

## THE ESSENCE OF POLYGAMY AND ITS ASSOCIATION WITH INDONESIAN MARRIAGE LAW

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HIMPUNAN ILMUWAN DAN SARJANA SYARIAH INDONESIA

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### **Abstract**

*This study aimed to analyze the legal standing of surrogate mothers from the Islamic law perspective. This study employed library research with a shar'i normative approach. The data were collected through documents related to the surrogate mother, both from books, texts (Qur'an and Sunnah), and scholars' opinions who discussed the implementation of a surrogate mother. Surrogate mother was one of the efforts made by a married couple to produce descendants. The results of this study indicated that the law of having descendants in a marriage was not something included in the dharuriyyah part or must exist. Additionally, the legal consequences of implementing a surrogate mother would have an impact on the child born, both from the status of the child born from the surrogate mother including legitimate child or illegitimate child, who was the mother or the mother status of children born from the surrogate mother, and the rights inheritance of children born from surrogate mother. Therefore, based on the Qur'an and Sunnah, individual and group scholars' opinions stated that the legal standing of surrogate mothers in Islam was unlawful.*

**Keywords:** Islamic Law; Legality; Surrogate Mother

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## INTRODUCTION

Islam as a holy religion (*hanif*) is revealed by Allah SWT as *rahmatan li al-alam*.<sup>1</sup> Every creature has the right to enjoy life, both animals and plants, on the surface of this earth. Therefore, Islam attaches great importance to the concept of *dharuriyyat al-khams* maintenance of five things, namely religion, soul, mind, descendant, and property. *Dharuriyyat al-khams* also means preserving essential needs for human life.<sup>2</sup>

Every human being created by Allah SWT cannot live alone.<sup>3</sup> Humans are known as social creatures; therefore, humans are creatures that depend on each other to meet their needs. In order to meet the needs and carry out human life requires social life activities, one of the human activities in carrying out their lives to get descendants is by way of marriage.

Marriage is a contract that justifies association to obtain descendants as an effort to maintain descendants, which is also one of the objectives of the Shari'a, namely *hifdz nasl*.<sup>4</sup> However, many married couples who have been married for a long time do not have children. They want children from their own germs, but the couple is not given descendants by Allah SWT. This is due to several factors, including the husband or wife experiencing infertility.

The alternatives to overcome infertility problems are adoption, treatment, reproductive health therapy, and using medical technology to bring a baby.<sup>5</sup> One of these methods is a surrogate mother. Surrogate mother is a woman who agrees to bear children on behalf of another couple who cannot have children because they are infertile or physically unable to carry a fetus in their uterus. Fred Ameln stated that a surrogate mother is a woman who binds herself through a contract with another party (husband and wife) to become pregnant after the insertion of the male germ and female germ cells whose fertilization takes place outside the uterus.<sup>6</sup>

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<sup>1</sup> Harwis Alimuddin and Tahani Asri Maulidah, "Implication of Local Wisdom in Islamic Law Compilation Legislation," *Mazahibuna: Jurnal Perbandingan Mazhab* 3, no. 2 (2021): 143–58, <https://doi.org/10.24252/mh.v3i2.24982>.

<sup>2</sup> Arif Rahman, "Al-Daruriyat Al-Khams Dalam Masyarakat Plural," *Mazahibuna: Jurnal Perbandingan Mazhab* 1, no. 1 (2019): 25–41, <https://doi.org/https://doi.org/10.24252/mh.v1i1.9664>.

<sup>3</sup> Anwar Sutoyo, "Human Dimension in The Perspective of The Holy Quran," *Internal Journal of Education* 7, no. 2 (2014): 71–83.

<sup>4</sup> Muhammad Hori and Eliva Sukma Clpta, "The Purpose of Marriage in Islamic Philosophical Perspective," *Journal of Islamicate Studies* 02, no. 01 (2014): 18–25, <https://doi.org/https://doi.org/10.32506/jois.v2i1.505> The.

<sup>5</sup> Jasmin Passet-Wittig and Norbert F Schneider, "Imaginability of Adoption, Foster Care, and Life without a(Nother) Child and Stress in Women and Men in Fertility Treatment," *Journal of Health Psychology* 25, no. 10–11 (2020): 1462–71, <https://doi.org/https://doi.org/10.1177/1359105318758857>.

<sup>6</sup> Fred Ameln, *Kapita Selektta Hukum Kesehatan*, I (Jakarta: Grafika Tamajay, 2020)., p. 117.

Uterine rental in India has provided the annual income of the state is 445 US dollars or around Rp. 4 trillion. Women in India rent wombs to improve the family economy. Government India has legalized uterine rental with make some kind of association to rent a womb. Even the Indian government also makes special visas or medical visas to facilitate people who come for rental purposes womb. Unlike in India, ladies a surrogate in the US do it because they want to get pregnant. They believe that by getting pregnant, they can learn to deal with emotional problems and cultivate maternal instinct, at the same time can help wives who want to have children.

The issue of the surrogate mother becomes a topic of debate regarding the existence of women, ethics, law, and society. In India, the implementation of the surrogate mother is a strategy to save oneself from poverty and therefore moral issues are ruled out. Until now, India is a destination for mothers to do surrogacy commercially. India was the first country to develop a commercial surrogacy industry on a national and transnational level.<sup>7</sup> In Indonesia, until now formally, the practice of surrogate mothers has not been carried out, but in practice, many behaviors lead to the practice of surrogate mothers (for example, on the Internet, many young women from Indonesia have registered to become surrogate mothers.<sup>8</sup>

The issue of renting a womb or a surrogate is still a matter of debate among the public, both Muslims and non-Muslims.<sup>9</sup> This is because this issue is not discussed in the texts or classical books. In Islamic law, in connection with this discussion, two groups have different opinions, namely the group that allows and the group that forbids. Ali Akbar's opinion allowed the rent of a uterus because "Entrusting IVF to a woman who is not her mother is permissible because the mother cannot get her pregnant because her uterus is disturbed while breastfeeding another woman is allowed in Islam and even paid.<sup>10</sup> So, it is also permissible to give wages to other women. a woman who lends her womb", while the opinion of Al-Shaykh Ali al-Thanthawi prohibits the rent of a uterus because "test-tube babies using a substitute woman are not allowed, because according to him a woman's womb is not a kitchen pan whose contents can be moved from one to

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<sup>7</sup> Amrita Pande, *Wombs in Labor Transnational Commercial Surrogacy in India* (New York: Columbia University Press, 2014).

<sup>8</sup> A.A.A.Ngr.Sri Rahayu Gorda, Ni Ketut Elly Sutrisni, and I Gusti Agung Ayu Mas Triwulandari, "The Legal Status of Surrogacy Agreement According to Contract Law in Indonesia," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 8, no. 4 (2019): 471, <https://doi.org/10.24843/jmhu.2019.v08.i04.p03>.

<sup>9</sup> Tawfique Al-Mubarak, "Surrogacy and Islam: Between Permissibility and Prohibition," *Islam and Civilisational Renewal* 5 (2014): 277-81, <https://doi.org/10.12816/0009843>.

<sup>10</sup> Supardin and Abdul Syatar, "Adultery Criminalization Spirit in Islamic Criminal Law: Alternatives in Indonesia's Positive Legal System Reform," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (2021): 913-27, <https://doi.org/http://dx.doi.org/10.22373/sjkh.v5i2.9353>.

another at will. others, because the uterus of a pregnant woman has a role in the process of forming a fetus that consumes nutrients from its mother's blood”.

The implementation of surrogate mothers is a new thing in medicine whose legal status is not yet clear. Based on this case, this study examines the legality of surrogate mothers from the Islamic law perspective.

## **METHOD**

In conducting this study, the researcher employed a normative syar'i with a conceptual approach to applying Islamic studies. This referred to all Islamic doctrines or teachings laid out in the nash revelation (Qur'an and Sunnah) whose degree of truth was absolute nature and or the context of its meaning in all religious thoughts created by scholars' interpretations of texts whose real form was contained in religious books and literature by scholars, religious figures, or codification of the teachings of Allah SWT. It could also be in the form of references obtained from the rules in Islamic law.

## **RESULT AND DISCUSSION**

### **1. Surrogate Mother and Its Arrangement in Indonesia**

The practice of surrogate mothers is carried out to help married couples with reproductive disorders, especially for women who have serious problems with their reproductive organs that prevent them from getting pregnant. This is usually caused by uterine disorders/weak uterus, cancer, defects, or not having a uterus because it has been removed during surgery.<sup>11</sup> It can also be due to personal desires without obstacles preventing pregnancy. Recent years have seen the growth and use of surrogacy to help couples start a family. There are three types of surrogate mothers, namely:

- a) Traditional surrogacy is a baby born to a woman who has an ovum and rents out her uterus, which is fertilized by sperm from a man who is not her partner. After giving birth, the baby is handed over to be cared for by the male owner of the sperm and his partner.
- b) Gestational surrogacy is a pregnancy that originates from the egg or ovum of a woman who has been fertilized by the sperm of a man (husband and wife) and is conceived in the uterus of another woman until the woman gives birth.
- c) Intended mother is defined as "a mother who wants a pregnancy," where the rights to the child will be transferred to her after the child is born. This type of surrogacy is carried out by single women or those who have a partner and want the

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<sup>11</sup> Indar et. all, *Hukum Dan Bioetik Dalam Perspektif Etika Dan Hukum*, II (Yogyakarta: CV Budi Utama, 2019)., p. 77.

pregnancy to be carried out by another woman who agrees to be pregnant with a fetus from her own ovum or donations through a business agreement system.<sup>12</sup>

From all these forms of surrogate mothers, the status of a woman who rents out her uterus is divided into two types, namely, women who are not bound by marriage (girls or widows) and women who are bound by marriage.

A study showed that approximately 10% of married couples were not blessed with children, while they were less likely to adopt children. The cause of infertility was approximately 40% due to abnormalities in men, 15% due to abnormalities in the cervix, 10% due to abnormalities in the uterus, 30% due to abnormalities of the fallopian tubes and peritoneal abnormalities, 20% abnormalities in the ovaries, and 5% due to other reasons. Thus, the total incidence exceeded 100% because approximately 35% of husbands and wives had multiple disorders.<sup>13</sup>

Several countries in the world have allowed the implementation of surrogate mothers, and even regulations regarding its implementation have been issued. In the UK, the practice of surrogacy is legal to do, but many other European countries such as France, Germany, Italy, and Spain its implementation is prohibited. Some countries that allow, have specific regulations regarding their use. For example, in Israel, the requirement to use a surrogate is only for the infertile legal partner and the surrogate must be single or divorced. The implementation of surrogate mothers in the United States is predicted to occur as many as 1,400 baby births. Not only Americans who do it, but also some couples who come from outside the United States.<sup>14</sup> This implementation is under the authority of the state which is supervised by a public committee.<sup>15</sup> While in Indonesia itself, the implementation of surrogate mothers has not been regulated in detail. The cases of surrogate mothers in Indonesia have occurred even though the implementation is carried out secretly. The cases of surrogate mothers occurred in Indonesia was an artist (Zarima Mirafsur) who rented out her uterus to a married couple in exchange for 50 million rupiahs and a luxury car.<sup>16</sup> Although Zarima Mirafsur's attorney denied this news, Zarima Mirafsur himself did not deny it. Apart from the Zarima Mirafsur case, which had two different answers, there was also a surrogate

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<sup>12</sup> Sonny Dewi Judiasih, *Aspek Hukum Sewa Rahim Dalam Perspektif Hukum Indonesia* (Bandung: PT Refika Aditama, 2016)., p. 14-16.

<sup>13</sup> Zahrowati, "Bayi Tabung (Fertilisasi In Vitro) Dengan Menggunakan Sperma Donor Dan Rahim Sewaan (Surrogate Mother) Dalam Perspektif Hukum Perdata," *HOLREV* 1, no. 2 (2017): 76.

<sup>14</sup> Seema Mohapatra, *A Race to the Bottom? In Globalixation and Transnational Surrogacy in India* (Lexington Books Plymouth UK, 2015)., p. 149.

<sup>15</sup> V. Jadva, "Surrogacy Families 10 Years On: Relationship With The Surrogate, Decisions Over Disclosure And Children's Understanding Od Their Surrogacy Origins," *Human Reproduction* 27, no. 10 (2012).

<sup>16</sup> Try, "Sewa Rahim Di Indonesia Dilakukan Diam-Diam," *Detik.com*, 2010, <https://health.detik.com/ibu-dan-anak/d-1370505/sewa-rahim-di-indonesia-dilakukan-diam-diam>.

mother case that actually occurred in Papua. This happened when a nephew rented out his uterus to his aunt to conceive because she could not get pregnant. On the other hand, she really wanted descendants from her sperm and ovum.<sup>17</sup> Based on this case, it is proved that there is a secret implementation of surrogate mothers.

The rules regarding surrogate mothers have not been regulated in detail. However, in the regulatory framework in Indonesia, several rules can be used as references, namely:

- a) Regulation of the Minister of Health Number 73/Menkes/PER/II/1992
- b) Decree of the Director-General of Medical Services of the Ministry of Health of the Republic of Indonesia in 2000 concerning Guidelines for IVF Services in Hospitals
- c) Law Number 36 in 2009 concerning Health
- d) Regulation of the Minister of Health Number 39/Menkes/SK/2010 concerning Assisted Reproduction
- e) Government Regulations Number 61/2014 concerning Reproductive Health
- f) Articles 449 and 570 of the Civil Code (if viewed from the side of the uterus used as a rented object)
- g) Article 1320 (if viewed from the aspect of the agreement)
- h) Article 1548 (if viewed from the aspect of leasing).

Meanwhile, in Islamic law:

- a) The National Conference of Alim Ulama NU in Sukeroje in 1983
- b) The OIC III Jordanian Fiqh Institute Session in 1986
- c) The Indonesian Ulema Council Decree Kep.952/MUI/1990 concerning Artificial Insemination
- d) The Indonesian Ulema Council fatwa dated 26/2006

## **2. Legal Consequences of Surrogate Mother Implementation**

- a. The status of a child born from the surrogate mother is concluded based on the status of the mother who gave birth to the baby from the surrogate mother.<sup>18</sup> Thus, there are two statuses of children, namely, if a child is born to a woman with a status bound by marriage, the child becomes the child of the woman who gives birth to her with her husband; in contrast, if a child is born to a woman not bound by marriage, then the child is an illegitimate child of the woman who gives birth to them.

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<sup>17</sup> Agnes Widianti, "Seperti Apa Sewa Rahim Di Indonesia: Ada Tapi Diam-Diam," in *Seminar Sewa Rahim* (Semarang, 2010).

<sup>18</sup> Muhammad Fatkhur Rizqi Amin, "Analisa Yuridis Terhadap Perjanjian Sewa Rahim Dalam Perspektif Hukum Perdata Dan Hukum Islam," *Dinamika: Jurnal Ilmu Hukum* 25, no. 5 (2020): 663.



- b. The status of the mother of a child born from a surrogate mother is concluded based on the child's status; the status of the mother is a woman who gives birth, even though the woman who gives birth is married or not. This is based on the QS al-Mujadilah/58:2:

Meaning: "None can be their mothers except those who gave birth to them."<sup>19</sup>

Also, QS al-Ahqaf/46:15 stated:

Meaning: "And we have commanded people to honour their parents. Their mothers bore them in hardship and delivered them in hardship. Their 'period of' bearing and weaning is thirty months."<sup>20</sup>

- c. In Islamic law, the distribution of inheritance in the *mawaris fiqh* version and inheritance law is based on QS al-Nisa/4: 7, 11, 12, and 176. In order to determine the share received by the child from surrogate mothers, the child's status must be determined first because their share is returned to their status.<sup>21</sup> If they are a legitimate child, then the portion they get is in accordance with the portion of a legitimate child. If the status is as an illegitimate child, then the portion obtained is in accordance with the portion of an illegitimate child, namely only from the mother and her descendants.

### 3. The Legality of Surrogate Mother in Islamic Law

Keeping descendants as one of the goals when associated with the law of having children related to the surrogate mother is the legal urgency of having children on the *dharuriyyat* scale in a marriage or *mustahab* or *mubah*. Thus, based on the word of Allah SWT in the Qur'an related to this, it seems that producing descendants is more *khariyah* OR *targhib*, as in QS al-Nahl/16: 72:

وَاللَّهُ جَعَلَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا وَجَعَلَ لَكُمْ مِنْ أَزْوَاجِكُمْ بَنِينَ وَحَفَدَةً وَرَزَقَكُمْ مِنَ الطَّيِّبَاتِ أَفَبِالْبَاطِلِ يُؤْمِنُونَ  
وَبِنِعْمَةِ اللَّهِ هُمْ يَكْفُرُونَ

Meaning: "And Allah SWT has made for you spouses of your own kind, and given you through your spouses children and grandchildren. And He has granted you good, lawful provisions. Are they then faithful to falsehood and ungrateful for Allah's favours?"<sup>22</sup>

Imam al-Qurtubi interprets the verse into five points, including showing the greatness of Allah's favor because of the presence of children in the household, and the

<sup>19</sup>Kementrian Agama RI, *Syamil al-Qur'an (Al-Qur'an dan Terjemahan)* (Solo: PT Tiga Serangkai, 2014), h. 542.

<sup>20</sup>Kementrian Agama RI, *Syamil al-Qur'an (Al-Qur'an dan Terjemahan)*, h. h. 504.

<sup>21</sup>Nurantiana, "Status Kewarisan Anak Yang Lahir Dari Hasil Sewa Rahim (Suroogate Mother) Menurut Hukum Perdata Dan Hukum Islam," *Journal of Lex Generalis (JLS)* 1, no. 4 (2020): 574.

<sup>22</sup>Kementrian Agama RI, *Al-Qur'an dan Terjemahan*, h. 274.

husband is required to serve (also) his wife.<sup>23</sup> This is exemplified by the Prophet Muhammad. In addition, in QS al-Kahf /18: 46 stated that:

الْمَالُ وَالْبَنُونَ زِينَةُ الْحَيَاةِ الدُّنْيَا وَالْبَاقِيَاتُ الصَّالِحَاتُ خَيْرٌ عِنْدَ رَبِّكَ ثَوَابًا وَخَيْرٌ أَمَلًا

Meaning: "Wealth and children are the adornment of this worldly life, but the everlasting good deeds are far better with your Lord in reward and in hope."<sup>24</sup>

The verse above is a subtle rejection of 'Uyainah bin Husain who is proud of his children and wealth. Thus, the statement about children here is *khabariyah*, as well as a prohibition to be proud of both.<sup>25</sup> Even if a husband and wife still feel that they have to do surrogate mother, then this would be contrary to the following hadith:

Meaning: "An Nufaili has told us, Muhammad bin Salamah from Muhammad bin Ishaq has told us, Yazid bin Abu Habib from Abu Marzuq from Hanasy Ash Shan'ani from Rufaifi' bin Thabit Al Ansari has told me, he said while preaching to us; should I tell you what I heard the Messenger of Allah صلى الله عليه وسلم say on the day of Hunayn: It is not lawful for a man who believes in Allah and the last day to water what another has sown with his water." (HR. Abu Dawud).<sup>26</sup>

The unlawful of surrogate mothers is in the following circumstances:

- a. Using another woman's uterus besides his wife.
- b. Mixing germ cells between husbands and other women.
- c. Mixing germ cells between wife and another man.
- d. Entering the germ cells compounded after the death of husband and wife.<sup>27</sup>

Based on the above opinion, the law on the unlawful of surrogate mothers can be viewed from several aspects, including social point of view and ethical point of view. From the social point of view, it can attract animals-like living standards and mix lineage. Moreover, from an ethical point of view, inserting germs into the uterus of other women is unlawful based on the hadith of the Prophet and causes the loss of motherhood for women and destroys the order of people's lives. Also, from a religious point of view, there is no justification or basis for permissibility in carrying out the surrogate mother. The technique allowed in the case of artificial insemination is that it must meet several conditions; namely, the extrauterine compound carried out on the husband and wife's germs, then returned to the wife's uterus.

## CONCLUSION

<sup>23</sup>Ibnu al-Arabi, *Ahkam al-Qur'an*, juz. III, h. 149.

<sup>24</sup>Kementrian Agama RI, *Syamil al-Qur'an (Al-Qur'an dan Terjemahan)*, h. 285.

<sup>25</sup>Eddy M. Astiwara, *Fikih Kedokteran Kontemporer* (Cet I; Jakarta Timur: Pustaka al-Kautsar, 2018), h. 185.

<sup>26</sup> Abu Dawud Sulaeman bin al-Asy'ab bin Ishaq bin Basyir bin Syidad bin 'Amru al-Azdi Al-Sajistani, *Sunan Abi Dawud* (Beirut: al-Maktabah al-'Asri, n.d.), p. 236.

<sup>27</sup> Muhammad Ali Hanafiah Selian, "Surrogate Mother; Tinjauan Hukum Perdata Dan Islam," *Jurnal Yuridis* 4, no. 2 (2018): 131, <https://doi.org/10.35586/.v4i2.255>.

Having children in a marriage is not included in the concept of emergency or necessity while renting a uterus will result in children being born. Islamic law perspective as a whole forbids the implementation of surrogate mothers. On the other hand, the provision of optimal health services is needed for all Indonesian citizens without exception. However, there are still concerns about surrogacy, also known as "uterus rent". Not having a strong legal umbrella, both in terms of health regulations, criminal law, and other special budgets, makes surrogacy difficult to implement. This has resulted in a legal dilemma regarding the position of surrogacy in Indonesia's positive regulations. Therefore, the implementation of uterine rental should remain prohibited until there are clear rules.

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