

# LEGITIMATION OF THE SURROGATE MOTHER AGREEMENT ON HUMAN RIGHTS PERSPECTIVE

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## Abstract

*Surrogate Mother is a method used by infertile married couples to have offspring who still have a genetic relationship. The implementation of the Surrogate Mother is generally based on an agreement. This agreement is a new innominaat agreement that grows and develops in the community so that it is not yet recognized in the Criminal Code. In Indonesia, until now there is no specific legal umbrella related to Surrogate Mother. The existence of this agreement cannot be separated from the existence of the principle of freedom of contract. Whether the agreement is in accordance with the principle of freedom of contract and how its legitimacy is viewed from a human rights perspective will be discussed in this paper. The research method used is the normative research method which studies based on theories, principles, concepts, laws and regulations without being influenced by the public's response to the Surrogate Mother agreement. Based on this, the Surrogate Mother agreement is in accordance with the principle of freedom of contract. With the Surrogate Mother agreement, the right to continue the offspring which is a human right (civil and political rights) which cannot be reduced under any circumstances can be fulfilled. In implementing Surrogate Mother, it also takes into account certain limitations as regulated in IVF regulations, including that carried out by a legal married couple and in a state of infertility. Therefore, the type of Surrogate Mother that can be done is Gestational Surrogate or Intrafamilie Surrogate by implanting the result of legal husband and wife fertilization into the surrogate mother's womb.*

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## I. Introduction

The development of science and technology is one of the driving factors for globalization that is increasingly accelerating throughout the world. Through science and technology, we make progress in various fields of life, including medicine, especially genetics. This progress makes solutions to almost all problems in human life can be found. One of them is having offspring who have a genetic relationship to an infertile married couple.

Having children is the dream of all married couples and is also a part of human rights (HAM). The right to continue the descent is included

in civil and political rights that cannot be reduced under any circumstances or non derogable rights (Temmanengnga, <http://ham.go.id/2014/03/24/implementasi-kovenan-hak-sipil-dan-politik-di-indonesia-hal-4-selesai/>, accessed June 15<sup>th</sup> 2020). This right is expressly regulated in Article 16 Paragraph (1) UDHR, Article 23 Paragraph (2) ICCPR, Article 28 B Paragraph (1) UUDNRI 1945, Article 2 Human Rights Charter, MPR Decree Number XVII / MPR / 1998 concerning Human Rights, and Article 10 Paragraph (1) Law no. 39 of 1999 concerning Human Rights.

A married couple who cannot yet have children (infertility) is usually caused by various factors. Aidil Akbar (Pandu Husada, Vol. 2 No.1, April 2020: 69) stated that male infertility is generally caused by internal factors (genetic, anatomical and body compounds), external factors (exposure to metals, addictive substances and drug use). medicine) and other factors (frequency of intercourse, length of effort, and exercise). Whereas in women, infertility is generally caused by factors of age, occupation, ovulation disorders, tubes, pelvis, uterus, and a history of other diseases (Irma Hamdayani Pasaribu, et al, 2019: 71). However, there is no need to worry.

Having offspring who still have a genetic relationship for an infertile married couple is no longer impossible. This can be reached through Surrogate Mother. Surrogate Mother is a form of development of the in vitro fertilization method which is usually based on an agreement. Surrogate Mother Agreement is an agreement between husband and wife and a woman, which the result of conception by husband and wife is implanted in the woman's womb and after the baby is born it will be given to the husband and wife according to the agreement (Sista Noor Elvina, Brawijaya University: 2).

Surrogate Mother is usually done because a wife cannot conceive properly due to infection in the uterus, abnormalities in the uterus, removal of the uterus (hysterectomy) or other diseases. The results of the husband and wife's fertilization cannot be implanted in the wife's womb like the IVF method. But the result of the fertilization is implanted in the uterus of another woman called the surrogate mother. A married couple who use the services of a substitute mother is called an Intended Parent.

The development of Surrogate Mother cannot be separated from the origin of the discovery of the IVF method. Tomson Situmeang (Law of *tô-râ* Vol. 3 No.1, April 2017: 504) stated that the method of IVF was successfully carried out for the first time by P. C. Steptoe and Dr. RG Edwards against the couple John Brown and Leslie in England in 1978. Then in 1986, the Surrogate Mother was successfully carried out for the first time in the United States (Dewi Astika Tandirerung, *Amanna Gappa* Vol. 26 No. 1, March 2018: 16 ). This then became the beginning of the development of Surrogate Mother in various parts of the world.

Surrogate Mother is mostly conducted in countries such as the United States, China, Thailand, Pakistan and India. In fact, India became the first country to implement a national and international surrogacy industry. Along with the times, the reasons for doing Surrogate Mother began to shift. Not only those who are infertile, but those who are in a state of fertility have also started to do the Surrogate Mother. The reasons for aesthetic factors (fear of less beautiful appearance after childbirth) are the most common (Ida Bagus Abhimantara, *Notarie Vol. 1 No.1*, June 2018: 40-41).

Sista Noor Elvina (Brawijaya University: 2) said that the Surrogate Mother itself was carried out in Indonesia, to be precise in Mimika, Papua in 2004. At that time husband and wife (B and S) could not have children. The couple then tried the IVF process. However, this could not be done because S had a severe infection in her womb. The doctor then explained about the Surrogate Mother or Substitute Mother process. This method was finally carried out with the help of M, S's younger brother as a substitute mother.

Currently, the implementation of the Surrogate Mother agreement in Indonesia is still a pro and contra in society. This agreement is often deemed incompatible with the Indonesian Civil Code, which is related to the validity of the agreement in Article 1320 of the Criminal Code. The terms of the validity of the agreement which are said to be not fulfilled in the Surrogate Mother agreement are included in the objective requirements, namely "an unlawful cause". If this is not fulfilled, the agreement is null and void.

Based on the introduction above, the problem formulations that the writer will discuss two problems namely, firstly, Is the Surrogate Mother agreement in accordance with the principle of freedom of contract?, secondly, how is the legitimacy of the Surrogate Mother agreement from the perspective of Human Rights (HAM) in Indonesia?

## **II. Research Methods**

This type of research used in this research is normative research. According to Soerjono Soekanto and Sri Mamudji, normative research is research that examines secondary data or library materials. This research is also called dogmatic research or library research (Ishaq, 2017: 66). This research is classified as a normative study because this study discusses the suitability of the Surrogate Mother agreement with the principle of freedom of contract and human rights in Indonesia at the level of theory, principles, concepts, laws and regulations without being influenced by the public response to the Surrogate Mother agreement. This study uses data collection techniques through literature study, namely data collection obtained from statutory regulations, books, journals, and dictionaries. The data analysis used is qualitative analysis. This is because this research

analyzes data based on concepts, theories, principles, laws and regulations, doctrines, or the views of the researchers themselves (Made Pasek Diantha, 2016: 69). Therefore, this paper is a descriptive analysis related to the surrogate mother agreement from a human rights perspective.

### **III. Research Results and Discussion**

#### **A. Surrogate Mother Agreement Based on Freedom of Contract Principle**

The agreement or engagement is regulated in Book III of the Civil Code (KUHPer). Article 1313 of the Criminal Code states that an agreement is an act in which one or more people bind themselves to one or more other people. M. Yahya Harahap stated that an agreement is a legal relationship between two or more people concerning the law of property which gives rights and obligations to the parties regarding an achievement (L. Herlani, <http://repository.unpas.ac.id/15946/3/7%20BAB%20II.pdf>, accessed July 03, 2020). According to the Big Indonesian Dictionary (KBBI), an agreement is an agreement made by two or more parties, each of which agrees to comply with what is stated in the agreement.

In Article 1319 of the Criminal Code, agreements are divided into two types, namely named agreements (*nominaat*) and anonymous agreements (*innominaat*). This article states that all agreements or agreements are subject to the general rules contained in this chapter and other chapters, whether they have a special name (*nominaat*) or those that are not known by a certain name (*innominaat*). Examples of *nominaat* agreements are lease, sale and purchase agreements. An anonymous agreement or *innominaat* agreement is an agreement that has not been recognized in the Criminal Code because the agreement grows and develops in the community (Azahery Insan Kamil, et al, *Serambi Hukum* Vol. 08 No.2, August 2014: 147). Examples of *innominaat* agreements are sale and purchase agreements with a bonded / wholesale system, Surrogate Mother agreement, and so on.

Surrogate Mother Agreement or Substitute Mother is an agreement between husband and wife and a woman, in which the results of the husband and wife's fertilization are implanted in the woman's womb and after the baby is born it will be given to the husband and wife according to the agreement (Sista Noor Elvina, *Brawijaya University*: 2) . This Surrogate Mother Agreement is a new type of *innominaat* agreement. It is said to be an *innominaat* agreement because this agreement grows and develops in the community. The beginning of the development of the Surrogate Mother was in the United States, when a woman for the first time succeeded in becoming a Surrogate Mother.

The Surrogate Mother Agreement as a new innominaat agreement means that this agreement does not yet have its own legal basis governing its implementation in several countries such as Indonesia. In Indonesia, there are only regulations related to IVF, namely in Act Number 36 of 2009 concerning Health (hereinafter referred to as the Health Law), Regulation of the Minister of Health No. 39 Menkes / SK / 2010 concerning the Implementation of Assisted Reproductive Technology Services (hereinafter referred to as PMK PPTRB), and Government Regulation Number 61 of 2014 concerning Reproductive Health (hereinafter referred to as PP Reproduction health). Meanwhile, regarding Surrogate Mother there is no specific legal umbrella. Even though it does not have its own legal basis, the existence of the Surrogate Mother agreement which is based on this agreement cannot be separated from the existence of the principle of freedom of contract in making the agreement.

The principle of freedom of contract is one of the principles in making agreements. This principle has been around since the 17th century AD Individual freedom is the source of this principle. The existence of individual freedom will provide freedom in contract. In other literature, this principle is often referred to by various terms such as Party Autonomy, Liberty of Contract, and Laissez Faire (Ghansam Anand, *Yuridika* Vol.26 No.2, May-August 2011: 89).

This principle means that everyone has the freedom to make an agreement with anyone and is free to determine the contents of the agreement made. Whether this has been regulated in law or not. In Indonesia, the principle of freedom of contract can be analyzed in Article 1338 Paragraph (1) of the Criminal Code that all agreements made legally are valid as laws for those who make them (Rhona K. M. Smith, et al: 51). According to Mariam Darus Badruzaman, the word "all" in the article means covering all types of agreements, whether they are mentioned by name in statutory regulations or not.

The principle of freedom of contract is one of the principles that apply universally. This principle is a continuation of the principle of equality of the parties as the basis for civil relations and then distinguishes it from public relations that are superior and subordinate. With the principle of freedom of contract, it is assumed that the bargaining position between the parties can be balanced (Lina Jamilah, *SYIAR HUKUM* Vol. XIII No. 1, March-August 2012: 229).

Furthermore, Abdul Rokhim (*State and Justice* Vol. 5 No. 9, August 2009: 2) mentions the scope of the principle of freedom of contract according to treaty law in Indonesia, namely:

- a. Freedom to make or not make agreements,
- b. Freedom to choose the party with whom he wants to make an agreement,

- c. Freedom to determine or choose causa from the agreement that will be made,
- d. Freedom to determine the object of the agreement,
- e. Freedom to determine the form of the agreement, and
- f. Freedom to accept or deviate from statutory provisions which are optional.

Based on this, everyone has the freedom to make an agreement in accordance with the 6 (six) elements in the principle of freedom of contract above. Likewise with the Surrogate Mother agreement. First, the parties to the Surrogate Mother agreement, namely the husband and wife partner and the Substitute Mother, have the freedom to make or not make a Surrogate Mother agreement. Second, the parties have the freedom to choose with whom to make the agreement. The husband and wife are free to choose who will be the substitute mother, and the substitute mother is free to choose with whom to make the agreement. Then both parties (Intended Parent and Surrogate Mother) have the freedom to determine the contents of the agreement, the object of the agreement, and the form of the agreement including the new innominaat agreement, namely the Surrogate Mother agreement. Based on this, the Surrogate Mother agreement is in accordance with the principle of freedom of contract.

Surrogate Mother agreement can be said to be valid if it fulfills the four elements in Article 1320 of the Criminal Code. There are many conflicts regarding the validity terms of the agreement in the Surrogate Mother agreement. There are those who say that this agreement does not meet the objective requirements in Article 1320, namely related to a cause that is not prohibited. This agreement is considered as an agreement that is against the law, namely the Health Law, PMK PPTRB, and PP on Reproductive Health. In the three rules mentioned above, it only regulates the process of IVF, while the Surrogate Mother is not explicitly stated as prohibited. Considering that the Surrogate Mother agreement is a new form of innominaat agreement, this agreement does not yet have specific regulations governing it. If we look again, this agreement has fulfilled the four elements of the validity of the agreement.

First, the agreement between the two parties. In the Surrogate Mother agreement, there is an agreement between the parties as outlined in the form of an agreement. The agreement is the result of negotiations carried out by the parties, namely the husband and wife couple and the substitute mother. Second, namely proficiency. The parties to the Surrogate Mother agreement are capable parties. Where the husband and wife have made a legal marriage. Likewise, a substitute mother who already has a husband with a legal marriage. Both parties are considered mature in making the agreement. In addition, both parties must also be physically and mentally healthy

and not under the ability to become Intended Parent and Surrogate Mother. Third is a certain thing. In an agreement there must be something that is agreed as an achievement. These achievements can be in the form of goods and / or services. In the Surrogate Mother agreement, it is a substitute mother service. The fourth is a cause which is not forbidden. According to Article 1337 of the Criminal Code, a prohibited cause is a cause that is contrary to law, decency, and / or public order.

When viewed from the statutory regulations, both in the Health Law, PMK PPTRB, and PP on Reproductive Health, there are contradictions and empty norms. In the Health Law Article 127 Paragraph (1), it is recognized that the condition of a married couple requires non-natural pregnancy efforts. However, the provision "implanted in the wife's womb ..." demands a natural condition for a wife to become pregnant. Then in the PMK PPTRB Article 2 Paragraph (3) mentions assisted reproductive technology services as a last resort to obtain offspring based on medical indications for legal married couples. These medical indications include 1) only tubal factors, 2) other factors in women besides tubal, 3) male factors, 4) many factors, and 5) unknown factors. Details regarding factors 2), 3), 4), and 5) are not explained. If we review, the removal of the uterus (histerectomy) which is one of the reasons for doing a Surrogate Mother is part of a medical indication.

Based on this, it can be said that there is a legal vacuum in the PMK PPTRB. Therefore, this regulation cannot be used as a reference regarding Surrogate Mother (Sista Noor Elvina, Brawijaya University: 2). Then related to morality, in the explanation of the Criminal Code Book II, actions that are contrary to decency are actions related to sexual crimes such as rape, sexual harassment, sexual torture, and others (<https://www.komnasperempuan.go.id> accessed July 14, 2020). The Surrogate Mother Agreement is not at all immoral. This agreement does not result in sexual harassment, sexual torture, or even rape.

Furthermore, related to public order. The definition of public order in statutory regulations is not explained in detail. According to Prof. Sunaryati Hartono, public order is difficult to define because it is heavily influenced by time, place, and the philosophy of the nation or state (Bayu Seto Hardjowahono, 2013: 138). Actions that are contrary to public order are usually interpreted as actions that violate positive law and / or legal values and principles that grow and develop in society (Amrie Hakim, <https://m.hukumonline.com/klinik/detail/ulasan/1t4e3e380e0157a/what-is-definition-public-order/>, accessed July 03, 2020). The Surrogate Mother Agreement in statutory regulations is not explicitly stated as prohibited, and this agreement is a new innominaat

agreement that grows and develops in the community. Fulfilling the right to continue the offspring, respecting and respecting human rights is part of public order (Sista Noor Elvina, Brawijaya University: 2). So this agreement can be said not to conflict with public order.

Based on this, the Surrogate Mother agreement cannot be said to be contrary to law, decency, or public order. So the Surrogate Mother agreement has met the elements in Article 1320 of the Criminal Code, both subjective and objective requirements. "A cause that is not forbidden" which is often considered not fulfilled in the Surrogate Mother agreement actually fulfills.

Surrogate Mother or if translated into Indonesian, namely "Substitute Mother" is a form of development of the in vitro fertilization method which is usually based on an agreement between the husband and wife and a woman. The results of the husband and wife's fertilization are implanted in the woman's womb and after the baby is born it will be given to the husband and wife according to the agreement (Sista Noor Elvina, Brawijaya University: 2). It is different from the concept of IVF which implants the results of the husband and wife's fertilization into the wife's womb itself. Ida Bagus Abhimantara (Notarie Vol. 1 No.1, June 2018: 40-41) mentions the various forms of Surrogate Mother, namely:

- 1) Commercial Surrogate (husband and / or wife are not infertile, and give compensation to the Substitute Mother).
- 2) Gestational Surrogate (husband and / or wife is infertile, and gives compensation to the substitute mother).
- 3) Intrafamilie Surrogate (husband and / or wife is infertile, and does not give compensation to the substitute mother)

Based on the various forms of Surrogate Mother above, Tomson Situmeang (Law of t $\hat{o}$ -r $\hat{a}$  Vol. 3 No.1, April 2017: 505) states that there are several ways to do Surrogate Mother, namely:

- 1) The results of the husband and wife's conception are transplanted into the surrogate mother's womb.
- 2) The results of the husband's fertilization with a donor ovum which is transplanted into the surrogate mother's uterus.
- 3) The results of the wife's fertilization with donor sperm that are transplanted into the surrogate mother's uterus.
- 4) The results of fertilization from the donor (ovum and sperm) who are transplanted into the surrogate mother's uterus.

The increasing number of married couples who use Surrogate Mother, of course it is important to pay attention to the condition of the Substitute Mother. Both in terms of physical, psychological, or other factors. This aims to minimize the occurrence of unwanted things to the prospective baby or the safety of the substitute mother. Based on this, not just women can become a substitute mother. There are also requirements to become a Surrogate Mother or Substitute Mother, as



quoted by Ida Bagus Abhimantara (Notarie Vol. 1 No.1, June 2018: 43), there are:

- 1) Under 40 years of age,
- 2) Married social status.
- 3) Have at least one child,
- 4) Has received approval from her husband.
- 5) In a healthy body and spirit, as well
- 6) Having a strong and healthy uterus.

## **2. The Legitimacy of the Surrogate Mother Agreement From a Human Rights Perspective**

Human Rights (HAM) is a right inherent in humans since in the womb based on their dignity as a human being which is a gift from God Almighty that must be respected and protected. Every human being has these rights regardless of differences in race, religion, or gender. These human rights are universal and cannot be revoked or inalienable (Rhona K. M. Smith, et al: 1). The recognition and existence of human rights has grown over time. The number of human rights violations occurred and considering the importance of protecting and upholding human rights, institutions and regulations related to human rights were finally formed.

In 1948 the Universal Declaration of Human Rights (DUHAM) was issued by the General Assembly of the United Nations (MU PBB). This Declaration contains the principles of human rights, basic freedoms, as well as civil and political freedoms. Furthermore, in 1976 the International Covenant on Civil and Political Rights (ICCPR) was ratified, which aims to strengthen human rights in the civil and political fields. In addition, human rights in the economic, social and cultural fields are also strengthened by the adoption of The International Covenant on Economic, Social and Cultural Rights (ICESCR) ([https://icjr.or.id/mengenal-konvenan-internasional-hak-sipil -and-politics /](https://icjr.or.id/mengenal-konvenan-internasional-hak-sipil-and-politics/), accessed July 1, 2020).

Based on this, Indonesia then ratified the ICCPR through the Republic of Indonesia Law No.12 of 2005 concerning Ratification of International Covenant on Civil and Political Rights. In addition, the 1945 Constitution also regulates human rights, namely in Chapter XA. Then in 1998-1999 the Charter of Human Rights, Decree of the MPR Number XVII / MPR / 1998 concerning Human Rights and Act Number 39 of 1999 concerning Human Rights (Human Rights Law). In general, human rights are divided into two, namely:

### **a. Politic and Civil Right,**

Civil and political rights are human rights that cannot be reduced under any circumstances (non derogeble rights). In the 1945 Constitution, the concept of non derogeble rights is regulated in Article 28I, namely the right to life, the right not to be tortured,

and others are human rights that cannot be reduced under any circumstances.

Temmanengnga

(<http://ham.go.id/2014/03/24/implementasi-kovenan-hak-sipil-dan-politik-di-indonesia-hal-4-selesai/>, accessed June 15, 2020) mentions other than in the UUDNRI 1945, the Human Rights Law also regulates civil and political rights, namely in Article 9 to Article 34, including:

- 1) Right to life,
- 2) The right to have a family and continue the offspring,
- 3) The right to develop themselves,
- 4) Right to justice,
- 5) The right not to be enslaved,
- 6) Right to freedom of religion,
- 7) The right to opinion and organize,
- 8) Right to security,
- 9) The right not to be tortured, and
- 10) Right not to be detained arbitrarily.

b. Economic, Social and Cultural Rights

In contrast to civil and political rights, economic, social and cultural rights are human rights that can be limited / reduced (derogable rights). Eko Riyadi (2012: 5) states that human rights are included in derogable rights, namely:

- 1) The right to freedom of peaceful assembly,
- 2) The right to freedom of association,
- 3) The right to freedom of expression or expression.

Surrogate Mother Agreement is an agreement made by husband and wife to have children or continue their offspring. Continuing descent is part of human rights, especially civil and political rights. These human rights are rights that cannot be reduced under any circumstances (non derogable rights). Regulations regarding the right to continue the offspring are strictly regulated in national and international law.

In international law, the right to continue the offspring is regulated in:

- a. Article 16 Paragraph (1) The Universal Declaration of Human Rights (DUHAM), namely men and women who are adults, have the right to marry and to form a family without being restricted by nationality, nationality or religion.
- b. Article 23 Paragraph (2) International Covenant on Civil and Political Rights (ICCPR), namely: every right of man and woman to marry and establish a family must be recognized.

Furthermore, in national law, the right to continue offspring is regulated in Article 28 B Paragraph (1) of the 1945 Constitution, Article

2 of the Charter of Human Rights, MPR Decree Number XVII / MPR / 1998 concerning Human Rights, and Article 10 Paragraph (1) of Law No. 39 of 1999 concerning Human Rights, namely that everyone has the right to form a family and continue their offspring through a legal marriage.

Based on these regulations, nationally or internationally the right to continue the offspring has been strictly regulated. Every person or state is obliged to protect and respect these rights as protection of human rights. The Surrogate Mother Agreement is one way that an infertile husband and wife can continue their offspring. This is even more so if the husband and wife cannot have offspring through the IVF method. Surrogate Mother will be the only solution to have offspring who are still genetically related to the husband and wife. If the Surrogate Mother agreement is prohibited, then the right to continue the offspring of husband and wife who cannot have children is not fulfilled.

In Indonesia, the right to continue offspring is regulated in the constitution, namely Article 28 B Paragraph (1) of the 1945 Constitution as mentioned above. The constitution is one of the bases of every rule made. Regulations that fall under the constitution must not contradict the constitution (unconstitutional). Although the Surrogate Mother has not been explicitly regulated in statutory regulations, the fulfillment of the right to continue the offspring through the Surrogate Mother must be guaranteed. This is as regulated in the constitution, other national laws and international law. Where that everyone has the right to continue their offspring.

With the existence of regulations related to the right to continue descent nationally and internationally, it is important for all parties to realize legal certainty which is one of the objectives of law. Where what has been regulated, must be guaranteed enforcement. Not respecting or guaranteeing these rights is a violation of human rights. As fellow human beings, it is certainly important for everyone to guarantee and respect the human rights of others (Manthovani, R., & Tejomurti, K, 2019: 277). This is because if a person wants his human rights to be respected, he is obliged to respect the human rights of others as well.

Based on this, if viewed from a human rights perspective, the Surrogate Mother agreement can help fulfill the right to continue the offspring for the infertile husband and wife. With this agreement, everyone will get the fulfillment of their rights, which are civil and political rights that cannot be reduced under any circumstances (non derogable rights).

Surrogate Mother in Indonesia currently has no specific regulations. However, because the initial procedure or action in Surrogate Mother is the same as in IVF, regulations that regulate IVF are used, namely the Health Law, PMK PPTRB, and PP on

Reproductive Health. In Article 1 of the Health Law, it is stated that legally married couples can attempt to conceive outside the natural way. Then it is reaffirmed in Article 40 Paragraph (1) of the PP on Reproductive Health, namely pregnancy outside the natural way or reproduction with assistance can be carried out if experiencing infertility for a legal married couple.

Based on the provisions above, there are several things that must be considered in implementing Surrogate Mother. First, a married couple who will use the services of a surrogate mother is a legal married couple. According to Article 2 of the Marriage Law, a marriage is valid if it is done according to the law of each religion and belief. The husband and wife who will do the Surrogate Mother must fulfill the provisions of the Marriage Law. In this case the donor of ovum and / or sperm is not allowed. This is because the ovum and sperm must come from a legal married couple. So the surrogate mother that can be done is by implanting the result of the legal fertilization of the husband and wife into the womb of the substitute mother.

In addition, according to the Taofikurrohman Procedure for the Judge of the Bandung Religious Court, both those who become Surrogate Mother or those who become Intended Parents must have a marriage contract basis. This means that not only the Intended Parent is a legal married couple. However, the Surrogate Mother must also be married by a legal marriage. This is also included in the requirements to become a substitute mother, namely being married, having at least one child, and having the husband's approval to become a substitute mother.

Second, a married couple who will use the services of a substitute mother is a married couple who is in a state of infertility. In this case, a married couple who will use the services of a substitute mother is a married couple who cannot yet have children. Types of Surrogate Mother that can be done are Gestational Surrogate (husband and / or wife who is infertile, and gives compensation to a substitute mother) or Intrafamilial Surrogate (husband and / or wife who is infertile, and does not give compensation to the substitute mother). Meanwhile, Commercial Surrogate (husband and / or wife are not infertile, and give compensation to the Substitute Mother) is not allowed.

So in order to fulfill the right to continue the offspring which is a human right, the implementation of Surrogate Mother can be done by fulfilling the rules contained in the provisions of IVF. These rules are related to being carried out by a legal married couple, a substitute mother who has been legally married, and by an infertile married couple. In this case, the type of Surrogate Mother that can be done is Gestational Surrogate or Intrafamilial Surrogate which is done by

implanting the result of legal fertilization of husband and wife into the surrogate mother's womb.

#### **D. Conclusion**

Based on the description above, it can be concluded that the Surrogate Mother agreement is a new type of innominaat agreement that grows and develops in society. As a new agreement, Surrogate Mother does not currently have a special legal umbrella. The existence of this agreement cannot be separated from the principle of freedom of contract. This principle provides freedom for everyone to make any agreement and with anyone. This means that both the husband and wife partner and the substitute mother are free to enter into any agreement, including the Surrogate Mother agreement. This agreement is in accordance with the principle of freedom of contract.

When viewed from a human rights perspective, the Surrogate Mother agreement is the fulfillment of the right to continue offspring. The right to continue the descent which is a human right (civil and political rights) that cannot be reduced under any circumstances. The existence of Surrogate Mother makes infertility married couples still have the right to continue their offspring. The application of Surrogate Mother as a development of the IVF method, must also pay attention to certain limitations regulated in IVF regulations such as must be done by a legal married couple and infertility. So the type of Surrogate Mother that can be done is Gestational Surrogate or Intrafamilie Surrogate by implanting the result of legal fertilization of husband and wife into the surrogate mother's womb.

#### **E. Suggestion**

Surrogate Mother is one way to fulfill the right to continue the offspring of infertile married couples, which is included in non-derogable rights. In Indonesia, until now there has been no specific regulation governing Surrogate Mother. In the future, it is hoped that regulations related to the implementation of Surrogate Mother in Indonesia can be formed. This is because this method is one of the methods that can be taken by an infertile married couple to have offspring who are still genetically related. With this regulation, the implementation of the Surrogate Mother can be carried out according to its purpose and function so that there is no abuse, as did Surrogate Mother commercially and not based on medical indications.

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