

Legal Status of Children Born by in vitro Fertilization Programs in Indonesia

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ABSTRACT : *The world statistics of infertile married couple is around 15 % while that in Indonesia is at the range of 12-15 %. Some methods have been devised to solve the problem; one of these is fertilization outside the womb or in vitro fertilization (IVF). In law, a child should be a subject of the law not an object. It's very important to conduct a study that aims to determine the legality status and guarantee the civil rights of children born by in vitro fertilization. This is a normative legal research that focused on reviewing the rules of positive law through a legislative approach and conceptual approach. The study uses a qualitative analysis technique. The results showed that the status of a child born from an in vitro fertilization program is recognized if the situation complies with Article 2 (1) and Article 42 of the Marriage Act; that is considered as a legitimate child with the consequences of having a civil relationship with his/her parents and with the family of his/her parents. Whereas, a child born by an in vitro fertilization program through a surrogate mother or mother (the wife of legal husband) with sperms not originating from a legal husband, will be regarded as an illegitimate child, but still also get protection of his civil rights after the Constitutional Court Decision No. 46/PUU-VIII/2010. Thus every child born through in vitro fertilization program should be guarded with strict regulations.*

Keywords: *legal status, in vitro fertilization, civil rights of children*

I. Introduction

One way to complete the happiness of a family is the birth of a child as the fruit of love of parents and as the continuation of the family line. However, in fact, not all families have a child. Nevertheless, with the rapid development of science and technology in the field of medicine, these infertile cases have been reduced by performing fertility treatment programs. Fertilization outside the womb or In Vitro Fertilization (IVF) is one of them. In vitro fertilization (IVF) literally means fertilization 'in glass'. It refers to creating an embryo by putting eggs and sperm together in a liquid culture medium in a glass (or plastic) laboratory dish. Embryos and children conceived by IVF, rather than in the normal environment of the mother's body, are sometimes referred to as 'test tube babies' (Anonymous 2006). In other words, in Vitro Fertilization (IVF) is a merging or fertilization of male's sperm to woman's ova on a petri dish in a laboratory, where after the merging, the zygote will be implanted back in the womb of the woman who has the genetic material or of the other woman's womb who has no relationship at all with the material. (Ratman 2012).

It has been 10 years since the birth of Louise Brown, the world's first "test tube" baby, generated in England with the assistance of Patrick Steptoe and Robert Edwards. It is estimated that by the end of 1988, more than 12,000 babies would have been born worldwide using the medical technique called in vitro fertilization (Coutts 1988). Currently the program is greatly increased in many countries worldwide.

The technology is absolutely useful and has become a solution for couples who have difficulty in conceiving children. In liberal countries such technologies received overwhelming response, especially for individuals or couples who do not want to be tied by marriage but want to have children or want to have children not from his/her legal couple.

This can be done by leasing the womb of a surrogate mother and that can be a source of income for women in some countries. A womb in India per infant costs between U.S. \$ 5,000 - U.S. \$ 6,000 or IDR 50.000.000- IDR 0.000.000 (if the exchange rate of U.S. \$ = IDR. 10,000), in the United States, it's around U.S. \$ 100,000, or 1 billion rupiahs (Ratman 2012). It's very possible that the same practice will also occur in Indonesia in the future.

The "generating child" technology can be a solution for couples who desire children. Whereas it becoming a pressing issue in contemporary societies starting from the polish debate but takes up its broader anthropological and ethical aspects. According to Holub (2011) dealing with the latter, it also employs some acute remarks from "Dignitas Personae." Finally it considers an approach to in vitro against the background of "European Convention on Bioethics." In its conclusion, he offers a balanced pro-life stance, albeit critical of in vitro.

The crucial issues is also debatable in Indonesia when it comes with the legal status and guaranteed civil rights of a child if the womb used in the implantation is not from the owner of the genetic material used or if a woman's ova merged with sperms from another man (not her husband). Because, before the law, a child is as a subject of the law not an object including civil rights protection, the child's legal status will depend on the legal status of the relationship between the men and women that lead to birth. Keeping in mind the above description, it is very important to conduct a comprehensive legal study to determine the legality status and guarantee of civil rights of children born by in Vitro Fertilization.

II. METHODS

This is a normative legal research that focused on reviewing the rules or norms of positive law (Ibrahim 2008). The study uses the regulatory approach and the conceptual approach. The regulatory approach is done by reviewing all laws and regulations related to the legal issues being investigated, while the conceptual approach comes from the views and doctrines developed in the jurisprudence, so that the researcher will find the ideas that form the law concepts which are relevant to the issue at hand.

Sources of legal materials used in this study are: authoritative primary legal materials in the form of legislation, and secondary legal materials namely materials that have been published and which are not official documents, such as textbooks, journals of law, and the articles of law (Marzuki 2007). The technique of qualitative analysis was carried out on the law content of the materials interpreted based on the theories and principles of existing law and, further, presented descriptively by providing an overview in law of the actual legality and guarantee of legal protection for civil rights of children born by in vitro fertilization in Indonesia.

III. RESULTS AND DISCUSSION

The issues reviews of in vitro fertilization and the ethical dilemmas that rise from the impact of the medical, social, moral and legal framework of this method of assisted human reproduction, starting with the origin of gametes, the status of embryos and of biological or shedding parents, the maternal age, the sexual orientation of parents, the fate of embryos, the experimentation on embryo, taking into account the legislative framework, but also the moral and religious ones. The dilemmas are all under review, seeking to highlight the positive and negative aspects of the process, considering fairly the need of these techniques and the benefits of their use and the benefit they would bring to society (Firuleasa at al. 2010).

In Vitro Fertilization is a method of fertilization of ovum by sperm cells in petri tube carried out by medical personnel. Fertilization outside the womb was first successfully practiced in 1970. This was originally known as IVF, after the discovery of sperm preservation methods. Initially this method was intended to help a spouse, in whom both *fallopian tubes* of the wife are abnormal with the absence of a cavity at all: either because of a congenital defect or a result of adhesions due to infection (whereas the ovary of the wife is still normal and routinely produces ovum every month), so that the egg cannot get to the uterus. Then, in a further development, this method became widely used with some variation for the ability of sperm storage and *zygote* (fertilized) that can be used at all anytime in accordance with consent. One use is for a surrogate mother (Ratman 2012).

The 30 years since the birth in England of the world's first "test tube" or in vitro fertilization (IVF) baby, Louise Brown, in 1978, have seen a progressive refinement in the medical techniques and popular perceptions of medically assisted reproduction (MAR). The term IVF is now applied generically to cover various forms of MAR, of which intracytoplasmic sperm injection (ICSI) is the most widely undertaken in many MAR facilities. In popular perception, IVF is no longer considered sensational or scandalous even despite condemnation by conservative religious hierarchies. The number of IVF children born worldwide is estimated to exceed 3 million (Dickens and Cook 2008).

Some studies conducted in some countries mainly focused on the status of the embryo in their law. As in (Zegers-Hochschild et al. 2013) that the law distinguished fertilization from conception, since conception—unlike fertilization—depends on an embryo's implantation in a woman's body. Under human rights law, legal protection of an embryo "from conception" is inapplicable between its creation by fertilization and completion of its implantation in uterus. In addition, Dickens (2010) reported that political legislatures may adopt religious approaches, such as by prohibiting embryo preservation and limiting how many may be created in an IVF treatment cycle. Legislatures may alternatively set time limits on embryo preservation, however, on expiry of which they must be left to natural degeneration. In treating human embryos as property, courts recognize owners' powers of voluntary disposition, for instance by gift, but have held back from making financial assessments of their value, for instance on loss, consistently with legislation prohibiting their exchange for payment. However, in legal perspective in Indonesia, big issues resulted from IVF is not only the status of embryo but also the status of the children after born. The other main issue is actually related with "Surrogate mother" that arisen from the agreement between a woman and another party (spouse or those who want a child and require medical intervention) to be implanted the zygote fertilized outside into the surrogate womb for conception until birth.

There are several forms of surrogate motherhood (Nabaha 2004) which can be chosen by the individuals or couples to perform the In Vitro Fertilization in accordance with the situation: (1) Genetic materials of wife (ovum) fertilized with the husband's sperm, and then put into another woman's womb. This form is used when the wife has viable eggs, but her womb has a disability due to chronic illness or was discarded due to surgery, or other causes. (2) Same as the first form, except after zygote have been previously harvested and frozen, they are then inserted into the womb of a surrogate mother after the couple's death. (3) Ovum of wife fertilized with sperm of another man (not her husband) is inserted into the womb of another woman. This form is used when a husband is barren and wife has an impediment or infirmity in the womb, but the ova of the wife are viable. (4) Husband's sperm is fertilized with the ovum of another woman, and then inserted into the womb of another woman. This form is used when the wife has diseases in the ovaries and uterus or the wife has reached menopause.

As mentioned previously the presence of a child is a continuation of the family line and is needed to complete the legal marital happiness of parents. From the legal perspective, the presence of a child in a family is not just to complete the happiness of the marriage of parents, because since his birth, he has been the subject of law with inherent rights as the consequences of his humanity: mainly the rights that come as the result of the legal relationship between himself with both parents and the families of his parents. The civil rights of the child include the right to have care, education, and the right to inheritance. Civil rights are an integral part of every child's life necessary for them to grow and develop naturally and optimally. Additionally it is a child's right as a human being to have their needs met and to be protected by parents, society, and the State (Yuningsih 2013).

However, the civil rights of a child depend on the legality of the marriage of the parents. If the parents' marriage is legally undertaken, the status of any child born is the same as that of a legitimate child and civil rights are automatically granted to him/her as the child of his/her parents. While, if both parents are not bound to a legal marriage, then the child is regarded as an illegitimate child. In other words, there are two statuses of a child in law; legitimacy and illegitimacy.

In formal judicial legislation, the definition of legitimate children is defined in Law No. 1 of 1974 on marriage, in Article 42. This determines that the legitimate child is the child born in or as a result of a legal marriage. Further to this (Muhammad, 2008) says that there are two kinds of legitimate children, namely: (1) With relation to a child born in a marriage, there are two possibilities; (a) after the marriage took place, the wife became pregnant and gave birth to a child and (b) before the marriage happened, the wife was pregnant, after the marriage took place, the child was born. (2) A child born as a result of marriage, in this case, the wife was pregnant after the marriage took place, and then there was a divorce or death of the husband; after that the wife gave birth.

A side from the legitimate child, in the Marriage Act also acknowledges a child born out of wedlock (illegitimate child). Article 43 paragraph (1) of Marriage Act, states that a child born out of wedlock has only a civil relationship with his/her mother and his/her mother's family. However, Article 43 (1) was amended by Constitutional Court Decision No. 46/PUU-VIII/2010 to become "A child born out of wedlock has a civil relationship with his/her mother and his/her mother's family as well as a civil relationship with his/her father's family if paternity can be proved by science and technology and/or there are other evidences in law to prove a blood relationship."

With regard to a child born by in vitro fertilization programs, his/her legal status is determined by referring to Article 42 and Article 43 paragraph (1) and Article 2 paragraph (1) of Law No. 1 of 1974 on Marriage: which determines that the marriage is legal if done according to the law of each religion or belief.

Thus, if the child from an in vitro fertilization program is in compliance with Article 2 (1) and Article 42 of the Marriage Act; meaning if both parents carry out a religious marriage and he/she is born in or as a result of a legal marriage, the status of the child is legitimate and the child has a civil relationship with his/her parents and the family of parents. However, it is still questionable if the law allows legitimacy for the in vitro fertilization program through a *surrogate mother* or mother (wife of legitimate husband) with sperm that does not originate from a legitimate husband, because of course, this cannot meet the meaning of Article 2 (1) although normatively, it is likely to comply with Article 42.

From a technology perspective, IVF is strongly advised and viable if only because of the principle of benefit for couples who are constrained in getting a child, but it still needs to be rethought considering ethical human values. A human child is a civilized being who is distinguished from other living beings, by the sublime flowing in the body of the child: as determined by the rule of law and religious norms.

Based on the doctrines of any religious law, a child born to legally married parents is regarded as a legitimate child, because the marriage has met the requirements specified by the religion of a bride and groom. While the child born from parents who never held a marriage, is an out of wedlock child, and is called the child of adultery. According to the Catholic faith, the marriage is legal if the sacraments have been done and, for Christians, marriage is legal with the blessing of the church. Similarly, for Buddhists, marriage is legal if carried out according to Buddhism, celebrated in the temple in front of Buddhist monks and for Hindus, a legal

marriage must be done ceremonially. Furthermore, for Moslems, if the marriage meets the Islamic principles of marriage, then the marriage is legal (Yuningsih 2013).

Islam applies a principle of *al-naslkhifdzu*; the guarantee of the process of human lineage in accordance with the rule of law by referring to the legitimacy of the blood flowing in the body of the child. This principle is revealed on the Islamic marriage law called *Al-Ahkam Al-Munakahat* (Rosyadi 2013).

The existence of religious law and positive law provides basic guidelines to be followed when interpreting legalities. Similarly, in legal action related to in vitro fertilization, because the child is not simply a technological “thing”, but the child no matter how it is born is a man who has the same human rights as all other human beings. Therefore, if the *in vitro fertilization* program is not in accordance with applicable law and does not comply with the norms of religion, the child will have the status as an illegitimate child.

Sociologically, the existence of illegitimate children cannot be ignored in a society. They have their own name in each society, for example, called *Natuurlijk kind* (Subekti 2005), in customary law in Muna, Southeast Sulawesi called *anahi patakoama* (Muttalib 2012), and the Javanese and Sundanese calls them as *anak haram jaddah* or *anak kowar* which means children born by the illicit intercourse (Witanto 2012). In Islamic norms (the author only refers to Islam) that child born outside of a legal marriage is called a child of adultery.

The results of the Commission Decision of the Indonesian Islamic Scholar Council on June 13, 1979, issued rules of fertilization outside the womb, or in vitro fertilization (IVF) as follows: (1) IVF with sperm and ovum of legitimate spouse, it's legally *mubah* (allowed) because it includes an effort based on religious principles. (2) IVF of couples using a *surrogate womb* of another wife (e.g. one wife's ova into another wife's womb) is *haram* (forbidden) because it will lead to complicated problems in relation to inheritance matters (especially between the child born with the mother who has ovum and the mother who conceived, and vice versa). (3) IVF with frozen sperm of the husband, who had died, is *haram* (forbidden) because it will lead to complicated problems, both in relation to the determination of lineage and relation to inheritance. (4) IVF with sperm and ovum taken from other than a legitimate spouse is *haram* (forbidden) because the status is the same as illicit sexual intercourse outside of legal marriage (adultery), and this is considered to be the same as the occurrence of actual adultery.

Thus, it becomes clear that if the in vitro fertilization program happens through a surrogate mother or mother (wife of legal husband) with sperm not from the legitimate husband, before the law, the child born will be considered to be illegitimate. This raises the question of whether the biological father (man whose sperm is used for conception) should be held accountable by law to meet the civil rights of the child born by the program of in vitro fertilization.

Before the Constitutional Court Decision No. 46/PUU-VIII/2010 on February 17, 2012 that annulled the legal norms contained in Article 43 paragraph (1) of Marriage Act in which the biological father was 'released' by law from the obligation to provide a living allowance, provide an education, and share his assets with a child of his out of wedlock, and the child born out of wedlock only has a civil relationship with her mother and her mother's family. Empirically, such provisions place illegitimate child is in a disadvantageous position and they experience discrimination.

In response to the matter, The Constitutional Court conducted a judicial review of law to the Constitution, amending Article 41 paragraph (1) of Marriage Act to read "Child born out of wedlock has a civil relationship with his/her mother and his/her mother's family as well as with the male as the father who can be proved by science and technology and/or other legal evidences to have a blood relationship, including civil relationship with his/her father's family".

The Constitutional Court believes that naturally, it's impossible for woman to be pregnant without fertilization of ovum and spermatozoa either through sexual intercourse (coitus) or through other means based on the development of technology. Therefore, it is unfair when the law stipulates that a child born of a pregnancy only has a maternal relationship. And it's also unfair if the law also releases a man from his responsibility as a father for the pregnancy and the birth of the child, and at the same time negates the legal rights of the child to the man as his father. Moreover, with existing technology, it's possibly to prove that a child is the child of a particular male.

The Constitutional Court Decision No. 46/PUU-VIII/2010 is a legal decision that is progressive and fundamental from the standpoint of protecting children born out of wedlock. The theory of progressive law requires that the law is to serve and not just cause the opposite of human happiness (Rahardjo 2009). Thus, the Constitutional Court Decision becomes the legal guarantee for the rights of all children born out of wedlock because it declares it is the responsibility of the biological father to fulfill his civil rights, either by voluntarily acting as the biological father and including the child in the biological father's family, or by allowing a personal initiative or parties representing the child's interests to petition or bring a lawsuit to the court in order that the civil rights of the child are fulfilled.

VI. CONCLUSION

The legal status of children born from in vitro fertilization program strongly relies on the legal status of marriage of the parents and the method of zygote implantation. If the zygote is the result of fertilization of the ovum and sperm of legal spouse and then implanted to the legitimate wife, then the child is legitimate and has a civil relationship to both parents, but after the decision of the Constitutional Court No. 46/PUU-VIII/2010, all the children out of wedlock in law in Indonesia, including illegitimate children born from in vitro fertilization program will receive the protection and recognition of the civil rights as far as the children or all parties represent their interests can prove blood relationship or other evidences that recognized by the law to have a civil relationship with the man who caused their birth.

The presence of the Constitutional Court Decision can be a guarantee for the fulfillment of the rights of parents causing the birth, therefore every child born through in vitro fertilization program should be guarded with strict regulations for the individuals who would use such method because the child is in principle not a product (goods) of an industry, but as human being who has rights as other humans in general.

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