

**HUMAN RIGHTS LAW ANALYSIS  
ON THE PRACTICE OF  
SURROGACY IN INDONESIA**

**THESIS**



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INDONESIA**

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**HUMAN RIGHTS LAW ANALYSIS  
ON THE PRACTICE OF  
SURROGACY IN INDONESIA  
THESIS**

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Requirements to Obtain a Bachelor's Degree at**

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**Yogyakarta**



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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

A BACHELOR DEGREE THESIS

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examined by the Board of Examiners at the Thesis Examination on December

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

HUMAN RIGHTS LAW ANALYSIS ON THE PRACTICE OF SURROGACY  
IN INDONESIA

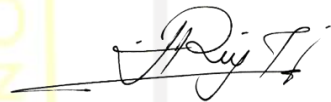
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**ORISINALITAS KARYA TULIS ILMIAH BERUPA TUGAS AKHIR**  
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*Bismillahirrahmanirrahim*

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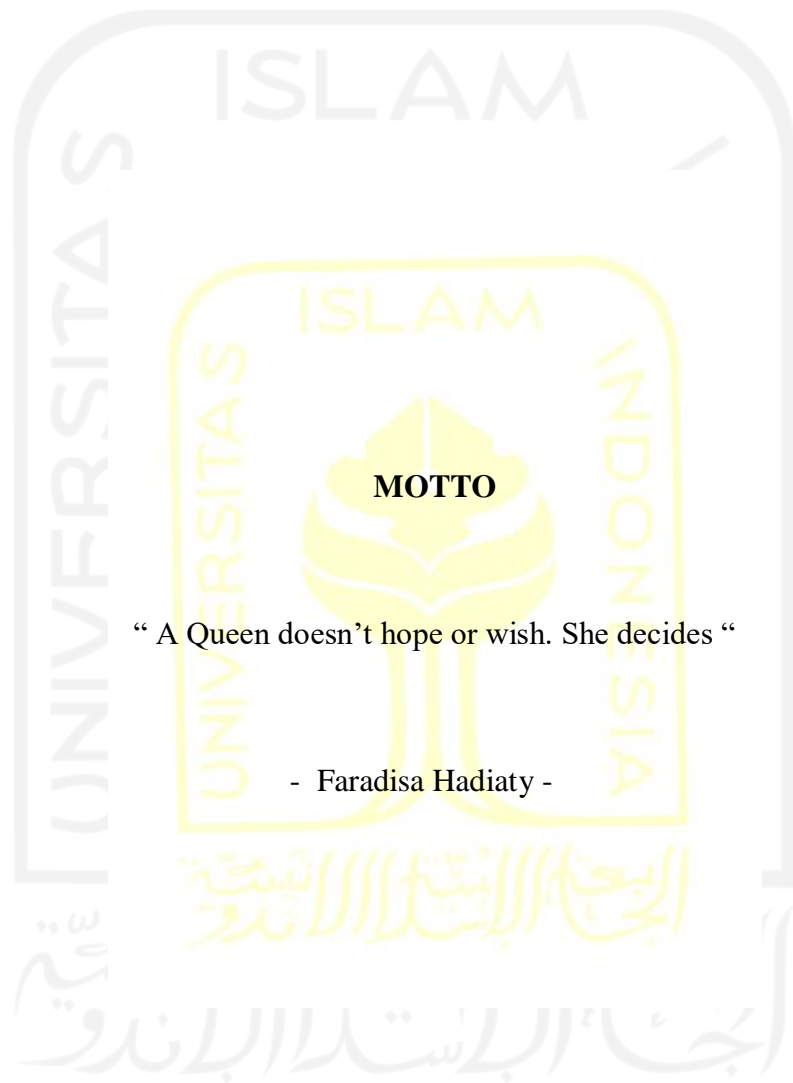
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## **DEDICATION**

This thesis is wholeheartedly dedicated to :

**Allah Subhanallahu wa ta'ala,**

Thank to Allah SWT who always give me strength, health and broad knowledge

Which made it possible to complete y thesis;

**My Parents, and Family**

Thank you for always provide me love, support and affection;

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**All of my lectures of Faculty of Law, Universitas Islam Indonesia,**

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Who always be on my side in easy and hard times;

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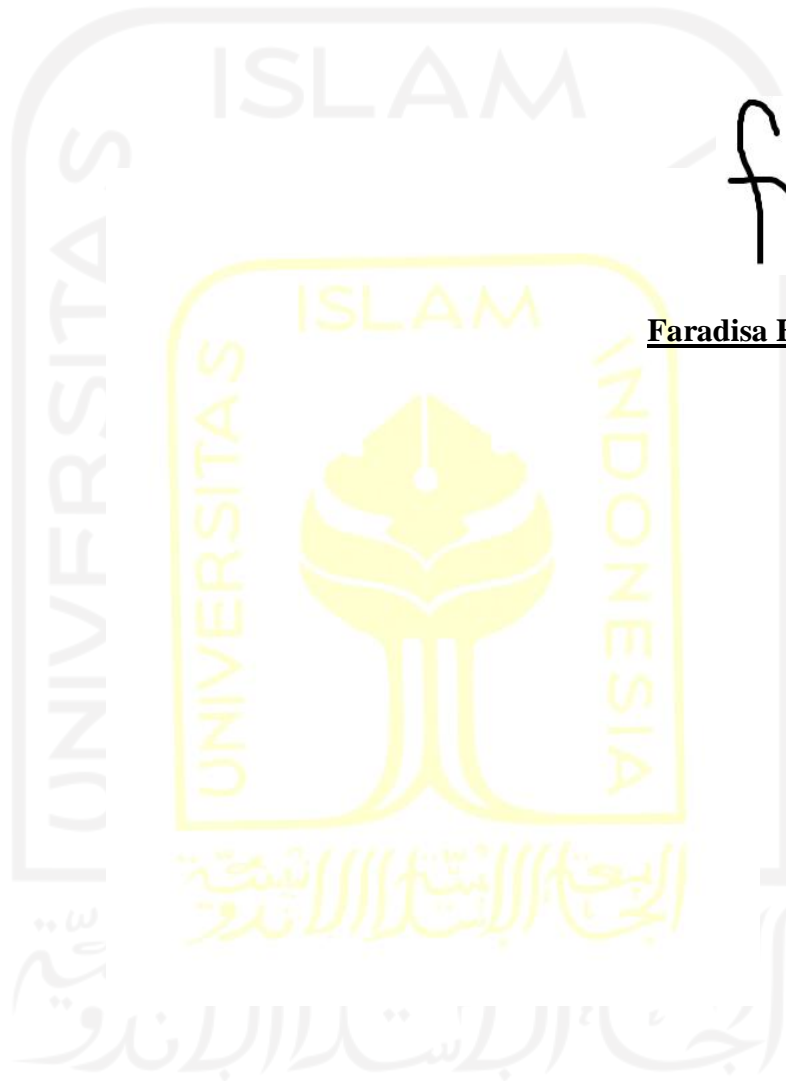
accepted and considered for better future knowledge. Hopefully this thesis can be useful for anyone who reads this.

Yogyakarta, ... 2022

Author,



**Faradisa Hadiaty**



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## ABSTRACT

Surrogacy is an attempt to get child outside the natural way that has not been regulated in Indonesian law. But many married couples in Indonesia carry out surrogacy in secret. This is certainly a problem and debate here because surrogacy carried out in Indonesia cannot be carried out because of an agreement to ensure continuity in surrogacy. However, continuing offspring is a Human Right as well as forming a family, this has been regulated in our constitution and internationally. This research was conducted by empirical juridical method. The results of the study concluded that the absence of clear rules regarding surrogacy created conflicts and legal vacuums. Relevant laws such as the Health Law are in conflict with the constitution and Human Rights Laws regarding the right to continue offspring.

**Keywords:** *Surrogacy, Human Rights Law, Surrogate Mother.*

## CHAPTER I

### INTRODUCTION

#### A. Introduction

Human Rights are basically the most essential rights possessed by every human being in his capacity as an individual. As long as this right does not interfere with the rights of others, this right cannot be contested by anyone, even the guarantor must be protected by the state. This right arises with the aim of protecting human beings as whole individuals.<sup>1</sup>

On the other hand, philosophically it is also a gift from God to every creature that cannot be abandoned for any reason. These human rights include the right to life, the right to religion, the right to build one another's household, the right to continue offspring, etc.

Based on the MPR Decree No. XVII/MPR/1998, on September 23, 1999, Law No.39/1999 on human rights, commonly known as the Human Rights Law, was enacted.<sup>2</sup> In this Law, apart from stipulating "human rights and basic human freedoms, several matters relating to basic human obligations are also emphasized."<sup>3</sup> The human rights and basic human freedoms stipulated in this Human Rights Law include, among others :

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<sup>1</sup> Nurhidayatulloh, Leni Marlina, *Perkawinan di Bawah Umur Perspektif HAM*, Al-Mawarid, Vol. XI, No.2, September- Januari, p. 211

<sup>2</sup> Satya Arinanto, *Hak Asasi Manusia dalam Transisi Politik di Indonesia*, (Jakarta: Pusat Studi Hukum Tata Negara, 2018), p. 16

<sup>3</sup> Republik Indonesia, Undang-Undang tentang Hak Asasi Manusia, UU Nomor 39 Tahun 1999, LN Tahun 1999 Nomor 165, TLN Nomor 3886

1. Right to life<sup>4</sup>
2. The Right to have a family and continue the lineage<sup>5</sup>
3. The right to self-development<sup>6</sup>
4. Right to get Justice<sup>7</sup>
5. Right to personal freedom<sup>8</sup>
6. The Right to say a sense of security<sup>9</sup>
7. Right to welfare<sup>10</sup>
8. The Right to participate in government<sup>11</sup>
9. Women's Rights<sup>12</sup>
10. and Children's Rights.<sup>13</sup>

Marriage as the first step in forming a small family that is happy and prosperous physically and mentally in accordance with what has been mandated by the 1945 Constitution where the state guarantees every Indonesian citizen to form a family, as stated in Article 28B paragraph (1)

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<sup>4</sup> *Ibid.*, Article 9, section (1), (2), dan (3)

<sup>5</sup> *Ibid.*, Article 10 section (1), dan (2)

<sup>6</sup> *bid.*, Article 11, Article 12, Article 13, article 14, article 15, dand article 16

<sup>7</sup> *Ibid.*, Article 17, article 18 section(1), section (2), (3), (4), and article 19.

<sup>8</sup> *Ibid.*, article 20, section (1), and (2), article 21, article 22 section (1) and (2), article 23 section (1) and(2), pasal 24 ayat (1) and (2), article 25, article 26 section(1) and (2),and article 27 section (1) and (2).

<sup>9</sup> *Ibid.*, Article 28 section (1) and (2), article 29 section (1) and (2), article 30, article 31 section (1) and (2), pasal 32, pasal 33 ayat (1) dan (2), pasal 34 dan pasal 35

<sup>10</sup> *Ibid.*, pasal 36 ayat (1),(2), dan (3), pasal 37 ayat (1), dan (2), pasal 38 ayat (1), (2), (3) dan (4), pasal 39, pasal 40, pasal 41 ayat (1) dan (2), dan pasal 42

<sup>11</sup> *Ibid.*, pasal 43 ayat (1), (2) dan (3), dan pasal 44

<sup>12</sup> *Ibid.*, 45, pasal 46, pasal 47, pasal 48, pasal 49 ayat (1), (2), dan (3), pasal 50, dan pasal 51 ayat (1), (2) dan (3)

<sup>13</sup> *Ibid.*,pasal 52 ayat (1),dan (2), pasal 53 ayat (1), dan (2), pasal 54, pasal 55, pasal 56 ayat (1), dan (2), pasal 57 ayat (1), (2) dan (3), pasal 58 ayat (1) dan (2), pasal 59 ayat (1) dan (2), pasal 60 ayat (1) dan (2), pasal 61, pasal 62, pasal 63, pasal 64, pasal 65, dan pasal 66 ayat (1), (2), (3), (4), (5), (6) dan (7).

of the Law The 1945 Constitution which reads “everyone has the right to form a family and continue the lineage through a legal marriage”.

With regard to the meaning of marriage, there is an understanding marriage according to the statutory regulations, namely Article 1 Law Number 1 of 1974 concerning Marriage , it is stated that :

“Marriage is an inner and outer bond between a man and a woman , a woman as husband and wife with the aim of forming happy and eternal family (household) based on belief in the one and only God”.

But sometimes in a marriage there is a problem where a husband and wife cannot get children because condition of the wife who suffers from a certain disease, which undergo of the uterus (hysterectomy). The concerns that arise with hysterectomy one of which is the loss of the ability to have descendants.<sup>14</sup> in conditions like this, a woman can still produce cells egg. But she had to lose her womb, so it’s certain that she didn’t can be pregnant again because the place for the development of the fetus is not there. In this case, it is possible to do a surrogate mother as a attempt to produce offspring.

Surrogate mother is an extension of the IVF method known as a womb rental agreement, which is an agreement between a woman who bind themselves through an agreement with another party (husband/wife) to become pregnant with the result of the fertilization of the husband and wife

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<sup>14</sup> Evelyn Billings, et.al, *Metode Ovulasi Billing*, Jakarta, Kepustakaan Populer Gramedia, 2006, p.179.

which is implanted into the in her womb, and after giving birth is required to give up the baby to the husband and wife based on the agreement made<sup>15</sup>

This case ever happened in Bandung, West Java. In 2020, a woman named R was diagnosed by the doctor that she could not get pregnant because her womb was badly infected. According to the story of Melati (her sister) they have a strict family, it mean if a married couple has not yet been blessed with children, then husband must divorced his wife. R and E decided to do IVF program at a hospital in Bandung, but the results examination showed that R could not get pregnant. Previously the doctor who checking has explained that IVF can also be done by implanting the product of his fertilization in the womb of another woman. How this is done by R and E with help from Melati, who is R's younger sister with check first.<sup>16</sup>

As for the other case, her name is raflessia. She is a woman who practices surrogacy. This story begins in 2019 at that time raflessia had a bad economy and needed more money to pay off her debts.

There is a husband and wife from Canada who are looking for a surrogate mother in Indonesia with the reason that at that time the husband happened to have a business proposal with a company in Jakarta, they met at raflessia's workplace where at that time raflessia was introduced by a friend about the intentions of a married couple. Not long after that raflessia

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<sup>15</sup> Desriza Ratman, *Bolehkah Sewa Rahim di Indonesia?*, Elex Media Komputindo, Jakarta, 2012, p.35-36.

<sup>16</sup> Interview with *Melati* in Ciwalk on Friday 13 August 2021

agreed and they met each other in Thailand and planted some embryo in there and signed the contract.

And one of the signed contents of the contract they will not do anything in Indonesia, everything is done outside the country of Indonesia.<sup>17</sup> Surrogate mother is not an attempt to get pregnant outside the natural way regulated in Law Number 36 Year 2009 concerning Health (hereinafter referred to as UUK) and the Regulation of the Minister of Health of the Republic of Indonesia Number 039/Menkes/SK/I/2010 concerning the Implementation of Technology Services Assisted Reproduction.

Continuing the descent is a human right of every person humans as the fulfillment of the function of family institutions. In Indonesia this right is regulated between otherwise in Article 28B paragraph (1) of the constitution of the Republic of Indonesia year 1945 (UUDNRI), another article 16 paragraph (1) of the Universal Declaration of Human Rights (UDHR), article 23 paragraph (2) of the International Covenant on Civil Rights and Politics (ICCPR), article 10 of the International Covenant on Economic Rights, Social and Cultural Affairs (ICESCR), Article 2 of the Human Rights Charter of the MPR Decree No XVII/MPR/1998 on Human Rights, and Article 10 of the law Number 39 of 1999 concerning Human Rights (UU HAM).

There is a legal conflict regarding this matter, in practice many feel that doing this is deemed necessary to seek an analysis of the rights of

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<sup>17</sup> Interview with *Rafflesia* in airplane to Bandung on Wednesday 6 October 2021

married couples so that they can perform surrogate mothering as an effort to continue the offspring is a human right for everyone.

## **B. Formation of The Problem**

Based on the above description above the writer finds the problems that will discussed related to the practice of surrogacy in Indonesia and its regulation, including :

1. What are the Legal Practices and rules related to surrogacy in Indonesia?
2. How the Analysis of Human Rights Law related to practices and regulations regarding surrogacy in Indonesia?

## **C. Research Purposes**

The authors hope that are benefits that can be taken from this writing will be able to provide an overview for the community regarding surrogacy. The benefits of this research can be seen from several aspects that is :

1. Theoretically, the results of this study are expected to be useful to develop knowledge and add insight all levels of Indonesian society against acts of surrogacy.
2. Practically, as a reference material and consideration in perfecting as well as policies taken by the government for legal action against surrogacy.



#### **D. Research Originality**

The originality of the research explains that this research is completely original and no one has ever investigated or there is a clear difference in the subject matter, the object studied, in order to avoid plagiarism. This research among others :

1. Perlindungan Hak Untuk Melanjutkan Keturunan Dalam Surrogate mother by Sista Noor Elvina Brawijaya University.

The focus of the research is the making of agreements in positive law in Indonesia which refers to the Health Law, Human Rights Law, and also Civil Code of Indonesia. Meanwhile, in this study we will discuss the practice of surrogacy in Indonesia, which is wrapped in Human Rights Law and The Civil Code of Indonesia where the surrogacy agreement is valid or not.

2. The Comparative Law Perspective of Surrogation: Indonesia and Several Countries That Legalized Surrogation by Ni Nyoman Putri Purnama Santhi Udayana University. The focus of the research is comparative law about surrogation in Indonesia and several countries that legalized surrogation. Meanwhile, in this study we will discuss the practice of surrogacy in Indonesia, which is wrapped in Human Rights Law and The Civil Code of Indonesia

#### **E. Literature Review**



## 1. Definition of Surrogacy and The Surrogacy Regulations in Indonesia.

### a. Definition of Surrogacy

Surrogate mothers according to Black's Law Dictionary 9<sup>th</sup> Edition are :

“ 1. a woman who carries out the gestational function and gives birth to a child for another; esp. a woman who agrees to provide her uterus to carry an embryo throughout pregnancy, typically on behalf of an infertility couple, and who relinquishes any parental rights she may have upon the birth of the child. 2. A person who performs the role of a mother.”

We assume that what we understand by surrogate mother is the first definition in Black's Law Dictionary, namely *a woman who carries out the gestational function and gives birth to a child for another.*

In other definition, surrogate mother is an agreement between a woman who binds herself through an agreement with another party (husband and wife) to become pregnant with the result of the fertilization of the husband and wife which is implanted into her womb, and after giving birth is required to hand over the baby to the husband and wife based on an agreement is commonly called a gestational agreement.<sup>18</sup>

In essence, a surrogate mother is a woman who accommodates the conception of a husband and wife and is expected

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<sup>18</sup> Dr. H. Desriza Ratman, MH.Kes, *Surrogate Mother dalam Perspektif Etika dan Hukum: Bolehkah Sewa Rahim di Indonesia?*. Gramedia, 2012, page. 3

to give birth to a child resulting from the fertilization. In simple language it means 'surrogate mother' or 'guardian mother'.<sup>19</sup> From a legal point of view, the woman who holds the conception is considered to be 'renting out' her womb.

#### **b. The Surrogacy Regulations in Indonesia.**

Surrogate mother is not an attempt to get pregnant outside the natural way as regulated in Law Number 36 of 2009 concerning Health (hereinafter referred to as UUK) and Regulation of the Minister of Health of the Republic of Indonesia Number 039/Menkes/SK/I/2010 concerning the Implementation of Assisted Reproductive Technology Services. (hereinafter referred to as PMK).

Moreover, this agreement is considered not to meet the legal requirement of the agreement regulated in Article 1320 BW regarding the legal requirements of the agreement related to halal object and causes. But on the other hand, continuing the lineage is a human right as a fulfillment of the function of family institutions.

This right is regulated, among others, in Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia (UUDNRI) Article 16 paragraph (1) of the Universal Declaration of Human

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<sup>19</sup> Dr. H. Desriza Ratman, MH.Kes, *Surrogate Mother dalam Perspektif Etika dan Hukum: Bolehkah Sewa Rahim di Indonesia?*. Gramedia, 2012, page. 5

Rights (UDHR), Article 23 paragraph (2) of the international Covenant on Human Rights. Civil and Political Rights (ICCPR), Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2 of the Human Rights charter of the MPR Decree No. XVII/MPR/1998 on Human Rights, and Article 10 of Law No. 39 of 1999 concerning Human Rights (UU HAM).

Thus the state is obliged to guarantee its citizens to continue their offspring and form a family as a protection for Human Rights.

### **c. Theory of Human Rights**

According to the theory of positivism, human rights granted by the state and regulated in laws and regulations. These rights must be regulated because humans are part of a socio-political, economic, cultural community that must be granted and protected by the state. Human rights must be protected with a view to maintaining a balance between rights and obligations as individuals and in the public interest<sup>20</sup>.

According to Rhona K.M.Smith, there are 2 principle of human rights, namely equality and non-discrimination. Another opinion is Manfred Nowak, there are four principles of human rights, namely ; universality, interrelated, indivisibility, and

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<sup>20</sup> Suparman Marzuki, Hukum Hak Asasi Manusia, PUSHAMUII, Yogyakarta, 2017, p.4.

interdependent. Another principles that is equally important is human dignity. Indonesia place great emphasis on another principle, namely state responsibility<sup>21</sup>.

The principle that will be related to this research is the principle of state responsibility, where the responsibility in the form of state obligations towards human rights includes two things, namely the obligation to ensure that the state does not take direct actions (*crime by commission*) that violates human rights. Human rights and not act passively by allowing a violation of human rights (*crime by omission*).

#### **d. Theory of the right to continue offspring**

as a form of respect for human rights, the 1945 Constitution of the Republic of Indonesia has mandates the recognition, respect and protection of human rights in implementation of social, national, and state life. Wrong one of these human right to continue spring as regulated in Article 28B paragraph (1), namely :

“everyone has the right to form a family and continue offspring through legal marriage.”

This means that everyone gets the same rights and treatment for continue the lineage through a legal marriage. An action

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<sup>21</sup> Eko Riyadi, *Hukum Hak Asasi Manusia Perspektif Internasional, Regional dan Nasional*, Rajawali Pers, Depok, 2018, p. 25.

discriminatory policies that can limit the fulfillment of these rights cannot be justified.

In order to carry out the mandate of the 1945 Constitution of the Republic of Indonesia, the Assembly of the People's Consultative Assembly (MPR) issued MPR Decree No XVII/MPR/1998 on human rights. Which in article 2 is attached to the charter Human Rights states that "everyone has the right to form a family and continue offspring through legal marriage".

The Human Rights Law does not fail to regulate the freedom of citizens to have families and continue the descent, as regulated in article 10 as following;

"(1) everyone has the right to form a family and continue the lineage through a legal marriage."

This commitment to fulfill human rights is reflected in several provisions in the Human Rights Law, as follows :

#### Article 2

"The Republic of Indonesia recognizes and upholds the rights and basic human freedom as inherently attached to and inseparable from humans, which must be protected, respected and enforced for the sake of improvement human dignity, well-being, happiness, and intelligence and justice."

#### Article 5

“(1) everyone is recognized as an individual who has the right demand and receive appropriate treatment and protection the same in accordance with his human dignity in front of law.”

#### Article 8

“Protection, promotion, enforcement and fulfillment of human rights humans are primarily the responsibility of the government. Thus, the right to continue the lineage and form a family is a human right whose existence has been recognized in law international and national law. Consequences of the existence of these rights is the state is obliged to respect, protect, and fulfill it for every citizen.”

Continuing offspring in a legal marriage is wrong a human right (HAM) which is regulated in article 16 paragraph (1) UDHR :

“Adult men and women, with no restrictions nationality, nationality or religion, have the right to marry and to form a family. They have the right the same in matters of marriage, in the period of marriage and divorce.”

Based on the above provisions, it means that everyone has the same rights to continue the lineage and form a family within marriage. “the family” in above is the natural and fundamental unit of society and has the right to get state protection. The provisions state is

obliged to recognize and provide protection to families from the stage of formation.

#### **e. Theory of State Obligation**

The theory of state obligations in it is inseparable from how the concept of human rights distinguishes between individuals as rights holders and the state as duty holders/bearers. The existence of these differences affects the ease of recognizing human rights violations committed by the state and how citizens can sue for violations of rights committed by the state.<sup>22</sup>

From above the point of view of the principle of the state as rights holder, there are three obligations of the state, namely :

- a) The obligation to fulfill
- b) The obligation to protect
- c) The obligation to respect.<sup>23</sup>

In particular with the obligation to protect, this obligation also requires active action from the state. Then regarding violence against children, in 2002, the UN Human Rights Commission proposed a broad research design on violence against children where

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<sup>22</sup> Eko Riyadi, *Hukum Hak Asasi Manusia.. Op.Cit., P.66*

<sup>23</sup> *Ibid*, p.69



in the end it was stated that corporal punishment by parents was considered a violation of Article 19 of the Convention on the Rights of the Child.<sup>24</sup>

## **F. Research Methods**

### **1. Research Type**

In writing this thesis, the type of research carried out is empirical juridical research. Empirical juridical research is an approach problems regarding matters of a juridical nature and the existing reality on matters of juridical nature. Empirical legal research or sociological research, namely legal research that uses primary data.

According to the empirical approach, knowledge is based on facts obtained from the results of research and observation.<sup>25</sup> Research conducted is The Regulation of Surrogacy in Indonesia against laws and regulation and practically with purpose is to identify the basic meanings of rights and obligations, events law, legal relations and legal objects.<sup>26</sup>

### **2. Research Approach**

#### **a. Approach Method**

What is used in this paper is the statutory approach because what is being studied are various rules aw which is the focus as well

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<sup>24</sup> Ibid, p.71

<sup>25</sup> Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri*, Ghalia Indonesia, Jakarta, 2009, page. 10.

<sup>26</sup> Zainudin Ali, *Metode Penelitian Hukum*, Jakarta, Sinar Grafika, 2009, page 25-26.



as the central theme of a research and conceptual approach, namely examining the views of legal doctrine developed in the science of law.<sup>27</sup>

#### **b. Research Object**

The object of study in the formulation of the research problem is the analysis of the practice and rules of surrogacy law in Indonesia.

#### **c. Research Subject**

The subjects in this study to assist the author in obtaining concrete data are the parties who have the data and will be allocated as primary data in empirical research, therefore the subjects in this study are Melati, Raflessia, B, R, and X as the perpetrators of this surrogate mother.

#### **d. Research Sites**

The location or place where this research was carried out in several places in the cities of Jakarta, Bandung, and Yogyakarta. Several places in cafes ,restaurants, and public transportation.

### **3. Research Data Sources**

#### **a. Primary Data**

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<sup>27</sup> Johny Ibrahim, *Teori & Metodologi Penelitian Hukum Normative*, Cet III, Bayu Media Publishing, Malang, 2007, page. 300.

This primary data is data obtained directly through interviews with research subjects, namely Melati, Raflessia, B, R and X<sup>28</sup>

## **b. Secondary Data**

Secondary data is obtained through library research consisting of :

### **1) Primary Legal Materials**

Primary legal materials are authoritative legal materials that are the main materials in research. The primary legal materials used in this study consist of :

1. Law Number 36 year 2009 concerning Health.
2. Civil Code of Indonesia (KUHPPerdata)
3. Government Regulation Number 61 of 2014 concerning Reproductive
4. Health Draft of the Family Resilience Law.
5. Regulation of the Minister of Health of the Republic of Indonesia Number 43 of 2015 concerning Provision of Assisted Reproductive Services or Pregnancy in beyond the Natural Way.
6. 1945 Constitution of the Republic of Indonesia.
7. XVII/MPR/1998 tentang Hak Asasi Manusia. (MPR Decree)
8. Universal Declaration of Human Rights, 1948.
9. Vienna Convention on the Law of Treaties, 1969.

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<sup>28</sup> The following names are only pseudonyms, for the sake of mutual convenience.

10. The law Number 11 of 2005 about Undang-undang Nomor 11 Tahun 2005 tentang Ratifikasi Kovenan Internasional tentang Hak-hak Ekonomi, Sosial, dan Budaya.

11. Undang-undang Nomor 12 Tahun 2005 tentang Ratifikasi Kovenan Internasional tentang Hak-hak Sipil dan Politik.

12. Undang-undang Nomor 36 Tahun 2009 tentang Kesehatan.

13. Undang-undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia.

14. Vienna Declaration and Programme of Action, 1993.

## 2) Secondary Legal Materials

Secondary legal materials are legal materials sourced from legal literature books, legal research journals, legal research reports, legal reports in print or electronic media.

## 3) Tertiary Law Material

Tertiary legal materials are supporting legal materials from primary legal materials and secondary legal materials that provide understanding and understanding of other legal materials.

#### **4. Data Collection Methods**

In this data collection method used was through interviews and literature study. In this study using literature study and interviews. Where this interview was conducted with parties related to the object of research, this interview was conducted in two directions with the research subject namely; Melati, Raflesia, X, B, R as my interviewees.

While the literature study is carried out by combining various sources of data and writing materials by reading and understanding the text to obtain concepts related to the object of research.

#### **G. Script Framework**

##### **CHAPTER I : INTRODUCTION**

This chapter contains the background, formulation problems, objectives and benefits of writing, scope, framework theory, research methods, and writing systematics.

##### **CHAPTER II : LITERATURE REVIEW**

That is the overall explanation related to the surrogacy regulations in Indonesia, a review of surrogacy actors in the Indonesian civil law system, a review of surrogacy practices in Indonesia, a review of the rights of the perpetrator of surrogacy according to review of human rights law, as well as other matters related to the background of the practice of surrogacy in Indonesia.

### **CHAPTER III : DISCUSSION**

This chapter discusses the implications of surrogacy regulations in Indonesia for the perpetrators of surrogacy and all the things behind the perpetrators so that they want to carry out surrogacy and their correlation with human rights law.

### **CHAPTER IV : CLOSING**

This chapter is the last chapter in this thesis which contains; conclusions and suggestions regarding the issues discussed.

## CHAPTER II

### SURROGATE MOTHER IN INDONESIA, HUMAN RIGHTS AND THE RIGHTS OF CONTINUING OFFSRPING, AND STATE OBLIGATION

#### A. Surrogate Mother in Indonesia

##### 1. Definition Surrogate Mother

Surrogation is an extension of the IVF method known as a womb lease agreement which is an agreement between a woman who binds herself through an agreement with another party (intended parent) to become pregnant against the result of conception of the intended parent who is implanted into her womb, and after delivery is required to deliver the baby to the intended parent based on the agreement made.<sup>29</sup> According to Black's Law Dictionary 9<sup>th</sup> edition are :

*"1. a woman who carries out the gestational function and gives birth to a child for another; esp. a woman who agrees to provide her uterus to carry an embryo throughout pregnancy, typically on behalf of an infertility couple, and who relinquishes any parental rights she may have upon the birth of the child. 2. A person who performs the role of a mother."*<sup>30</sup>

In another definition, surrogate mother is an agreement between a woman who binds herself through an agreement with another party (husband and wife) to become pregnant with the result of the fertilization of the husband and wife which is implanted into her womb, and after giving

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<sup>29</sup> Ratman, D. (2012). *Surrogate Mother dalam Perspektif Etika dan Hukum : Bolehkah Sewa Rahim di Indonesia?*. Jakarta: PT Gramedia Indonesia, p. 34-35.

<sup>30</sup> Bryan A.Garner, *Black's Law Dictionary 9<sup>th</sup> edition*, in CHIEF, p. 55

birth is required to hand over the baby to the husband and wife based on an agreement is commonly called a gestational agreement.<sup>31</sup>

In essence, a surrogate mother is a woman who accommodates the conception of a husband and wife and is expected to give birth to a child resulting from the fertilization. In simple language it means 'surrogate mother' or 'guardian mother'.<sup>32</sup> From a legal point of view, the woman who holds the conception is considered to be 'renting out' her womb.

According to Faith Merino, there are several types of surrogacy that can be carried out by a mother's surrogacy including.<sup>33</sup>

a. Traditional Surrogacy

Consists of artificial insemination performed between a surrogate mother with sperm from her husband or donor. Because the fertilized egg belongs to the surrogate mother it has a genetic relationship with the fetus it contains. The fetus may or may not be genetically related to the father, depending on the sperm used for fertilization.

b. Gestational Surrogacy

This technique is preferred by married couples who want to have a biological bond with the child, assuming the husband and/or wife have mature sperm and eggs. This process begins with

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<sup>31</sup> Dr. H. Desriza Ratman, MH.Kes, *Surrogate Mother dalam Perspektif Etika dan Hukum: Bolehkah Sewa Rahim di Indonesia?*. Gramedia, 2012, page. 3

<sup>32</sup> *Ibid*, page. 5

<sup>33</sup> Faith Merino, **Global issues : Adoption and surrogate pregnancy**, InfoBase Publishing, New York, 2010, p. 16 -17

fertilization which is carried out using the IVF method with one or more embryos that are not genetically related to the surrogate mother. In many cases, married couples prepare their eggs and sperm in order to have children who are biologically related to the husband and wife.

## **2. The Surrogacy Regulation in Indonesia**

Surrogate mother is not an attempt to get pregnant outside the natural way as regulated in Law Number 36 of 2009 concerning Health (hereinafter referred to as UUK) and Regulation of the Minister of Health of the Republic of Indonesia Number 039/Menkes/SK/I/2010 concerning the Implementation of Assisted Reproductive Technology Services. (hereinafter referred to as PMK).

Moreover, this agreement is considered not to meet the legal requirement of the agreement regulated in Article 1320 BW regarding the legal requirements of the agreement related to halal object and causes. But on the other hand, continuing the lineage is a human right as a fulfillment of the function of family institutions.

This right is regulated, among others, in Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia (UUDNRI) Article 16 paragraph (1) of the Universal Declaration of Human Rights (UDHR), Article 23 paragraph (2) of the international Covenant on Human Rights. Civil and Political Rights (ICCPR), Article 10 of the International Covenant



on Economic, Social and Cultural Rights (ICESCR), Article 2 of the Human Rights charter of the MPR Decree No. XVII/MPR/1998 on Human Rights, and Article 10 of Law No. 39 of 1999 concerning Human Rights (UU HAM).

Thus the state is obliged to guarantee its citizens to continue their offspring and form a family as a protection for Human Rights. An example of another country's regulations regarding this surrogacy is India, in India the government said surrogacy for profit is illegal and according to Dr Nayana Patel, one of India's leading fertility specialists said<sup>34</sup> :“the move discriminated against foreigners who were also desperate to have children need to be strict checks and there is no exploitation, it's a voluntary contact between human beings involving an exchange of money.”

Some states are considered to be completely “surrogacy – friendly”, meaning they either have statutes permitting and recognizing surrogacy or they have a long history of favorable rulings in surrogacy cases.<sup>35</sup> There state are considered surrogacy-friendly :

1. California
2. Connecticut
3. Delaware
4. District of Columbia

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<sup>34</sup> Dr.Nayana Patel, *India bans Foreigners from hiring surrogate mothers*, The Guardian, 2015, p. 47

<sup>35</sup> American Surrogacy, Surrogacy laws by state, 2022 , <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/> access on 1 April 2022 at 12.06 p,m

5. Maine
6. New Hampshire
7. Nevada
8. Oregon
9. Rhode Island
10. Washington

## **B. Human Rights and The Rights of Continue Offspring**

### **1. Definition Human Rights**

The term Human Rights (HAM) is an understanding of the rights possessed by humans because of their nature as humans. Human have this right not only because it is given by society based on positive law, but this right is inherent because of their dignity as human beings.<sup>36</sup>

These human rights are universal, which means that even though every human being is born with different physical conditions as well as differences in language, culture, and citizenship, each individual still has rights as a human being. Apart from being universal, human rights are also inalienable or inalienable. It can be understood like this, every treatment that has been done by someone no matter how bad it is, then he is still considered a human, will not stop the rights attached to him as a human being or a human being.<sup>37</sup>

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<sup>36</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca and London, 2003, p.10-21.

<sup>37</sup> Rhona K.M. Smith, et al., *Hukum Hak Asasi Manusia*, PUSHAM UII, Yogyakarta, 2008, p.10-11

The beginning of the idea of human rights comes from the theory of natural rights where this theory stems from the theory of natural law, which can be traced back to ancient times with Stoic philosophy to modern times through natural law essay by Saint Thomas Aquinas. Then Hugo de Groot a Dutch legal expert, further developed Aquinas' natural law theory by making it a product of rational secular thought.<sup>38</sup>

In subsequent developments, John Locke, who was a post-Renaissance scholar, proposed ideas related to the theory of natural rights, this thought was the basis for the emergence of a rights revolution in the revolutions that took place in England, the United States, and France in 17<sup>th</sup> and 19<sup>th</sup> centuries. Locke puts forward the idea that :<sup>39</sup>

“ All individuals are endowed with inherent rights to life, liberty and property which are their own and cannot be revoked or stripped away by the state.”

In Locke's opinion, if the state through these rulers ignores the social contract by violating the natural rights of individuals, then that's when the people in the country can freely reduce the ruler and replace him with a government that is willing to respect these natural rights. It is with this natural right that pre-positive individual rights have the existence of strong recognition. This theory of natural rights has contributed to the foundation of a legal system that is considered superior to the national legal system in each country, namely international human rights norms.

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<sup>38</sup> *Ibid.*, p.11-12

<sup>39</sup> John Locke, *The Second Treatise of Civil Government and a Letter Concerning Toleration* edited by J.W.Gough, Blackwell, Oxford, 1964, p.9-11

However, the emergence in international human rights norms makes the concept no longer the same as the theory of natural rights, the substance contained already exceeds the substance of the rights contained the theory. It is no longer limited to civil and political rights, but also includes economic, social and cultural rights and even penetrates new rights called solidarity rights.<sup>40</sup>

According to the theory of positivism, human rights are rights granted by the state and regulated through laws and regulations. These rights arise as a result of the position and existence of humans as part of a socio-political, economic, cultural community that must be protected by the state. The purpose of respecting and protecting human rights in this context is to maintain a balance between rights and obligations, as well as a balance between public and individual interests.<sup>41</sup>

## **2. The Rights of Continue Offspring**

The right of continue offspring is related to the right to form a family and continue offspring is part of the right basis guaranteed and protected by article 28B paragraph (1) of the Constitution Republic of Indonesia in 1945. In order to be able to exercise these rights, the 1945 Constitution of the Republic of Indonesia has

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<sup>40</sup> Rhona K.M.Smith, et all., *Hukum Hak.... OP.Cit.*, P. 11-12

<sup>41</sup> Jack Donnelly, *Universal Human Rights.., Op.Cit...* P. 5-22

stipulated the prerequisite is that is carried out through a legal marriage institution.<sup>42</sup>

With thus, the categories and criteria for institutionalizing legal marriages have become part of the arrangements in the constitution and therefore become the basic rules that must be followed and become a reference in the assessment and formation of related norms marriage at the statutory level.

On the basis of the argument that the Preamble of the 1945 Constitution of the Republic of Indonesia is a legal ideal (*rechtsidee*) which is the basis of thought of all provisions which is in the body of the 1945 Constitution of the Republic of Indonesia; thus, the framework the purpose of the norm :

“ Everyone has the right to form a family and continue descendants through legal marriage”

is so that the state government as an implementing body (executive body) can realize protection in the broadest sense in an impartial and equal way to all citizens, promote general welfare (social welfare), educate the nation, and take an active role in realizing a world civilization that is orderly, liberating, peaceful and social justice.

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<sup>42</sup> Maktiono SH., M.Phil., AMICUS CURIAE , PPHD FH Universitas Brawijaya, 2014.  
p.5

It also reaffirms the existence of a relationship that is not inseparable, as an integral part, between the provisions in the Preamble and provisions on the body of the 1945 Constitution of the Republic of Indonesia<sup>43</sup>. In the construction of the norm of Article 28B paragraph (1) which reads “everyone has the right” form a family and continue the lineage through a legal marriage grammatical (objective) norms can be identified as follows (as a phrase then put in quotation marks) :

- a. “Everyone is Entitled”
- b. “forming a family
- c. “continuing the Descendants”
- d. “Through Legal Marriage”

Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia at the beginning of the sentence mentions the phrase “Every” ”Entitled People”. The phrase “Everyone has the Right” gives the meaning that the bestowal (entitlement) the basic rights of the 1945 Constitution of the Republic of Indonesia are addressed equally to every Indonesian citizen without any discrimination on reason anything such as and is not limited to ethnicity, gender, religion, belief, race, skin color, social status, political direction, control of wealth or property, and so on the like.

Thus, the right holders in the context of Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesian

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<sup>43</sup> Article II Supplementary Rules

as a legal subject (legal person) has equal status between one person and another. This is also confirmed in Article 28I paragraph (2) which states that <sup>44</sup>;

“everyone has the right to be free from discriminatory treatment on any basis and are entitled to protection against such discriminatory treatment”

“every person has the right” is also a form of realization of the provisions of Article 1 paragraph (2) the 1945 Constitution of the Republic of Indonesia which states that “Sovereignty is in the hands people” . “sovereignty” is in the context of the pre-establishment of the state or state independence is called “The right to self-determination” as a form of claim that is owned collectively by the group.

Individuals from a certain territory (later we can be called the territory of the state) to free from the shackles of colonialism. During the era of independence like today, “sovereignty” is not lost to the people but is handed over in part to state authorities through legal instruments as stipulated in Article 1 paragraph (2) the 1945 Constitution of the Republic of Indonesia which states that “...implemented according to the Constitution”. While the other part of the “Sovereignty” is still owned by every citizen through an instrument called “constitutional rights” or what is more generally or globally called “human rights”.

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<sup>44</sup> Maktiono SH., M.Phil., AMICUS CURIAE , PPHD FH Universitas Brawijaya, 2014. p.8



Thus, the people still have private freedom spaces to act or behave according to his own will (positive liberty). In addition, the independence of the people also includes the aspect of being free from intervention illegitimate acts committed by other parties, including the state (negative liberty).

Therefore, the restrictions on independence are both aimed at basic rights (constitutional rights) as well as on human rights by the authorities the state is regulated very strictly as stipulated in Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia which reads “... stipulated by law for the sole purpose of to ensure the recognition and respect for the rights and freedoms of others and to meet just demands in accordance with moral considerations, values religion, security and public order in a democratic society.”

Essence of restrictions is to ensure the fulfillment of basic rights itself, and not focusing on aspects the restrictions. Therefore, in the provisions of Article 28J paragraph (2) of the NRI Constitution 1945 used the phrase “...with the sole purpose of guaranteeing recognition” and respect for the rights and freedoms of others...” and “...in a democratic society.”

## **C. State Obligation**

### **1. The State Obligation to fulfill Human Rights**



“Every person who is given the attribution of authority to do something and/or not to do something on behalf of the state.”<sup>45</sup>

In the statement above the state is defined where the holders of these rights are individuals/community groups, both citizens and non-citizens. While the holders of obligations are the state. Human Rights are closely related in providing indicators of how the state has made achievements in granting the authority given to them through political mechanisms that are fully delegated by the community to the government. Human rights divide the actors into two categories; first is rights holders and second are duty bearers.

The above categorization is based on various international human rights instruments in the form of declarations, covenants and conventions. This understanding can be taken from the nomenclature contained in all international human rights instruments which regulate two things; first is everyone has the right to... and second state parties must... where the sentence reinforces the division actor.

Meanwhile, what is contained in the Indonesian human rights legal regime provides a different understanding, because the state and society are placed as holders of obligations, which is stated in Law Number 39 of 1999 concerning Human Rights, precisely in article 1 which stated that :<sup>46</sup>

“Human Rights are a set of rights that are inherent in the nature and existence of humans as creatures of God Almighty and are his gifts that must be respected, upheld, and protected by the state, law, government, and

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<sup>45</sup> Eko Riyadi, *Hukum Hak... Op.Cit.*, Page. 66-67

<sup>46</sup> *Ibid*, p.68

everyone for the sake of honor and protection of dignity and worth human dignity.”

The meaning of each person in the article who is burdened with the same obligations to the government and the state will obscure the obligations that must be carried out by the state. Furthermore this meaning will confuse the meaning of human rights violation. It is true that everyone is also an actor holding the obligation to respect the rights and freedoms of others, but from the sound of article 1 state that everyone is given the obligation to uphold and protect human rights.<sup>47</sup>

There is a categorization of state obligations based on the ‘Status Theory’ by George Jellinek in which there are 3 statuses namely negative status, active status, and positive status. Where this negative status is in the form of the right to freedom from interference (liberal rights of non-interference), active status in the form of the right to participate in democratic mechanism (status actives = democratic participations rights), and positive status in the form of social rights that require active state action (positive status – social rights requiring positive state action).

The categorization of state obligations which are generic obligations is as follows :<sup>48</sup>

**a. The Obligation to fulfill**

This obligation refers to the state’s obligation to take legislative, administrative, judicial, and practical policy steps to ensure that the

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<sup>47</sup> *Ibid*, p.68

<sup>48</sup> *Ibid*, p.69

rights that are its obligations can be fulfilled to the fullest. An example is the right to education which requires the state to prepare an education system.<sup>49</sup>

**b. The Obligation to protect**

The obligation requires the state to act actively, the state is obliged to ensure that there are no human rights violations by individuals and/or corporations. Learning from past events where the state did not have the authority to enter into private areas even though there were many violations of such as cases of domestic violence where related cases involving women and children as the majority were considered as private matters that did not state can interfere. The result of this concept is that cases of marital rape and violence against families cannot be legally resolved.<sup>50</sup>

**c. The Obligation to respect**

The obligation of the state not to intervene, the provision of this intervention is not allowed with a limitation mechanism or reservation clause. Illegal state intervention is a violation of human rights. Thus for example :<sup>51</sup>

- i. the right to life is related to the state's obligation not to kill
- ii. the right to physical and mental integrity is related to obligations state not to torture; and

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<sup>49</sup> Ibid, p.69-71

<sup>50</sup> Ibid, page 70.

<sup>51</sup> Ibid, page 71.

- iii. the right to work, health and education relate to the state's obligation to provide employment, health facilities, and an education system.

In this study the author will use the indicator of state obligations, namely In the obligation to fulfill because what will be tested is the state's obligation to fulfill a right in this study.



### **CHAPTER III**

## **THE ANALYSIS OF HUMAN RIGHTS LAW RELATED TO PRACTICES AND REGULATIONS WITH ISLAMIC PRESPECTIVE REGARDING SURROGACY IN INDONESIA**

The discussion that will be discussed by the author in this chapter, namely about the practice of society in carrying out its role as a surrogate mother or the knowledge of some communities in practice in carrying out surrogacy is associated with existing regulations in Indonesia whose research has been carried out by the author. This section consists of three parts.

#### **A. Portrait of Practice a Surrogate mother in Indonesia**

“from what I have felt, this is mentally torturous, risky, illegal because in Indonesia this has not been clearly regulated. But there are lots of people who do it, just don’t say it, money and meeting other people’s standards are more important. The important thing is that standards are real, even though it is risky and very torturous.”<sup>52</sup>

“money is not everything, but everything needs money. Doing surrogacy for Indonesians is not easy, especially with Indonesian culture that is not very individual. It is very risky and also requires a strong mentality, if at the time it was not for money factor. I will not do it.”<sup>53</sup>

These two remarks accurately reflect closed, highly guarded, and ill prepared surrogacy scenario in Indonesia. We completed as a result of pressures from the family environment and economic pressures. The right to have children is just one of many types of standard rules that must be

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<sup>52</sup> Interview with melati at ciwalk on 12 Augustus 2021.

<sup>53</sup> Interview with rafflesia at fore coffee Paris van java on 8 October 2021

followed in the family, which is supposed to be the main basis for learning make a family for a new marriage couple.

Other than family, there are other variables that heavily influence this illegal practice of surrogacy because there are no rules or regulations that govern it. Another important element in this approach is money. In the explanation that follows, some of the key indications will be discussed.

### **1. Legal Vacuum Regarding Surrogacy in Indonesia**

“Pregnancy efforts outside the natural way can only be done by a legitimate intended parent with the following conditions :

- “a. the results of sperm and ovum fertilization from the husband and wife concerned are implanted in the womb of the wife from which the ovum originates.
- b. performed by health workers who have the expertise and authority for that;
- c. at certain health care facilities.”<sup>54</sup>

on this Article 127 paragraph 1, regulates the criminal penalties that may be imposed on people who use surrogate mothers. But it was not clearly stated on this act. Reinforced with :

“Artificial reproductive technology services can only be given to married couples who are related to legal marriage and as a last resort to obtain progeny and based on medical indications.”<sup>55</sup>

These two regulations are not enough to say that Indonesia is not allowed to do surrogacy in Indonesia.

### **2. The Surrogate Mother Factor Perform Surrogacy in Indonesia**

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<sup>54</sup> Act 36/2009 on Article 127 paragraph 1.

<sup>55</sup> article 2 paragraph (3) Act Number 39/2010.

In Practice, There are three major factors that have a serious influence on a surrogate mother's willingness to perform surrogacy :

**a. Family Commitments**

"she (my sister) carried out surrogacy voluntarily without any reward or anything..."<sup>56</sup>

"... this is maybe because of our big family preference however if you get married, the goal is to have children, what do you do? Yes to inherit and continue offspring..."<sup>57</sup>

Based on the above statement, it has happened that the perpetrators of surrogacy carried out surrogacy been the case that the perpetrators of surrogacy

**b. People Expectations**

Different from *melati* and B, there is a X who does surrogacy to meet other people expectation because she can't stand the chatter of his neighbors who insulted her for about 5 years.

"I can't stand it *mba* (call sister in Indonesia culture especially java area) maybe if I'm the one who insulted and didn't cause any slander, yes I was upset because my husband was ordered to remarry so that I could have children, I was depressed and in the end I chose to take surrogacy..."

According to the statement above, many married couples use surrogacy due to societal expectations and demands. These

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<sup>56</sup> Interview with *melati* at ciwalk on 12 august 2021.

<sup>57</sup> Interview with B at BIP on 8 September 2021.



demands come not from family members but from neighbors or strangers who have no idea what other families through.

### **c. Economic Factor**

“money is not everything, but everything needs money. Doing surrogacy for Indonesians is not easy, especially with Indonesian culture that is not very individual. It is very risky and also requires a strong mentality, if at the time it was not for money factor. I will not do it.”<sup>58</sup>

“I did surrogacy through an agreement, at that time I got 700 million exclude the cost of giving birth..”<sup>59</sup>

“I was pegged the agreement was approximately 1,5 M.”<sup>60</sup>

“ I don’t use price, if I need or want something, I buy it directly.”<sup>61</sup>

According to the preceding statement, economic factors in Indonesia are indeed very influential, especially with a relative high price offer. However there are those who perform surrogacy without setting a price and instead meet the surrogacy mother’s daily needs.

### **3. Place to do surrogacy in Indonesia.**

In Indonesia, most of the surrogacy is outside the country such as Thailand, and Australia.

“we did it secretly in Indonesia but we carried out surrogacy in Thailand to implant the embryo...”<sup>62</sup>

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<sup>58</sup> Interview with rafflesia at fore coffee Paris van java on 8 October 2021

<sup>59</sup> Interview with B at BIP on 8 September 2021.

<sup>60</sup> Interview with X at airplane on 4 October 2021.

<sup>61</sup> Interview with R at her home at Yogyakarta, on 8 august 2021.

<sup>62</sup> Interview with B at BIP on 8 September 2021.



“yes, we do it in India, because Indonesia doesn’t exist.”<sup>63</sup>

“we got good information in Thailand, that’s why we did it in Thailand. In Indonesia, there are no clinics or hospitals that have opened this program.”<sup>64</sup>

#### **4. Mental Health of Surrogacy Mothers**

“I regret after doing the surrogacy, maybe if it wasn’t for the money at the time I didn’t do it.”<sup>65</sup>

“yes, take the actions that I believe will benefit to others is a good thing, but I don’t want to do it again. I regret.”<sup>66</sup>

“I traumatized by this..”<sup>67</sup>

According to the statement above, many surrogacy perpetrators feel remorse, guilt, and trauma. This problem will almost certainly become serious for the state to establish legal certainty, particularly for the surrogate mother itself.

#### **5. The Practice of Surrogacy in Indonesia in The Health Sector**

For medical health aspect in Indonesia, there is no hospital or clinic that provides a surrogacy program, this is also confirmed by a doctor’s statement at one of the obstetrics clinics.

“for the surrogacy program in Indonesia, there are no specific regulations or rules so that in any clinic or hospital there is definitely no program in Indonesia, so if we you want to have children, it is recommended for IVF program or adopted children programs.”<sup>68</sup>

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<sup>63</sup> Interview with X at airplane on 4 October 2021.

<sup>64</sup> Interview with Melati at ciwalk on 12 agustust 2021.

<sup>65</sup> Interview with Melati at ciwalk on 12 august 2021.

<sup>66</sup> Interview with R at her home, Yogyakarta. On 8 august 2021.

<sup>67</sup> Interview with X at her home, Ciumbeleuit on 22 February 2022.

<sup>68</sup> Interview with dr. obgyn on her clinic, Pekanbaru on 7 April 2022.

We can conclude that medicines or other medical or health related facilities for the surrogacy program in Indonesia are not available.

## **B. THE ANALYSIS OF HUMAN RIGHTS LAW RELATED TO PRACTICES AND REGULATIONS REGARDING SURROGACY IN INDONESIA.**

Generalized human rights law gives the state three different sorts of commitments; the commitment to uphold, the commitment to safeguard, and the commitment to respect. This study was done solely to document the performance of one duty, namely the realization of the right to continue offspring. In order to ensure that the rights that are its obligation can be honored to the fullest extent possible, the state is required to take legislative, administrative, judicial, and practical policy measures.<sup>69</sup>

Indicator of fulfillment of the right continue offspring include the availability of administrative policies, judicial policies, and practical policies.

### **1. Human Rights Law in Indonesia Guaranteeing The Right to Family.**

The Constitution mandates the acknowledgment, respect and preservation of human rights in the conduct of social, national, and state life as a means of demonstrating respect for those right. One of these human rights is the one outlined :

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<sup>69</sup> Manfred Nowak, .... Op.Cit, p.48 , and Eko Riyadi, ... Op.Cit, P. 69

“Everyone has the right to establish a family and to have children through a valid marriage.”<sup>70</sup>

The right to family has been guaranteed in Law Number 39 of 1999 concerning Human Rights in Article 10 relating to continuing offspring. Marriage is intimately connected. Because, in order to be legally recognized by the state to form a definite family through marriage, regulated in Article 28B paragraph 1 of the constitution, which state that:

“Everyone has the right to form a family and continue offspring through a legal marriage.”

## **2. Human Rights Law in Indonesia Guaranteeing The Right Continue Offspring.**

In particular, the government’s obligation to preserve, advance, and uphold human rights is ensured by the requirements of Article 43 of the Human Rights Charter. The freedom of citizens to start a family and raise their offspring is likewise governed by the Human Rights Law, and is described in Article 10 as follows :

“Everyone has the right to form a family and continue their offspring through a legal marriage.”

The human rights law has various clauses that illustrate this dedication to upholding human rights, including the following :

### **Article 2**

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<sup>70</sup> Article 2 on Human Charter Attachment Tap MPR Number XVII/MPR/1998.

“The Republic of Indonesia acknowledges and respects the inherent and inseparable human rights and fundamental freedoms, which must be safeguarded, respected, and upheld in order to further human dignity, welfare, happiness, intelligence, and justice.”

#### Article 5

“Everyone is recognized as an individual who has the rights demand an obtain equal treatment and protection in accordance with their human dignity before the law.”

#### Article 8

Protection, promotion, enforcement and fulfillment of human rights humans are primarily the responsibility of the government.

As a result, the ability to procreate and start a family is a human right that is protected by national law. The state has responsibility to respect, safeguard, and uphold these rights for each and every individual, knowing that it exists.

Through this research, we will analyze the practice of applying the various regulations above related to cases of surrogacy in Indonesia regarding the right to continue offspring. It can be said that the lack of state supervision and enforcement led to various kinds of conflicts in this case before the existence of clear rules and after the rules.

### **3. Regulation of Surrogation Based on Positive Law in Indonesia**

#### **3.a The Importance of Children in a Marriage**

“ I carried out surrogacy and involved my own younger sibling as surrogate mother, children are important thing in our family it’s okay to adopt but my husband and I do surrogacy because we want to have children from both of us.”<sup>71</sup>

In a family, children represent hope. The presence of a child determines whether a home is happy or not. Because they don’t have children, there are numerous instances where the husband remarries or the wife searches of a substitute husband. According to Article 4 of Law Number 1 of 1974 Concerning Marriage (hereafter referred to Marriage Law) a husband may be allowed to accept more than one wife if the wife is unable to conceive a child.

Based on fieldwork investigation against a caught person, the relevant law where this rule is issued by the state has essentially created a system that explains the IVF program, but some people try to create new paths with the same aim, so that what they desire is accomplished and this makes the existing regulations not a public reference.

### **3.b Legal Requirement Based on Article 1320 Civil Code of Indonesia and Practice Surrogacy in Indonesia**

According to article 1320 Civil Code of Indonesia, “agreement is an act by which one person binds himself to one or more persons.” An

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<sup>71</sup> Interview with Melati at ciwalk on 12 august 2021.

agreement can be said to be valid if it has fulfilled the legal requirements of the agreement contained in Article 1320 BW which consist of : (i) agreed, (ii) competent, (iii) a certain matter, and (iv) a halal cause.

In order to legally perform a surrogate mother, the parties must meet both the subjective and objective requirements in the provisions of Article 1320 Civil Code of Indonesia. The terms of agreement and competence can be fulfilled if the agreement has been agreed by the parties who are capable according to law, where the parties are not immature and under guardianship. Another issue related to the validity of the surrogate mother is regarding the objective requirements in the form of halal objects and causes.

An object of agreement can be determined from the type of achievement to be performed. Article 1234 Civil Code of Indonesia determines the various achievements in an engagement, namely to give something, to do something, or not to do something. In other words, the form of an achievements can be in the form of goods or services. Based on the understanding of the surrogate mother, the achievements given are in the form of services for conceiving, giving birth, and then handing over the baby to biological parents. The objects of this agreement is in the form of services.

In this case, the use of the word rental womb as a translation of surrogate mother is not appropriate. If we look at the construction of the agreement, the surrogate mother has nothing to do with the lease agreement. Article 1548 Civil Code of Indonesia concerning the lease agreement explains that:

“lease is an agreement, whereby one party binds himself to give the other party the enjoyment of an item, for a certain period of time and with the payment of a price, which the payment of a price, the party is later agreed to pay.”

**Table 3.1**  
**Comparison between lease agreement and surrogate mother**

	Lease agreement	Surrogate mother
Daluwarsa	According to contract	x
Type of achievement	Giving something	Do something
Control	Tenant/lessee	x
Burden	Hypothetical	x
Submission	Directly	x
Object	House	Service



In terminology, the word “surrogate” when translated in to Indonesian can mean representative; replacement; or guardian.<sup>72</sup> Therefore, a surrogate mother is more accurately said to be a surrogate mother service agreement.

Another polemic related to a surrogate mothers is regarding the halal cause. Causa as something that is the goal of the parties.<sup>73</sup> If causa is defined as the purpose of an agreement, then the purpose of a surrogate mother is to produce offspring. Article 1337 Civil Code of Indonesia states that a cause is prohibited if it conflicts with the law, decency and public order.

Based on the legalization of surrogacy in various nation, they voiced the opinion that intended parent embryos were placed in the surrogate mother’s womb after intended parent eggs and sperm were used to create the baby. An adopted child’s relationship with a surrogate mother during the process of development leading up to the baby’s birth has ended. Due to the fact that adopted children are not biological children, they do not have the right to inherit or be inherited. The implication of this viewpoint is that children born

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<sup>72</sup> John M. Echols, et,al. *Kamus Inggris Indonesia*, Gramedia Pustaka Utama, Jakarta. P. 570-571.

<sup>73</sup> Saim H.S., *Hukum Kontrak : Teori dan Teknik Penyusunan Kontrak*, Sinar Grafika, Jakarta, 2008, p.32-34.



through surrogacy have the same status as children who are adopted.<sup>74</sup>

However, according to Article 127 Paragraph (1) of Law 36 of 2009, it is associated with the objective conditions of agreement, namely; “ a cause that is not prohibited,”, where it is further explained on Article 1337 Civil Code of Indonesia that; “ a cause is prohibited by law or if contrary to morality and public order.” These two article are related because they explain the intentions and forms of causes that are not contradictory and are not prohibited by law and public order.<sup>75</sup> As a result of this explanation, the womb lease agreement in Indonesia is invalid or null and void.

### **C. SURROGACY ON ISLAMIC PRESPECTIVE**

Surrogacy is a type of artificial insemination. According to Islamic Law, artificial insemination is a contemporary issue of ijtihadiyah<sup>76</sup>. It is not explained in the Qur'an or al – Hadith, as in Surah An – Nahal verse 72 of the Qur'an.

"Allah has made for you wives of your own kind and has made for you from your wives children and grandchildren and has provided you with good things. So why do they believe in falsehood and deny Allah's favor?"

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<sup>74</sup> Thamrin, H. (2014). *Aspek Hukum Bayi Tabung dan Sewa Rahim (Perspektif Hukum Perdata dan Hukum Islam)*. Yogyakarta: Aswaja Pressindo. P.55-56.

<sup>75</sup> Sanjaya A.W. (2016) Aspek Hukum Sewa Rahim (Surrogate Mother) dalam Perspektif Hukum Perdata dan Hukum Pidana. *Rechtens Law Review* 5(2). 36-67. P.39-41.

<sup>76</sup> Desriza Ratman, *Surrogate Mother in Ethics and Legal Perspective: Is it OK to Rent a Womb in Indonesia?*, (Jakarta: PT Elex Media Komputindo, 2012) p. 2

We can conclude from the verse above that the answer to the rental of the womb has not been found specifically in the Qur'an or al-Hadith. As a result, contemporary scholars are attempting to ijtihad to solve this problem from various perspectives. All Muslim scholars and scholars agree that artificial insemination is permissible as long as the processed sperm and ovum come from husband (AIH) marriage bond<sup>77</sup>, and the embryo is implanted in the wife's womb.

Renting a uterus is illegal in the following ways :

1. According to the decision of the second ijtima ulama fatwa commission in Indonesia in 2006, the transfer of the embryo to the womb of the legal custodian as :

- i. Transfer of artificial insemination embryos between the husband's sperm and the wife's ovum are not allowed to be placed in another woman's womb (haram).
- ii. It is illegitimate to transfer embryos resulting from artificial insemination between the husband's sperm and the wife's ovum placed in another woman's uterus because the husband and/or wife do not want pregnancy.

iii. According to the Prophet Muhammad's words narrated by Imam Daud, children born from the forbidden results in points 1 and 2 above are children of the mother who gave birth to them :

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<sup>77</sup> Salim HS, Op.Cit, P.32-34

“ it is not permissible for a person who believes in Allah and the last day to pour his sperm into the womb of another person.” ( H.R Abu Daud).

2. As stated by Mutamar Tarjih Muhammadiyah in 1980. It is not justified under Islamic law because, as the Prophet SAW planting seeds in another woman's womb is unlawful: likewise, it is prohibited because (1) such fertilization is a crime that degrades human dignity and (2) destroys the legal system that has been established in people's lives.

“it is not permissible for a person who believes in Allah and the hereafter to pour water on the fields of others.” (H.R Abu Dawud)

Likewise, it is forbidden because (1) such fertilization is a crime that degrades human dignity, and (2) it destroys the legal system that has been fostered in people's lives.<sup>78</sup>

3. the outcomes of the OIC III Islamic Fiqh Institute meeting in Jordan in 1986. Decided that renting the womb was illegal and absolutely forbidden for him because it would result in lineage mixing, loss of motherhood, and other syar'i obstacles. Similarly, for those who are polygamous, it is not justified to leave it in the womb of a second, third, and so on.

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<sup>78</sup> Imam Bajuri, “Penitipan Pra Embrio Pada Rahim Wanita Lain (Sewa Rahim) Menurut Hukum Islam”, (Ponorogo; Jurnal Hukum Dan Ekonomi Islam, ISID, 2011), p. 268-269.

4. Sukorejo Situbundo National Conference of Alim Ulama (NU)

Opinion in 1983. Renting out a womb to a husband and wife who are fertile and healthy enough to want a child is both illegal and unethical. However, the wife's womb is not yet ready to bear a child.

In addition to the hadith mentioned above, the scholars at the National Conference are based on the following hadith of the prophet

Muhammad SAW :

“There is no greater sin after shirk, it is compared to someone who puts his sperm in the womb of a woman, which is not unlawful for him.” Allah messenger said. ( H.R Bukhari and Muslim)

If such a case exists, the Munas participant believe that, according to Imam Ibn Hajar, guardianship and hadlanah cannot be attributed to the owner of sperm because entry is not muhtaram. According to Imam Ramli, sperm is muhtaram only when it comes out, even though it becomes dishonorable when it enters into someone else's vagina.

## **CHAPTER IV**

### **CLOSING**

#### **A. Conclusion**

Based on the description of the analysis and previous discussion, the following conclusion can be drawn :

1. Judicially, Article 10 paragraph 1 of law no.39 of 1999 concerning Human Rights, and article 127 paragraph 1 of Law No.36 of 2009. Guarantee of rights, the role of the government here for surrogacy cases which have been many in Indonesian society, especially in the area of the island of Java, is considered important for the state's obligations in fulfilling, protecting, respecting. The system formed by various surrogacy in the national realm has not been implemented optimally, likely to result in many flaws in two aspects, namely :

- a. Surrogacy cases do not have strong Legal Protections

The method of fertilization sperm and ovum from a lawful husband and wife implanted in the wife's womb from which the ovum originates is permitted by Indonesian law through the health law.

This is referred to as the IVF method. It is against the law to use methods or efforts to get pregnant that are not regulated in article 127 of the Health Law, including surrogate mothers. Of course, the emphasis here is on surrogacy cases that have not been carried out,

and if they have been carried out, how can there be no one who can guarantee the surrogate mother's health and surrogacy as alternative way to get offspring. In this case, the government's involvement is being considered because not all citizens are aware of the surrogacy issue, the government will not intervene because the state's obligation to respect it not to intrude on citizens privacy.

b. Surrogacy has a lack of consensus.

According to article 1338 of Civil Code. It is indeed regulated regarding freedom of contract, where the parties to the contract are free to make agreements, whatever the content and whatever from. However, the principle the contract freedom may not be used to violate the legal terms of the agreement outlined in article 1320 of the Civil Code. One of conditions for an agreement's validity is that has a lawful causes , that is, it does not violate law, decency, or public order. Meanwhile, surrogate motherhood is not a conceiving effort that "can be done" according to article 127 of the Health Law, including surrogate motherhood, which is illegal. As a result, the conditions for a lawful cause are not met. In practice, this legal cause is frequently ignored, and there are many agreements with the reason that doing so serves a greater purpose than considering what has been meaning of lawful cause. So that the government feels more aware of the situation and can carry out monitoring and coordination.

2. In the Perspective of Human Rights, this violates human rights, as seen from the surrogate mothers perspective, where human rights are violated, namely in Article 28B paragraph (1) where “everyone has right to build a family and continue offspring through a legal marriage.” The practice of surrogacy certainly violates the surrogate mother’s right to continue her offspring through a legal marriage. From the child’s perspective, this act of surrogacy clearly violates the child’s rights as stated in Article 56 paragraph (1) of the Human Rights Law, which states that the child has the right to know his biological parents and receive attention from his own biological parents. Furthermore, the child’s rights were violated specifically on Article 27 of the 2002 Child Protection Law, as amended to become the 2014 Child Protection Law, states that child’s right to an identity will be included in his birth certificate. Surrogacy is still a topic of discussion in people’s lives; there are many points of view on the pros and cons of this practice, so the government must pay attention to it. Due to lack of legal products that regulate surrogacy, there is a void in the terms in their position. In the Indonesian legal order. As a result, further investigation is required to determine whether (legally or illegally) this surrogacy method is used in Indonesia. Aside from that, it is also necessary to consider all fields, including the medical field, the field of human rights; surrogate mother’s rights, children inheritance rights, child’s rights, and so on, the field of socioeconomic aspects, and the field of law



when making a decision, so that no party is harmed if this practice is carried out.

## **B. Recommendation**

The suggestions that the author can give relating to the title of this research are as follows :

- i) Surrogacy regulations in Indonesia are required because many people have used surrogacy and the guarantee of the rights for surrogate mothers and perpetrators of surrogacy is still unclear. As a result, rules must be established so that those who engage in surrogacy understand the Implications and consequences of their actions, as well as what must be done to protect the rights of both parties.
- ii) Civilian, especially married couples who want to have children, should be in a good way or in accordance with the teaching of Islam, so that there are no legal errors from the children that are obtained by married couples. And medical parties should give advice to husbands and wives who want to have children, even though the child is very much needed in the family because the child is a complement to a married couple by means of a surrogate mother, it is not justified in Islamic teachings.



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## ATTACHMENT



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No. : 371/Perpus/20/H/XI/2022

*Bismillaahirrahmaanirrahaim*

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OF SURROGACY IN INDONESIA

Karya ilmiah yang bersangkutan di atas telah melalui proses uji deteksi plagiasi dengan hasil 14.%

Demikian surat keterangan ini dibuat agar dapat dipergunakan sebagaimana mestinya.

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