of any child resulting from the pregnancy, whether born or unborn. This principle asserts that biological roles do not necessarily impact parental status, and that the husband who gives consent to use a reproductive cell

donor should be recognized as the legal father, while the sperm donor has no parental obligations or rights towards the child resulting from this process.

Any woman who experiences a pregnancy resulting from the gift of an egg or embryo through the implantation process within or without marriage, and without obtaining the consent of her husband, faces significant legal consequences. Any offspring born or unborn from this pregnancy will have no legal ties to the man who donated the sperm for the donor procedure. The rights and obligations towards the child in question are automatically assigned to the husband of the woman experiencing the pregnancy. The man who provides sperm for the donor procedure will not have the rights and responsibilities of a father towards the resulting child, but rather if he becomes the husband of the woman carrying the child. Thus, the concept of legal relationship between the sperm donor and the child born through the donor procedure is limited and closely linked to the marital status of the husband of the pregnant woman.

When a woman becomes pregnant as a result of the delivery of an egg or embryo in the implantation process, it is expected that she will become the mother of any children she carries, whether already born or still in the womb. Generally, surrogacy agreements require the woman to immediately relinquish parental responsibility for the newborn. As a surrogate mother, the woman is then required to sign a document confirming the termination of her parental rights. The main challenge in surrogacy arises when the agreement cannot expressly establish custody and parental status if the surrogate mother is reluctant to relinquish custody.

In Indonesia, the status of a child born through surrogacy in the regulation of Law No. 1 Year 1974 regarding Marriage confirms that the child is considered the legitimate child of the surrogate mother, not of the biological parent who donated the seed into the surrogate mother's womb. This refers to the legal regulation that stipulates official recognition of the relationship between the child, the surrogate mother, and her biological parents, which clearly states that the child is legitimate and has legal status as the biological child of the surrogate mother.

Conclusion

The position of children born through the process of in vitro fertilization (IVF) in the perspective of Civil Law can be described by considering certain aspects. If the child comes from an in vitro fertilization process involving the husband's sperm, it can be concluded that the child, both from a biological and legal perspective, is recognized as the legitimate child of the couple. The child acquires a legal status that legitimizes civil relationships, including inheritance rights. Conversely, if the in vitro fertilization process involves the use of donor sperm with the permission of the husband, this action can be interpreted as a form of implied recognition by the husband of the child from the donor. With this consent, the husband is indirectly considered to recognize the child as a legitimate offspring.

Meanwhile, children born through the process of in vitro fertilization involving a surrogate mother, according to Articles 1320 and 1548 of the Civil Code, any surrogate mother agreement is considered null and void in Indonesia. This is due to the incompatibility with the Health Law, Marriage Law, and the principles of Islamic Law.

The status of children involving surrogate mothers in Marriage law, as regulated by Law No. 1 of 1974, stipulates that the child is considered legitimate as the child of the surrogate mother, not as the offspring of the egg donor implanted in the womb of the surrogate mother. Given the common practice related to the use of surrogacy, it is necessary to develop regulations as a guide for the implementation of surrogacy, aiming to create regularity and legal certainty.

Based on these conclusions, the author provides recommendations regarding the implementation of IVF (in vitro fertilization) according to civil law with the following steps:

1. Propose that legitimate married couples who have difficulty having offspring can use the IVF method as a solution.
2. Encourage doctors involved in the IVF process to contribute to the government by providing input to form appropriate legislation.
3. Emphasizing the need for the establishment of legislative regulations that specifically regulate the rights of children born through IVF (in vitro fertilization).

4. Suggesting a standardized form of agreement with the surrogate mother, with special attention to the clear legal status of the child, whether as a legitimate child of the surrogate mother or the couple who donated the seed.
5. Voiced the need for better studies to create order and legal certainty in IVF.

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