

## **SURROGATE MOTHER DEVELOPMENT IN PERSPECTIVE OF LAW AND GLOBALIZATION**

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The development of science and technology hereinafter called science and technology cannot be avoided by humans, because science and technology as a means of modernization that continues to grow and cannot be avoided by anyone both nationally and International. The development of science and technology (IPTEK) is currently growing In the field of health and medicine is the Surrogate Mother (Mother Substitute / Rental). The presence of Mother Surrogate in society nationally and internationally raises a very important problem as part of the era of globalization in the field of medicine. Some implementation of surrogate mother agreement has been done for the parties according to the provisions of the applicable regulations, but in fact not all can be accepted by society in religious law, national and international. The Mother Surrogate Agreement has been committed as part of Science and Technology but has also had an impact on the economic and legal consequences of the child's separation from mother and childbirth, causing a different problem of settlement of each State.

### **A. BACKGROUND**

The development of science and technology (Science and Technology) is increasingly increasing. The sophistication of technology in the field of science produced by human is the gift of Allah S.W.T., to be grateful, because humans are given a mind that should be used as possible and as much as possible with the intention of worship, in accordance with the needs and the rapid development of the age.

One of the developments that is currently developing is the advancement in the field of health, especially in medical technology that helps couples to get descendants with rocks of medical technology. The sophistication of medical technology is very helpful couples who want to have children with the help of technology and some countries already provide facilities Hospital or clinic that will help couples who want to have offspring.

One of the countries providing facilities to obtain offspring is the Akansha Clinic in India by providing Surrogate Mother facility (Rental Rewards). The growing uterine custody in the community is not supported by official regulation of the Government, and its execution is mostly done by agreement of the parties who will enter into a welfare rental agreement. Only a few countries such as India The government permits Renting of the Womb with reasons to help the economy of its citizens.

One of the countries forbidding to rent a uterus is Thailand, because Thai citizens have a Reward Covenant with Australia and are more detrimental to Thai

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citizens when a child is born out of proportion to expectations of inadequate conditions. The development of science and technology hereinafter called science and technology cannot be avoided by humans, because science and technology as a means of modernization that continues to grow and cannot be avoided by anyone both nationally and internationally. The development of science and technology is an era of globalization that is very helpful to human in determining all activities that cannot be denied as a gift of God S.W.T., to humans who have been given a mind.

Al-quran Surat Thaaha verse 114 that:

“And Say: O my Lord, Add to me the Sciences of Knowledge”.

Q.S. Az-Zumar verse 9:

“Verily, the one who receiveth can receive Lesson.”

Al-Quran Surah Al-Mujaadilah verse 11:

“O ye who believe! If ye are spoken unto thee in the assembly, then lay it down, Allah will give the field to you, and if it be said” Stand ye, “then stand, Allah will exalt the believers amongst you and People who are given science a few degrees. And Allah knows what you do “.

Based on the above paragraph clearly can be understood that human beings are given a high degree by Allah SWT. When it has science, and science is given to humans with minds that are constantly used for the benefit, by developing the mind which is the Gift of Allah S.W.T.

In connection with the development of science and technology and according to the development of society it cannot be released the era of globalization with the applicable law that will regulate human beings to achieve the objectives of law and the creation of justice, peace and legal certainty that regulate the association of human life in society.

One of the development of science and technology (IPTEK) which is currently developing is in the field of Health and medicine is the Surrogate Mother (Mother Substitute / Rental). The development of science Knowledge and technology is getting better and very rapid progress. This is because humans are always innovating to produce a better work in developing science according to the field of science owned and occupied so useful.

The development of science and technology is also very beneficial for the medical world one of the success of the development of science and technology is medical technology. The presence of Mother Surrogate in the society nationally and internationally raises a very important problem as part of the globalization era in the field of medicine. Surrogate Mother currently still cause problems that cannot be overcome well in various countries because of the lack of legal certainty that can be explicitly used as the basis for consideration to be implemented.

Surrogate Mother is very helpful to married couples who have longed descendants for the successor will come, surrogate mother is needed to overcome the wishes of married couples who crave children in marriage, and the sophistication of medical technology can help realize the couple in the doctor's diagnosis that his wife can not Childbirth and / or condition of husband cannot give her offspring, or other with many considerations in terms of health of husband and wife.

Surrogate mother if done should be with good and right consideration, according to religious law, ethics, norms, and legal provisions in force in society. Several executions of the mother's commitments have been made to the parties in accordance with the provisions of the applicable regulations, but in fact not all can be accepted by society in religious law, national and international. The Mother Surrogate Agreement has been committed as part of Science and Technology but has also affected the economic and legal consequences of the child's separation from mother and childbirth.

Some countries that have been conducting Surrogate Mother openly are India, Thailand and America. India is one of the most committed States of the Surrogate Mother Agreement where the outcome of the treaty is responded nationally and internationally positively and negatively by the world community.

The development of science and technology is also very beneficial for the medical world one of the success of the development of science and technology is medical technology related to medical service provided to patients who want to get offspring by way of new discovery and raises new problems in the field of health law and Medical law.

The development of medical technology on the handling of reproduction in humans begins with the discovery of one of the sperm cells and egg cells (ovum) called donor gametes. Gametes, material genetic material consisting of sperm cells or eggs/ovum cells thus distinguished donors of sperm cells and ovum cells.<sup>1</sup>

The finding of storage of sperm cells and egg cells (gametes) gives way and opportunity for married couples to obtain offspring by way of invention of in vitro fertilization is often called surrogate mother (Rent womb). One of the countries that openly practice the rental of the womb (Surrogate mother) is India. In India there is a very famous clinic and openly opened Surrogate Mother clinic with one reason to help the economy, where the substitute mother is made from the poor and the poor and uneducated, where they are interested and signed the contract without understanding the contents.

A clinic in India that helps couples who want to have offspring is the Infertility Clinic Akansha is very famous throughout the world. People call it "Baby Factory", because there is a baby tube program that rent surrogate mother (surrogate mother). And it is the poverty that makes the Indian woman willing to do anything to survive and finance her family including renting the womb.

The Akansha Clinic prepares 500 women who are ready to rent their uterus to accommodate the results of sperm and egg cell fertilization for couples who crave children. After childbirth, the woman's task is completed, she has no right over the baby, and even though she has been 9 months 10 days she resides in her life.<sup>2</sup>The regulation of the surrogate mother itself was validated in India in 2002, aged 21-35 years, and once giving birth in her life. Until now this policy is still reaping controversy, such as surrogate mother must be severe must be separated from the baby they contain, even though the baby tube from the original parents.

These surrogate mothers are recruited by contracting systems, staying in the clinic during pregnancy, and they must be willing to distance themselves from their families and leave their husbands and children during this work. The Akansha Clinic is managed by Nayna Patel, a renowned fertility specialist doctor. His name stuck out to the public after successfully helping a British woman become a surrogate mother, because her daughter could not conceive.

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For the surrogate mother is paid about US \$ 7,000 or Rp.78juta. Jika twin fetus, it will get an additional US \$ 1,500 to US \$ 2,000 or about Rp.17 - 22 Juta.<sup>3</sup>

In connection with the example of the case, the Surrogate mother is the new science in the world of medical science because of the sophistication of technology in medicine in the field of human reproduction as one form of procreation / reproduction to obtain offspring for married couples to get children.

The existence of this womb rental is one part of the modernization of globalization in the field of health and medicine that cause controversy where the rental of this uterus raises different opinions in various countries for both experts and *ulama* leaders and religious leaders including in Indonesia. Good intentions should always consider and pay attention to the applicable law, so bring goodness - goodness and benefit the world and the hereafter with still pay attention relation with the God (*hablumminalloh*) and relation with human being (*hablumminannas*).

In relation to the above, the author is interested in writing a paper entitled: "Development of Surrogate Mother in Law and Globalization Perspective",

## **B. PROBLEM IDENTIFICATION**

The subject matter of the author of the paper is:

1. What is the development of surrogate mother in legal perspective and globalization?
2. What legal consequences arise from the surrogate mother agreement for the parties?

## **C. PURPOSE OF WRITING**

The purpose of writing a paper is as follows:

1. To examine and analyze the development of surrogate mother in legal perspectives and globalization;
2. To review and analyze the legal consequences arising from the surrogate mother's agreement to the parties.

## **D. WRITING PURPOSES**

The usefulness of the paper writing is as follows:

1. Theoretical Uses.  
The theoretical usefulness of writing this paper is for the development of science and technology especially in relation to Medical Law, Health Law, Child and Women Protection Law, Law and Globalization and the Law of Contract.
2. Practical Usefulness.  
Practical usefulness of the writing of this paper are:  
To provide input, consideration advice for the Community, Government and all parties wishing to implement the surrogate mother as a useful consideration.

## **E. FRAMEWORK FOR THINKING**

The Qur'an Surah Al-Hujuraat: verse 13 specifies that:

"O mankind, we created you from men and a woman and made you nation and tribe so that you may know one another. Verily the most honorable among you by Allah is the one who is most devoted to you. Allah is the Knower, the Knower".

Based on that verse many meanings that can be taken that from knowing each other will arise ties of relationship and introduction that is very useful and can be enhanced with marriage braid. Marriage is an obligation required in Islamic Law to continue the offspring as the next generation for families and mankind on earth for the mature and capable.

Article 1 of Law Number 1 Year 1974 on Marriage determines: Marriage is the inner birth bond between a man and a woman as a spouse with the aim of forming a happy, everlasting family or household based on the One Supreme Godhead.

Couples who have done marriage expect the child as a successor to his family and as amanah Allah S.W.T. Which must be maintained and protected. Understanding the child according to Article 1 paragraph (1) Law Number 35 Year 2014 on Child Protection that: Child is a person who has not attain the aged 18 (eighteen) years, including children who are still in the womb.

Article 1 paragraph (3) of Law Number 35 Year 2014 on Child Protection that: Family is the smallest unit in society consisting of husband and wife, or husband and wife and child or father and child, or mother and child, or family of blood in line Straight up or down to third degree.

Based on the above provisions of the couple who have done Marriage would expect the offspring or children in the family. Relating between Marriages in one family with a Child is a dream for every human being who has made a marriage and as a binder of the couple husband and wife. But not all married couples have a child or more than one child in marriage. This is the thought of health and medical law experts who examine more deeply in the field of science to study and analyze and use his mind as a gift of Almighty God, to examine more in science, especially in the field of health and medicine supported by technological sophistication.

Science and technology continues to evolve with human needs and the times that are often called modernization and globalization.

In essence, the notion of modernization includes a total transformation of traditional or pre-modern coexistence in the sense of technology and social organization to modern society. The process of modernization is not only present in developing countries, but also in developed countries, such as European countries.<sup>4</sup>

Modernization is increasingly influential in the world nationally and internationally, modernization and globalization is an incessant progress in human life. Since the last few decades, globalization as a process has accelerated. Therefore, it is conditioned to relate and build relationships with one another. Such circumstances suggest that the relation between the powers of the nation in the world will greatly color social, economic, law and law enforcement. In addition to the rapid flow of goods and services, there is also a rapid flow of information flowing so fast from one hemisphere to another hemisphere. The information dissemination and receiver is developing so rapidly with its easy use that it helps to accelerate the spread to remote areas. This in turn leads to very serious problems, such as the emergence of new values contrary to old values so that their own implications for people's lives.

Such a condition, takes place in all aspects of life, whether economic, social, cultural, political, or legal. In this context, this paper is considered important as a discourse in the development of law (and its enforcement). Simply because in addition to being influenced by globalization, Indonesia as part of the international community is also experiencing globalization.<sup>5</sup>

Modernization and Globalization also affect the development of Science and Technology related to Medicine and Health which is currently developing is Surrogate Mother.

Surrogate Mother is an agreement between a woman who bounds herself through an agreement with another party (husband and wife) to become pregnant with the result of conception of the spouses who is implanted into her womb, and after delivery is required to deliver the baby to the husband and wife under the agreement Made (gestational agreement).<sup>6</sup>

Surrogate Mother conducted by the parties related to the law in the society both nationally and internationally. Surrogate mother is done according to the rules and rules as a solution to get the offspring with the help of science and technology in the field of medicine and technology. To conduct surrogate mother is inseparable from law that will bind the parties to arrange and force the parties to obey them.

According to Mochtar Kusumaatmadja that: If we mean in the broad meaning then the law is not only the whole principles and rules that govern human life in society but also includes institutions (institutions) and processes (processes) that manifest The enactment of those rules in reality. In other words, a normative approach solely about the law is not enough if we want to do legal counseling thoroughly.<sup>7</sup>

Thus it can be said that, if it will perform any activity in human life in society, it is necessary that the law will regulate in society nationally and internationally, as a normative rule which must be obeyed and implemented according to the agreement and according to positive law which will bind the parties to guarantee Legal protection and legal certainty.

The provisions governing the implementation of surrogate mother are mostly done by the parties with agreements and agreements that are adjusted to the intentions of the parties, as not all countries have official rules that allow surrogate mother who is still pro and cons.

## **F. METHODS**

To facilitate the writing of this paper, the authors use the method of writing to facilitate the preparation of scientific work tailored to the existing writing in this paper. The method of writing is the procedure or how to acquire correct knowledge or truth through the steps systematically.

Normative legal research is one of the most widely conducted research by students, both undergraduate students, S2 and S3 students. This is because the

research is just enough done in the workplace, without bothering to dig the data coming from the community. The term normative legal research comes from English, namely normative legal research, in Dutch called *normatieve juridischonderzoek*, while in German called *normative juristischerecherche*.<sup>8</sup>

The stages of Writing as follows:

#### 1. Writing Method

Writing method used in this panelizing is the method of writing normative law is a writing that seeks to examine the application of positive law within the community and protected by law. Besides, the writing also uses the method of *pencanempiris* (sociologist) is to know the extent of effective legislation applicable in the community. Thus, it can be said that normative legal writing method is used to know various laws and regulations that regulate the implementation of health services, especially for the parties who will do Surrogate Mother Agreement. The method of writing empirical or sociological law is to know the opinions of the parties relating to surrogate mother and field data only as input and complementary information data about the validity of health services for the parties who will do surrogate mother.

#### 2. Nature of Writing

While the nature of writing is juridical normative and sociological juridical with the type of research and legal writing that takes the data library and field. The writer of normative juridical is the writing of library law especially the secondary data while the writing of juridical sociology is writing that is complementary and as input especially primary data.

#### 3. Data Collection Techniques

Sociological juridical writing is a method of juridical writing using primary data by collecting data related to the writing of papers;

Normative juridical research using secondary data are:

- a) Primary legal material is a binding library that covers the laws and regulations of the 1945 Constitution, Law Number 36 Year 2009 on Health, Law No. 39 of 1999 on Human Rights, Law. Number 1 Year 1974 about Marriage, Act. Number 35 Year 2014 on Child Protection and Civil Code
- b) Secondary law materials that provide explanations about primary legal materials in the form of scientific writings in the field of Law, health, and children and human rights, the results of research and papers related to health services, searches on line, and so forth.
- c) Tertiary legal material that is the legal material that provides guidance and explanation of primary and secondary legal material for example is a dictionary of law and Indonesian dictionary.



4. Data Analysis

Data analysis method used is qualitative method that is secondary data, primary data collected through literature study

**G. MOTHER SURROGATE LOGGING IN LEGAL PERSPECTIVE AND GLOBALIZATION**

1. Definition of Law

The Law in English is called “Law”, in French called “droit”, in Dutch called “recht”, in German called “recht” and in Arabic it is called “syari’ah”<sup>9</sup>

The notions of law vary from scholars and jurists. Every law scholar or lawyers provide different definitions of the law in accordance with the views and opinions of lawyers and law scholars in expressing their opinions.

Some opinions on the Law as follows:

a) Mochtar KusumaAtmadja put forward as follows:

If we interpret in a broad sense then the law is not only the whole principles and rules that govern human life in society but also includes institutions and processes that embody the rule reality. In other words, a normative approach solely about the law is not enough if we want to do legal counseling thoroughly.<sup>10</sup>

b) The Law According to Utrecht that: Law is the set of living instructions (commandments and prohibitions) that govern the order in a society and therefore should be obeyed by the members of the society concerned; Therefore violation of such directions may result in action by the Government or the public authorities.<sup>11</sup>

c) Wirjono Prodjodikoro states that: Law is a set of rules regarding the behavior of people as members of a society.<sup>12</sup>

d) Immanuel Kant about 200 years ago put forward: “NochSuchen die JuristenEine Definition ZuIhrem Begriffe von Recht: (Still law scholars are looking for a definition of law)and field analyzed qualitatively then sorted and made in scientific writing form.<sup>13</sup>

Under these provisions it is understandable that until now there is still a precise definition of the law, based on the fact that every jurist and law scholar has different opinions about the law. Legal experts and law scholars seek a legal restriction in accordance with the reality of society.

Law is needed in the interaction of human life nationally and internationally. The law regulates the rules, norms, standards, rules and customs that bind the people to obey them so as to create justice and legal certainty, thereby protecting the law of rights and duties as expected.

For the national interest of Indonesia as a State the law has the purpose of the State as stated in the Preamble to the Constitution 45 paragraph 4 that: Furthermore, to form a Government of Indonesia that protects the whole Indonesian nation and the entire blood of Indonesia and to promote the general welfare, educate the life of the nation, and Participate in implementing the order of the world based on independence, eternal peace and social justice, then the Indonesian National Independence was composed in an Indonesian State Constitution, which is formed in a composition of the Republic of Indonesia sovereign people by virtue of the Supreme Godhead, the Humanity Fair and civilized, Indonesian Unity and Democracy led by Wisdom Hikmat in the Consultative/Representative, and by realizing a social justice for all Indonesian people.

While Article 1 Sub-Article 3 of Amendment of the 1945 Constitution provides that: The State of Indonesia is a State of Law. Thus it is clearly understood that Indonesia respects human rights and has legal provisions governing the intercourse of human life in society, and may be subject to sanctions in violation of it.

In connection with the development of science and technology, especially the development of modern globalization and its relation to the law is very important. Globalization requires laws to ensure certainty in the activities and development of science and technology which progressively progresses, the law is needed to protect the national and international society in the development of science and technology in the development of modern globalization, so that legal protection and legal certainty in the development of globalization and law can be aligned and awake Well in human society in national and international society.

The law exists in every society everywhere in the world. A primitive or modern society must have laws. Therefore, the existence (ecosystem) of the law is universal. The law cannot be separated from society. Both have three major roles in society, first as a means of social control. Second as a means to facilitate the process of social interaction. Third as a means to create certain circumstances.<sup>14</sup>

## 2. Globalization and Forms of Reproductive Procreation

Basically everyone has the autonomy to regulate his own life and the state is responsible for making legal provisions which, regulating each of its citizens so as not to interfere with each other and hurt others, so that the rights and obligations of each can be implemented according to his needs.

In relation to reproductive procreation it is essential to take into account the ethical values living in the community so that it is restricted and does not violate the provisions of the religious law and the applicable rules on which the citizens are situated.

The advancement of science and technology of medical science especially in human reproduction has grown rapidly, and helps couples who crave the descent of marriage to realize the desire by trying and trying to find the solution as much as possible in overcoming all the wishes and hopes.

There are several ways related to reproductive procreation:<sup>15</sup>

i) Procreation and Infertility aids.

Procreation (procreastie, vootplanting) the continuation of human existence by making offspring (human reproduction). Procreation can be attributed to The Right on Self determination and human autonomy to self-regulation; In this case decides / regulates itself about making offspring. Those who are infertile are not able to procreate and want the help of the biomedical world to gain the possibility of procreation.

ii) Re-fertilization.

Medical Science, in many cases in fertilization, is capable of operatively re-functioning human organs related to procreation and this is called re-fertilization. Re-fertilization or IVF and IEC? KID only in one case cannot help a woman to get a child, is in this case uterine damage (Uterus Defect). And this case is only helped with surrogate mother (surrogate mother);

iii) In Vitro Fertilization and Embryo Transfers

With IVF-ET meant a fertilization in a woman, outside of the body concerned with a woman's sperm, where the female's egg has been removed from it through an action / medical operation and an embryo that occurs in a tube and then in the womb.

Embryo from IVF before being implanted in the mother's constituency by Leenen referred to as pre-embryo;

iv) Donor Embryo

Embryo donation can be done in two ways:

- a) First through IVF;
- b) Both Lavage;

Lavage, the taking of an embryo of natural conception (maternal intercourse) of the mother's womb and then incarcerated in the womb of another woman who wants to give birth (embryo donor recipients) .This Lavage way in various countries is not acceptable;

v) KIE and KID

KIE and KID stands for the origin of the Dutch word of Kunstmatige Insemination Echgenoot (husband) and Kunstmatige Insemination Donor. In Bahasa Indonesia it may be a Handmade Insemination (IBS) and Donor-Made Insemination (IBD).KIE is similar to IBS with husband's sperm and KID is similar to IBD with other male sperm;

vi) DonorGametes

Gametes, genetic material / material consisting of sperm cells or ovum / egg cells and thus can be distinguished in donor sperm cells and egg / ovum donors.

## vii) Mother Substitute (Surrogate Mother)

A surrogate mother, a woman who bounds herself through an agreement with another party (usually a husband and wife) to become pregnant and after giving birth to that other child under the agreement. In addition to those other husbands and wives, it may be that women and men who live together without marriage or same-sex couples or single people live alone, and this situation in every country has different legal provisions;

## viii) Ectogenesis

Ectogenesis enlarge (develop) embryos outside the womb. It is still like a dream but paying attention to the speed in development and developing biomedical science then ectogenesis is not impossible;

## ix) Clones

Known two ways klonen:

1. First called CelKern transplantation or a nuclear transplant of a cell;

In this first way the core is taken from an egg that has not been fertilized and then replaced with a cell from a donor (female or male).

The cell will grow as if it were fetalized and there will be an individual with hereditary nature (erffelijke eigenschappen) similar to his donor cell.

Leenen calls this method of procreation asexual because it only passes the genetic trait of one person only, in contrast to the sexual procreation in which the genetic nature of two people is passed on.

2. The second is called Embryo Spitting or fetal solution;

In the second way (embryo splitting) can only be done on a pre-embryo still in a young stadium wherein then two identical individuals (or more than two individuals if more than one solution occurs);

Based on the above theory that the procreation of human reproduction can be done in various ways in accordance with the sophistication of science and medical technology that can be utilized by humans, so as not to cause problems then required clear rules for each country so that the legal certainty can be implemented properly.

## **H. CONSEQUENCES OF THE LAW OF THE MOTHER SURROGATE TREATY LAWS FOR PARTIES**

The development of medical science leaves a lot of big questions. Surrogate problems Mother and womb rental, for example, can be done to get offspring for couples who have been declared sterile at all or difficult to have children? Along with the invention of in-vitro fertilization, through the practice of surrogate mother, so often called, rife found in various countries and controversy in various countries

in the world, there are already have positive law and which have not have positive law.

According to medical science itself, called the rent of the womb is a woman who accommodates the conception of a husband and wife and is expected to give birth to a conception of children with inserting eggs and sperm cells to other women according to the agreement. Moreover, with the discovery of sperm preservation method, the frequency of its use is increasing in various countries in the world.

The existence of Medical Service for the implementation of surrogate mother raises the pros and cons in terms of various applicable Law Positives. Surrogate Mother conducted by the parties is done by agreement as well as the economic needs that do it. Seen from the Covenant itself is equally necessary and mutually beneficial, but when viewed from different angles the law has a different view from the experts. Implementation and the fact that there is in society about surrogate mother that raises the pros and cons.

The various perspectives of surrogate mother from the legal point are as follows:

A) Surrogate Mother from the Corner of Human Rights and Health Law

One of the objectives of the law is to create peace, order and tranquility of society and its coercive and governing nature. One of the problems in the field of bioethics in medicine (biomedical ethics) is in the field of medicine (biomedical ethics) is in the field of reproduction (pro creations) which in general every citizen has the right autonomy to regulate his own life as long as not contrary to the public interest, , Including in the case of state production.<sup>16</sup>

Article 10 paragraph (1) of Law No. 39 Year 1999 on Human Rights determines: 'Everyone has the right to form a family and to continue the offspring through legitimate marriage'.

While Article 72 of Law. Number 36 Year 2009 on Health That:

- 1) Living a healthy, secure, and free sexual and reproductive life and being free from coercion and / or violence with a legitimate partner;
- 2) Determining the life of production and freedom from discrimination, coercion and / or violence that respect the noble values that do not degrade human dignity in accordance with religious norms;
- 3) Determining by themselves when and how often to reproduce medically healthy and not contrary to religious norms;
- 4) Obtaining educational and counseling information about the correct and accountable health of reproduction.

While Article 127 of Law Number 36 Year 2009 provides that:

- (1) The effort of pregnancy outside the natural way can only be done by legitimate couple with the provisions of:

- a) The result of fertilization of sperm and ovum from the husband of the wife concerned is implanted in the womb of the wife from where the ovum originated;
  - b) Do by a health worker who has the expertise and authority to do so; and
  - c) At certain health care facilities;
- (2) Provisions concerning the requirements of pregnancy outside the natural means as referred to in paragraph (1) shall be regulated by a government regulation;

While Article 4 Permekes RI Number 73 of Minister of Health / Per / II / 1999 concerning Service Provision of Artificial Reproduction Technology specifies that: The service of artificial reproduction technology can only be given to married husband and wife as the final effort to obtain the offspring and based on an indication Medical.

Based on these provisions can be understood that such provisions are set well that the process allows for the globalization of science and technology in medical science in technology reproduces artificial allowed only for married couples who are bound by a legal marriage with the egg and sperm of the couple tied legitimate marriage One of them through the baby tube.

B) Surrogate Mother from the Civil Aspects Angle.

Surrogate Mother that occurred between the parties of the engagement and the agreement part of Book III of the Civil Code. The agreement of the parties that the case must meet the elements of Article 1320 of the Civil Code of Legal Terms Agreement, Article 1233 of the Civil Code, Article 1234, 1333, Article 1321 of the Civil Code, 1322.1328 and 1338 and other articles of the Civil Code relating to the Surrogate Agreement Mother.

If the record of the provisions of those Articles can clearly assessed that when they see the principle of the Law of Treaties, namely the principle consensualism, the principle of pacta sunt servanda, the principle of freedom of making contracts, and the fulfillment of Article 1320 and 1338 of the Civil Code the Agreement implementation Surrogate mother cannot be justified even though There is a treaty and binding on the parties making it and having legal consequences for the parties making it due to the rights and obligations of each Contracting Party; and the surrogate mother agreements do not meet kosher causa, because there is not a mother who take away their children who have been born to other parties.

According to the law a mother who gave birth and mothers bear children become legitimate, although initially there to become pregnant surrogate agreement egg cells and sperm cells of the parents genetics.

In reality there are some countries whose common law recognizes an agreement between a surrogate mother and a genetic parent. The contents of the Agreement may be:<sup>17</sup>

- (1) The willingness of surrogate mothers to receive artificial insemination;
- (2) The surrogacy of the surrogate mother receives the name to the child / baby to the genetic parent;
- (3) The willingness of surrogate mothers to deliver children / infants to genetic parents immediately after childbirth;
- (4) Substitute mother's willingness to fully assist in the completion of family law procedures related to the desired legal status and the change of surname of his child;
- (5) The availability of a surrogate mother for the duration of the pregnancy acts well on the fetus;
- (6) The willingness of genetic parents to receive a child / baby immediately after birth;
- (7) Genetic parents' willingness to pay for all expenses during pregnancy and the cost of birth;
- (8) The genetic cohesiveness of parents to provide money to surrogate mothers.

C) Surrogate Mother from the Ethics Corner.

When in a social condition, the Surrogate mother process should consider the norms prevailing in certain societies so that in order to maintain order, proper rules and standards of behavior reasonable and necessary, the preparation of moral views that consciously make it a norm Which applies and applies to a society for the good of the society itself known as the general norm (norm of decency, moral norms, and legal norms) and special norms (religious norms). Since surrogate mother is closely related to living creature and health, it will also be reviewed ethics based on human life in the field of health (bioethics / biomedical ethics)<sup>18</sup>

The implementation of Surrogate Mother should take into account the prevailing ethics in the community in which the surrogate mother will exercise the rights and obligations and take into account the applicable legal ethics whether written or unwritten.

D) Surrogate Mother in Islamic Law

The Word of God by the command of Allah Ta'ala to keep the genitals as in the Qur'an :,

والذين هم لفروجهم حافظون إلا على أزواجهم أو ما ملكت أيمانهم فإنهم غير ملومي"

"And those who guard his cock, except against their wives or slaves they have; Then verily they are not in this way blameworthy. "(Al-Mukminun: 5-6).

Religious norms are the norms that apply only to its adherents defined as rules or rules whose source is derived from the commandments of the Lord through His prophets and apostles, the bias of the teachings conveyed will be the way of life adherents.

Religious norms are regarded as one of the most powerful norms to be changed because they relate to the spiritual spirituality of human beings with their Creator. Here the author only tried to review about the surrogate mother's performances in

Indonesia is limited to the religion of the author, namely Islam. This is related because the author is afraid to misinterpret the terms or values of other religious beliefs.

In Islamic teachings known as the term Rukunimanyang contains 6 levels of belief in a believer belief. In the fate is known by the existence of two terms, namely Qadha and Qhadar<sup>19</sup>, Qhada is the provision of God which is still His secret, while the Qadar is the decree of Allah which has become the fact of the incident and between them there is still what is called Ikhtiar (effort). At this level of human endeavor can still work optimally to achieve the desired intent for not violate the creed and rules that have been determined Al-qur'an and Hadist (contemporary fikih). One endeavor for those descendants of interracial pairs is that of infant and surrogate mother, especially for surrogate mother, there is some emphasis regarding the ulama's decision:

- (1) Indonesian Council of Ulama / MUI (the result of fatwa commission dated June 13, 1979), the Board of Ulema of the Indonesian Ulama Council shall be as follows:
  - a) Baby tube with sperm and ovum of married couples are legally permissible (may) because this right includes endeavor based on religious principles.
  - b) The tube baby from a married couple with another wife's womb (for example from a second wife entrusted to the first wife) is haram based on the rules of Saddaz-zari'ah<sup>20</sup> because this will create a complicated problem in relation to inherited problems (especially between children Who was born with a mother who had an ovum and a pregnant mother then gave birth, and vice versa).
  - c) Baby tubes from sperm frozen from husbands who have passed away are forbidden under the rules of Saddzari'ah because this will create a complicated problem, both in relation to inheritance.
  - d) Baby tube sperm and ovum taken from the husband and wife beside the law is forbidden because it is the same status with the sex of inter type outside of legal marriage (adultery), and based on the rules of Saddzari' ah, which is to avoid the actual occurrence of adultery.
- (2) The International Islamic Center for Population Studies and Research, Cairo-Egypt, November 2000:
  - a) In Vitro Fertilization is allowed unless using sperm, ovum or embryo from a donor.
  - b) Pre-Implantation Genetic Diagnosis (PGD) is allowed for medical reasons, to avoid hereditary diseases.
  - c) Studies for follicular maturation, invitro oocyte maturation and invitro oocyte growth are allowed.



- d) Implantation of the embryo to a deceased husband has no fixed decision.
  - e) IVF in menopausal women is prohibited because it has a high risk to the health of mother and baby.
  - f) Uterine transplantation is still under consideration; Allowed to conduct research on animals.
  - g) The use of therapeutic cloning (stem cells) is still under dispute, requested to be approved.
  - h) Reproductive cloning or human duplication is not allowed.
- (3) Fatwa issued by MajelisMujamma'FiqihIslami: The following five cases are forbidden and forbidden altogether because they can result in mixing of nasab and the loss of parental rights and other cases that are shouted by the Shari'a:
- a) The sperm taken from the side of the man is given to the ovaries of the woman who is not his wife and then transplanted into the womb of his wife.
  - b) The ovaries are taken from the woman sperm taken from the side of a man who is not her husband and then grafted into the womb of the woman.
  - c) The sperm and the eggs are taken from a husband and wife, then transplanted into another woman's womb willing to contain their seeds.
  - d) The sperm and ovaries that are sugared from other men and women are then grafted into the wife's womb.
  - e) The sperm and ovaries are taken from a couple of husbands and wives, then transplanted into the womb of another wife.

So it can be inferred from some of the ulama's decisions in the world and Indonesian clerics, the not allowing surrogate mother practice in countries whose majority are Islamic:<sup>21</sup>

1. The existence of an element of adultery, in which the mixing of "male substance" (sperm in the form of zygote) into the genital (womb) of women who are not bound by legitimate husband-wife bonds.
2. The existence of mixing nasab (lineage) and inheritance of children born (including if surrogate woman is the second wife of biological father).
3. Degrading of the marwah and the glory of women to the value of a womb because in Islam, the uterus is the noblest organ because of it a woman can be considered noble.
4. The uterus is a part of the human body that should not be in the business of making a living, in contrast to the hands and feet that have naturally to make a living.

5. Will cause a problem of commotion / trouble between both parties when one of the parties violates the agreement.
6. Will cause excitement in the community, when the woman hired is a girl or a widow.

E) Based on Bioethics

Bioethics regardless of as a new science or a combination of several disciplines, it turns out its role is quite large in its function of bridging between science and humanity.

Especially in the field of medicine that is not always the technology that can be applied to a human or human beings, without mention of the sides of humanity (human being) as a noble creature so that the existence of human beings as autonomous beings can still be maintained. Technological advances with culture are so much different that this is where there arises a clash called “cultural clash” or “Shock Culture”, where the average level of thinking is very far behind compared to the thinking of scientists so that a gap arises in which the common people feel forced to follow the tech language always spoken by practitioners who are struggling with commercialization in the economic and trade sectors. This is where the role of bioethics / biomedical ethics plays a role (certainly ideally along with the law) acts as “The Guardians” against the sides of humanity.<sup>22</sup>

The practice of surrogate mother when reviewed based on the principles of bioethics put forward by Beauchamp and Childress, is as follows:<sup>23</sup>

1. Princip of Respect to Autonomy (principle of respect for the right of autonomy).

To say that man is an autonomous being so that he has an existential freedom to make decisions based on conscientious and mutual respect of conscience. In the case of surrogatemother, a medical tenada values the freedom or desire of a married couple to have children and resort to various means of using existing technological advances, but on the other hand, the medical officer should also assess to respect and appreciate the position of the surrogate woman and Will be a baby to be born so that it will occupy a position that is balanced with their respective autonomous rights in the eyes of the medical personnel.

2. Principle of Justice.

Here it is said that every person should ideally be undifferentiated to anything, whether it be gender, race, nation, religion, social status or anything so that everyone has equal rights and opportunities to be required equally responsibly, honestly And open to decision makers but should not be forgotten by the medical personnel is the basis of existing rules of law (law) that should not be violated.

3. Principle of Beneficence (Principles of Utilization).

Any action taken should really think of the benefits / benefits of the action of all factors and minimize the likelihood of losses to be suffered by the patient, but they should not merely take advantage of economic or technological factors without regard to humanitarian values. A human being so that these desires must be overcome and controlled by the ethical thinking of a medical worker, so it is clear if the practice of surrogate mother is not legally permitted, so do not be just for the sake of science experiment or hazard for pursuit of profit merely deviation intention of a person Medical personnel.

4. Principle of Non-Maleficence (Principles for No Disadvantage).

Any action against the decision taken, should really put the person to be taken the action is not harmed or incurred loss. So in the practice of this surrogate mother, although on the one hand the biological parent couple is benefited, then the medic should have to think far ahead, whether the action he took will not harm the surrogate woman and the baby to be born so that the decision he took has covered all Aspects and factors that will be faced.

So from the principles of bioethics, all problems can be decided as long as a human being can be respected his autonomous right as a human being with no discrimination and any respect regarded his decision by not harming anyone and in addition to the benefits of what he will decide. But also that should not be forgotten, do not break the law when there are rules that govern it. Because one of the functions of the law, said above, together with ethics (as the guardians) keeps the dignity of human beings intact as a human, human as the object of technological progress.

F) Surrogate Mother in International Law

The development of science and technology and the globalization of medical and health law in particular the surrogate mother which is more specifically identical to the rent of the uterus in each country still cause controversy, because not all countries allow surrogate mother.

This applies to the impact of technological progress which is not yet available legal umbrella to be a reference of its real implementation so that if the technology progress is in touch with humanity values, then this will cause adverse impact to the humanity's own values because not always every progress The technology is always profitable. This incident can be seen in the case of surrogate mother, although this is one form of solution to the problem of procreation, but whether it leads to justice to all parties involved including the results that want to produce it, that is a child.

But is it so easy to apply a medical technology to its application in society so that there is no obstacle in any form? It turns out that the average problem faced by the problem of the limitations of reproductive function is that the object of the technology is a living thing (human) is not limited to inanimate objects, but here the value of a human is not stopped at the value of an object (outward value) but he also has Values as subjects (mental values and autonomy) that must be respected as being glorified and glorified by their Creator.

Surrogate mother is literally equated with the term “Substitute Mother” which is defined freely as A woman who bounds herself through a covenant tie with another party (usually husband and wife) to become pregnant after the inclusion of male seed cell union (Sperm) and female seed cells (ovum) which carried out its fertilization outside the uterus (In Vitro Fertilization) until delivery according to the agreement then the baby is submitted to the husband and wife by getting the reward in the form of material that has been agreed. But there is another variant that states that the engagement is not consciously based on reward but on the basis of kinship (although rarely), in which a female relative is willing to conceive the seed and the female relative without material reward so that by the nature of the engagement that gives a reward in return, Surrogate mother is also known as the womb rental / gestational agreement (although not in accordance with the etymological meaning of surrogate mother).<sup>24</sup>

Surrogate mother cases have been rife in the last few decades since the introduction of a fertilization method outside the womb known as In-vitro Fertilization, which is a method of fertilization of sperm cells in a petri tube performed by medical personnel.<sup>25</sup> It may also be referred to as a conception outside the uterus that was first practiced in 1970 (early known as the IVF), after the discovery of a method of sperm preservation. Initially this method aims to help couples, where the wife there are abnormalities in both fallopian tubes<sup>26</sup> in the absence of no cavity at all.

Both due to congenital defects as well as the effects of adhesions due to infection (while the ovaries of the wife are normal and routinely produce eggs every month) so that the egg cannot reach the uterus, then on the next development of this method is widely used with some variation to the ability of storage Sperm and zygote (the result of fertilization) that can be used at any time according to his will, one of which is surrogate mother (IVF-Embryo Transfer-Surrogate Mother). The surrogate mother’s engagement initially occurs in countries where the legal system permits gametes cell donation, sperm cells and ovum cells so that surrogate mother cases are possible in those countries as described by Schenker&Frenkel, *Medico-Legal Aspects of IVT -ET Practice: USA, UK, Australia, Germany, Denmark, Finland, France, Israel, Japan,*

Norway, Singapore (Sperm donations) and USA, UK, Austria, Australia, Israel (ovum donation).<sup>27</sup>

Thus, it can be seen in some cases that emerged from Surrogate Mother in the world, that India is one of the most printed countries of the Surrogate Mother agreement and is done because of economic needs or improve the economy of his family and authorized by his country officially.

Some countries are interested in doing Surrogate Mother in India and China, because the cost is cheaper than America. As for the Government of Thailand prohibits its citizens from renting a womb or having a foreign spouse after a cessation of a uterine lining that arises and harms a surrogate mother of an Australian foreign partner, and the Government of Thailand issued a new law to ban ransacking the uterus and impose sanctions.

The implementation of surrogate mother continues to evolve in various countries and creates legal uncertainty for the state that has not had its law, and causing harm to the parties if something happens that is not in accordance with the agreement.

The sophistication of Science and Technology of Surrogate Mother is preceded by the existence of IVF baby, the sophistication of medical technology is finally causing controversy from some countries because there is no legal provisions that officially regulate in some countries. Indonesia itself for the case of Surrogate Mother there are many who do, but done secretly not open and not published.

## **I. CONCLUSION**

Based on the discussion of the previous chapters as for the conclusions of this paper as follows:

1. The development of Surrogate Mother in the perspective of Law and Globalization as follows:
  - a) Nationally: The implementation of Mother Indonesia Surrogate Indonesia is not as good as in other developing countries. Surrogate Mother in Indonesia has done but closed its implementation;
  - b) Internationally: The implementation of Surrogate Mother is mostly done, especially India, there are regulations that allow Surrogate Mother to be implemented. Some countries come to India to implement Mother Surrogate which is often called "Baby Plant", because India has most implemented Mother Surrogate Agreement and is assisted Economy of the poor. While the Government of Thailand prohibits its citizens to conduct Surrogate Mother in connection preceding the existence of cases detrimental to its citizens after the Mother Surrogate Agreement with the Australians;

It can be concluded that in general some countries in the world including Indonesia there is no official regulation governing the Surrogate Mother Agreement as a positive law binding on the parties and protecting citizens who will do so, to this day cause controversy in some countries in the world so there is no legal certainty Which will provide protection for the parties that will implement the Surrogate Mother Agreement.

2. The legal consequences of the Surrogate Mother Agreement for the parties  
The absence of a Positive Law in various countries of the World governing the Implementation of Surrogate Mother raises the legal uncertainty of the Parties that do so. This is feared, causing great disagreement and debate as opposed to the aims and intentions of the parties, and in the Islamic Shari'a in the form of creating stability, peace and eliminating disputes or limiting them to the smallest possible scale. The Mother Surrogate Agreement in some Haram Islamic States is to be conducted as it relates to *Hablumminauloh* and *HablumMinanas* specially the relationship of mother and child born and its impact on the law of the treaties executed by the parties.

The Mother that Surrogate Treaty is forbidden is the sperm taken from the husband of a legitimate partner, while the egg and uterus belong to a woman who is not his wife. Babies born from the womb in question will be handed over to the legitimate couple.

The Mother that Surrogate Agreement not allowed in religion is when the egg comes from a legitimate wife, but the sperm used for conception does not belong to her husband, but the result of a donor from another man. The uterus used is not the womb of the wife, but the other woman. After birth, the baby is then handed over to the owner of the egg cell, in this case is the wife and her husband, who barren.

The prohibited and prohibited Surrogate Mother Agreement in religion is when the egg comes from a legitimate wife, but the sperm used for conception is not his / her husband, but the result of a donor from another man. The uterus used is not the womb of the wife, but the other woman. After birth, the baby is then handed over to the owner of the egg cell, in this case is the wife and her husband, who barren

## J. SUGGESTIONS

The suggestions from the Implementation of Surrogate Mother are:

1. The Surrogate Mother Agreement as part of the Development of Science and Technology Globalization, it is advisable to the Government to immediately follow up with the Positive Law Regulation that will apply to the society nationally and internationally with due regard to the Law of

Religion as a first step to create the Law Applicable in the Mother Surrogate Agreement;

2. Surrogate agreement Mother is basically good to do to help couples who want to have children as a binder and successor in the household. For those who will conduct Surrogate Mother it is advisable to pay attention to the provisions of Religious Law as it relates directly to *HablumMinaulloh* and *HablumMinanaas* and Positive Laws applicable nationally and internationally.

#### *Notes*

1. Fred Ameln, *Kapita Selekta Kedokteran*, Jakarta: Grafikatama Jaya, 1991, page. 117.
2. Kartini Magazine, *Penyewaan Rahim di India*, Jakarta: Majalah Nomor 2361 2013, page 56-58.
3. *Ibid*
4. H. Yusriadi, *Tebaran Pemikiran Kritis Hukum dan Masyarakat*, Semarang: Surya Pena Gemilang, 2009, page 187.
5. *Ibid*, page 49-50
6. H. Desriza Ratman, *Surrogate Mother dalam Perspektif Etika dan Hukum: Bolehkah sewa Rahim di Indonesia?*, Jakarta: Gramedia, 2012, page 3.
7. Mochtar Kusuma Atmaja, *Pembinaan Hukum Dalam Rangka Pembangunan Nasional*, Bandung: Bina Cipta, 1986, page. 11
8. H. Salim HS and Erlis Septiana Nurbaini, *Penerapan Teori Hukum pada Penelitian Tesis dan Disertasi*, Jakarta: PT. Rajagrafindo Persada, 2014, page. 12
9. H. Riduan Syahrani, *Rangkuman Intisari Ilmu Hukum*, Bandung: PT Citra Aditya Bhakti, 2013, page. 15.
10. Mochtar Kusuma Atmaja, *Pembinaan Hukum Dalam Rangka Pembangunan Nasional*, Bandung: Bina Cipta, 1986, page. 11
11. Utrech and Moh. Saleh Djindang, *Pengantar dalam Hukum Indonesia*, jakarta: PT. Ikhtiar Baru, 1983, page 3
12. Wirjono Prodjodikoro, *Bunga Rampai Hukum*, Jakarta: PT Ikhtiar Baru, 1974, page. 11
13. C.S.T. Kansil and Critine S.T Kansil, *Pengantar Ilmu Hukum Indonesia*, Jakarta: PT. Rineka Cipta, 2011. Page. 30
14. Teguh Prasetyo and Abdul Halim Barkatullah, *Politik Hukum Pidana*, Yogyakarta: Pustaka Pelajar, 2008, page 6-7.
15. Fred Ameln, *Kapita Selekta Hukum Kedokteran*, Jakarta: Grafikatama Jaya, 1991, page. 114-118.
16. H. Detririza Ratman, *Op Cit*, page 42-44
17. Fred Ameln, page. 125-126
18. *Ibid*, page. 79-87
19. Internet, 5 August 2012, Bidan Shop, *Surrogate Mother (Ibu Tetapan)*, Desember 2009 <http://bidanshop.blogspot.com>

20. Kaidah Sadd Az-zari'ah:
  1. Perbuatan yang membawa kepada kebutuhan/kehancuran
  2. Keburukan/kehancuran yang ditimbulkan oleh suatu perbuatan, sama atau lebih besar dari kemanfaatannya.
21. *Ibid*, page. 85-86
22. *Ibid*, page. 87-90
23. *Loc.Cit*
24. *Ibid*, page 34-37
25. Internet, Bayi Tabung dari Sudut Pandangan Hukum Perdata Internasional, [www:http://bayitabung.blogspot.com](http://bayitabung.blogspot.com)
26. Tuba Fallopi adalah satu organ kelamin internal internal seorang wanita yang berupa saluran panjang yang berhubungan dengan uterus (rahim) di kiri-kanannya yang berfungsi sebagai saluran penghubung sel telur (ovum), setelah sel terus dilepaskan oleh indung telur (ovarium) untuk disalurkan menuju rahim (dalam buku ilmu kandungan prof. Sarwono Prawiriharjo dengan editor ketua Hanifa Wiknyo sastro yang diterbitkan oleh Bina Pustaka Sarwono Prawirohardjo edisi kedua cetakan ke tujuh 2009).
27. Ameln Fred, Op Cit, page. 124

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