



## **Criminal legal protection for pregnant women from a human rights perspective**

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### **Abstract**

This research seeks to examine the application of criminal culpability for pregnant women within the Indonesian criminal justice system, focusing on human rights protection. This research highlights two primary issues: the lack of defined regulations governing the handling of pregnant women as offenders and the variability in law enforcement procedures concerning this vulnerable demographic. The used methodology is doctrinal legal research, using a statute, case, analytical, and comparative legal approach. Data were acquired from primary and secondary legal sources that were subjected to qualitative analysis. The study's findings reveal that the Indonesian criminal law system lacks a comprehensive and human rights-oriented framework for addressing the circumstances of pregnant women implicated in criminal cases. The new Criminal Code (Law No. 1 of 2023) allows for the consideration of the perpetrator's circumstances; nonetheless, its application in practice remains contingent upon the judgment of law enforcement officials, without explicit technical requirements. Consequently, legal reform is essential via the establishment of specialized rules, the promulgation of sentencing guidelines, and the enhancement of the substantive justice approach to provide equitable and humane protection for pregnant women and their fetuses.

**Keywords:** Criminal liability, pregnant women, human rights

### **Introduction**

The law embodies the essence of a nation, with distinct and intrinsic traits that vary from one country to another. The law is neither absolute nor supernatural; it originates from the dynamics of communal existence. Within that paradigm, law is not only a static norm but is dynamic, evolving, diminishing, and reinforcing in tandem with societal developments. In Indonesia's legal framework, criminal responsibility serves as the fundamental cornerstone for the administration of justice. This legal framework mandates that any person who perpetrates a crime must be held responsible for their conduct according to relevant legal standards. Nonetheless, the issue gets more intricate when the legal entity in question is a pregnant woman. This complexity pertains not just to legal dimensions but also to social, moral, and humanitarian considerations, particularly when analyzed from a human rights (HR) viewpoint.

Pregnant women, as a marginalized demographic, require a thorough legal framework. Pregnancy situates women in a distinct legal status, since it encompasses not only their rights and responsibilities but also safeguards for the fetus they bear. Of the many legal rules of Indonesia, fetuses are acknowledged as legal entities. Article 1, section 1 of Law Number 23 of 2002 on Child Protection defines a child as an individual under the age of 18, which includes unborn children. Similarly, Law Number 4 of 1979 on Child Welfare and Law Number 39 of 1999 about Human Rights define a child to include individuals who are still in utero. This indicates that the fetus has legal status as a creature with rights, particularly the right to life and protection.

This acknowledgment presents a quandary when a pregnant lady is implicated in a crime. The concept of equality before the law mandates that all individuals, without distinction, including pregnant women, must be held responsible for their conduct under the law. Conversely, the enforcement of criminal sanctions against pregnant women may adversely

affect the unborn baby. This challenge necessitates prudence and a measured approach in the law enforcement procedure. The principles of human rights outlined in Law Number 39 of 1999 should serve as the foundation for developing legal policies for pregnant women. The rights to life, humane treatment, and health protection are essential considerations that must not be overlooked in the legal proceedings against them.

The status of the fetus is often examined from the viewpoints of legal positivism and natural law within philosophical discourse. The positivist perspective, as articulated by Hans Kelsen, asserts that an entity may be acknowledged as a legal subject alone if it is specifically delineated in law. Simultaneously, the natural law perspective, articulated by John Locke, starts with the premise that the right to life is an intrinsic natural right possessed by every human being from conception. In this sense, the fetus has intrinsic rights that need safeguarding, irrespective of their acknowledgment in positive law. This perspective regards the fetus as a sentient being that ethically and legally warrants humane treatment, necessitating its consideration in all legal policies, including the imposition of criminal penalties on pregnant mothers.

The Indonesian criminal law system does not provide for special treatment of pregnant women condemned to incarceration. In some instances, pregnant women remain incarcerated without any provisions for sentence reduction or postponement. This scenario jeopardizes the health of both the mother and fetus, while also highlighting the inadequate responsiveness of the legal system to disadvantaged populations. In some instances, women experience delivery and nursing while incarcerated, a situation that is far from optimal for human rights and reproductive health. This issue illustrates the enduring gender disparity within the judicial system, where women, particularly those who are pregnant, receive insufficient protection.

Numerous nations worldwide have implemented more compassionate criminal law regulations for pregnant women. Numerous European nations use laws to mitigate or defer sentences for pregnant women, based on humanitarian considerations and to safeguard the well-being of both mother and child. Conversely, in more orthodox judicial systems, pregnant women are handled identically to other inmates, disregarding the ramifications of pregnancy on the health and safety of the baby. Indonesia needs to derive insights from these experiences by developing equitable, proportionate, and human rights-oriented policies for managing criminal cases involving pregnant women.

National law has acknowledged children's rights from the prenatal stage via numerous rules. Article 131 of Law Number 36 of 2009 regarding Health underscores that child health care starts in utero. Similarly, Article 27 of the 1945 Constitution ensures that every citizen, including unborn infants, has the right to a dignified existence. Nonetheless, this normative acknowledgment has not been entirely manifested in law enforcement actions, particularly regarding criminal culpability for pregnant women. The absence of comprehensive normative rules, contradictions in judicial rulings, and the inadequate comprehension of law enforcement officials of the rights of pregnant women are the primary impediments to the execution of this protection. This scenario underscores the need for more precise and actionable legislative changes to guarantee justice for pregnant women in judicial disputes. Proposed changes may include empowering judges with the authority to defer or mitigate penalties in light of pregnancy, enhancing the legal system's comprehension of human rights and reproductive health, and creating specialized jail facilities that are accommodating to mothers and children. Moreover, public education is crucial for dismantling the social stigma surrounding pregnant women entangled in criminal law, since this stigma often exacerbates their psychological and social circumstances.

Given the intricacy of this issue, criminal culpability for pregnant women must be administered judiciously and proportionately, while maintaining the tenets of justice and safeguarding human rights. The presence of the embryo in the womb must be acknowledged and prioritized in all legal proceedings. The law's primary objective is not only punitive; it also aims to safeguard and defend justice, particularly for vulnerable populations like pregnant women. Consequently, the Indonesian legal system must be further evolved to become more responsive and compassionate in addressing emerging societal concerns.

**Articulation of the issue:** What is the legal framework regarding criminal culpability for pregnant women in Indonesia? What is the viewpoint on the application of criminal responsibility for pregnant women within the Indonesian criminal justice system for human rights protection?

### Research methods

This study employs a doctrinal legal research methodology, commonly referred to as normative research or literature review. This methodology was used due to the research's primary emphasis on the examination of statutes and other legal documents. The technique used in legal research significantly influences the trajectory and caliber of the legal arguments presented. The research process starts with

the formulation of fundamental concepts, followed by the implementation of systematic methodologies for legal data collecting, analysis, and interpretation. This research approach aims to discover, comprehend, and address legal issues systematically and by relevant regulations.

This research primarily employs the legislative approach, which is a fundamental component of the normative technique. This method conducts a thorough review of the laws and regulations pertinent to the criminal responsibility of pregnant women. The primary legal sources in this framework comprise the 1945 Constitution of the Republic of Indonesia, Law Number 1 of 1946 regarding the Criminal Code, Law Number 8 of 1981 about Criminal Procedure, Law Number 35 of 2014 on Child Protection, Law Number 39 of 1999 addressing Human Rights, the Convention on the Rights of the Child, and Law Number 36 of 2009 concerning Health. This research employs a case method by examining court rulings concerning pregnant women as offenders of crimes. This case research aims to ascertain how court procedures interpret and implement the law rules concerning these vulnerable populations.

Another method used is an analytical approach, namely by assessing the definitions of legal terminology and their application within the framework of laws and jurisprudence. This technique conceptually analyzes legal issues about criminal culpability, fetal protection, and human rights principles to enhance comprehension. This research employs a comparative legal method, specifically contrasting the Indonesian legal system with those of other nations concerning the treatment of pregnant women who commit offenses. This comparative research is crucial for assessing the alignment of Indonesian legislation regarding the rights of pregnant women with practices in other countries.

This research categorizes data sources into main legal resources and secondary legal materials. Primary legal materials include statutes, regulations, judicial rulings, and other official legal documents that serve as the fundamental foundation for the analysis of the legal problems examined. Secondary legal resources include legal literature, including books, scholarly journals, expert analyses, and papers that examine and interpret the main legal texts. Both categories of legal documents are gathered and examined qualitatively. The data collection for this research was performed via literature reviews by consulting different pertinent textual sources. The data analysis procedure was performed inductively, focusing on comprehending the context and substance of the obtained data. The data analysis included data reduction, data display, and conclusion formulation. Data reduction seeks to eliminate extraneous information, data presentation organizes results systematically, and verification ensures the findings' validity before conclusion. This strategy aims to provide legal judgments that are rational, thorough, and scientifically valid. This analytical approach is anticipated to address legal issues objectively and enhance the evolution of criminal law and human rights protection in Indonesia.

### Discussion

#### 1. Forms of Criminal Responsibility for Pregnant Women in the Framework of Positive Law in Indonesia

Criminal responsibility is a fundamental component of the criminal justice system designed to uphold social order,

safeguard society, and provide accountability for persons who engage in illegal conduct. This principle is universally applicable to all persons, irrespective of their social, economic, or personal circumstances. Nonetheless, when this notion is used to pregnant women encountering criminal law, intricate issues emerge that pertain to legal, ethical, and human rights dimensions. Pregnant women possess legal status as people and simultaneously embody two entities: themselves and the baby they carry. This circumstance necessitates legal consideration that not only highlights the retributive element but also safeguards the rights of the unborn as a living being inside the mother's body.

#### **Indonesian criminal law differentiates between two key concepts:**

**Ius poenale**, which refers to objective criminal law including written legal rules, and **ius puniendi**, which denotes the state's authority to impose punishment. Within this context, the Indonesian legal system asserts that any infraction of the law must be penalized by relevant regulations. When the violator is a pregnant woman, a critical concern emerges about the potential influence of her pregnancy status on the severity and nature of the criminal culpability assigned. In legal practice, pregnancy is often seen as a mitigating circumstance; nonetheless, in the absence of express normative assurances, this consideration mostly rests on the judge's judgment.

#### **Criminal culpability has two primary components:**

Blame (mens rea) and the capacity for accountability. A criminal may be held responsible if he or she does an act with volition and comprehends the ramifications of his or her conduct. In this context, fault encompasses not only a physical act that contravenes the law but also the presence of ill purpose or ignorance of the resultant consequences. In the situation of pregnant women, the discourse on the ability to be responsible expands due to the possible effects on the fetus, which is legally acknowledged as an entity with rights. This acknowledgment is manifested in several statutes, including Law Number 39 of 1999 regarding Human Rights and Law Number 23 of 2002 in conjunction with Law Number 35 of 2014 concerning Child Protection, which asserts that children, including those in utero, possess the right to life, protection, and enhancement of their living standards.

The presence of a baby in the womb presents a philosophical and legal quandary about the sentencing of pregnant women to criminal punishment. The state must uphold the law with the idea of equality while also safeguarding the right to life of a fetus that is unable to defend itself. Indonesian courts sometimes see pregnancy as a mitigating factor, as shown by the Gorontalo District Court Decision Number 106/Pid.B/2023/PN Gto, when the judge acknowledged the defendant's pregnant status as a consideration that lessened the harshness of the punishment. Nonetheless, not all instances demonstrate uniformity in this approach. This engenders legal ambiguity and poses hazards to pregnant women confronting the law.

Other nations have implemented a more methodical and specific methodology for pregnant women who perpetrate offenses. Russia's Criminal Code, under Article 82, clearly permits the deferral of sentence execution for pregnant women or mothers of children under 14, contingent upon the term not exceeding five years. This signifies the safeguarding of the child's ongoing existence and growth.

The Sentencing Council in England and Wales has released recommendations, effective April 2025, indicating that pregnant women or mothers of children under one year old should not be incarcerated, unless for severe offenses. This method prioritizes the rehabilitation and physical and psychological well-being of the mother and child above mere punitive measures. Canada has a conditional sentence framework allowing offenders to serve their sentences outside of incarceration via house arrest or community programming, provided the offense does not pose a threat to public safety and the term is no more than two years. This method openly reconciles the goals of punishment with the safeguarding of vulnerable populations, especially pregnant women.

In contrast to the three nations, the Indonesian legal system now lacks explicit and comprehensive written legislation concerning the protection of pregnant women within the criminal justice process. Article 31 of the Criminal Procedure Code permits the postponement of imprisonment for humanitarian reasons; nevertheless, its execution is largely contingent upon the discretion of law enforcement officials, including investigators and judges. Both the previous Criminal Code and the new Criminal Code (Law No. 1 of 2023) lack clear provisions that ban the imprisonment or criminalization of pregnant women. The new Criminal Code has created an opportunity to evaluate the personal circumstances of the offender as a reason for mitigating or deferring the execution of the punishment, as stipulated in Articles 54 and 100. These articles embody a spirit of humanism and the safeguarding of human rights; nonetheless, the absence of explicit standards and technical guidelines fails to provide definitive protection.

The lack of concrete limitations in the Indonesian legal framework concerning the criminal culpability of pregnant women is a significant deficiency in the safeguarding of human rights. Article 53 of Law Number 39 of 1999 stipulates that every child, from the moment of conception, has the right to life, sustenance, and enhancement of their quality of life. Consequently, when a pregnant woman is convicted of a criminal violation, the state indirectly administers a punishment to the unborn child. This position is troublesome since the fetus is unable to defend itself, hence, the state is obligated to provide proper legal protection. The detention of pregnant women without appropriate care and suitable facilities may lead to significant health issues for the fetus, perhaps resulting in fetal demise or long-term damage to the child post-birth. In this context, it is hardly an overstatement to assert that the imposition of criminal sanctions on pregnant women is a sort of double accountability that necessitates regulation via a more equitable and compassionate legal framework.

The revision of legislation about pregnant women is vital in the regeneration of the Indonesian legal system. The revised Criminal Code needs to specifically stipulate that pregnancy may serve as a justification for deferring or altering the nature of punishment. The Criminal Procedure Code requires revision to clarify measures for deferring the custody of pregnant women, including the establishment of a monitoring system and the provision of medical and psychological assistance mandated by the state. The Corrections Law No. 22 of 2022 fails to comprehensively address the rights of pregnant women in correctional facilities. In reality, incarcerated pregnant women spend their sentences in correctional facilities and get inadequate

medical care, often resulting in human rights abuses. To address this issue, it is essential to establish technical rules, like Government rules, Permenkumham, or Supreme Court Regulations, to serve as guidance for law enforcement agents in their treatment of pregnant women accused of criminal crimes.

In the realm of international human rights, the incarceration of pregnant women without adequate protection is deemed a breach of the principle of non-discrimination and constitutes cruel treatment. The Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) underscore the safeguarding of mothers and children as a fundamental aspect of human rights protection. Indonesia, having signed both agreements, must guarantee that the safeguarding of pregnant women in criminal procedures is included in the constitutional execution of international commitments. In this context, the state is mandated to provide a legal framework that not only prosecutes lawbreakers but also guarantees that all policies and law enforcement actions do not adversely affect vulnerable populations, including unborn babies.

The protection of pregnant women in the criminal context is substantive justice, integrating legal certainty with the safeguarding of human rights, rather than serving as a kind of impunity. The state retains the authority to inflict penalties on offenders of criminal actions, including pregnant women, but the application of these sanctions must consider humanitarian principles and the right to life as enshrined in the constitution and international law. The state must differentiate between the kind of punishment and its execution to ensure that the concept of equality before the law does not hinder equitable protection for individuals in unique circumstances. The criminal law approach should transcend mere formalism and evolve into a system that addresses the genuine requirements of society.

Considering comparable practices in Russia, the UK, and Canada, and the reformative ethos of the new Criminal Code, Indonesia has a significant chance to implement a more humane and human rights-focused criminal law system. The characterization of pregnant women as offenders must be contextualized within the framework of dual responsibility: as independent legal entities and as mothers bearing future citizens. In an optimal legal framework, pregnancy is not used as a pretext for evading punishment, but rather as a foundation for devising a type of punishment that adheres to the principles of substantive justice, safeguards life, and ensures that the state's presence continues to uphold humanity in law enforcement.

Consequently, the reform of the Indonesian criminal law system should focus on enhancing legal provisions that safeguard pregnant women by including specific articles in the Criminal Code, Criminal Procedure Code, and Correctional Law. Furthermore, technical instructions via PERMA and other regulatory frameworks must be established to provide guidance and standards for law enforcement officials in executing equitable and compassionate acts. Indonesia must underscore that safeguarding pregnant women within the criminal justice system is not a legal exception, but an integral aspect of human rights, social justice principles, and the state's obligation to future generations. In the absence of comprehensive systematic reform, the notion of justice within Indonesian criminal law would remain case-specific

and may perpetuate discriminatory practices that contradict constitutional principles and international obligations.

## 2. Implementation of Criminal Responsibility for Pregnant Women in the Indonesian Criminal Justice System When Reviewed from the Perspective of Human Rights Protection

The enforcement of criminal responsibility for pregnant women within the Indonesian criminal justice system, analyzed through the lens of human rights protection, reveals the intricate balance between equitable law enforcement and the safeguarding of vulnerable populations. In the Indonesian criminal law system, all individuals are fundamentally regarded as equal before the law, as underscored by the concept of equality before the law, a cornerstone of a modern constitutional state. The application of this principle to pregnant women presents challenges, as they are not only criminal offenders but also bear another entity, the fetus, which Indonesian law recognizes as a subject entitled to life, the preservation of life, and the enhancement of living standards, as articulated in Article 53 of Law Number 39 of 1999 concerning Human Rights.

The Indonesian criminal justice system currently lacks precise regulations governing the treatment of pregnant women involved in judicial processes. Law Number 8 of 1981 about the Criminal Procedure Code (KUHAP) permits courts or investigators to use discretion in suspending custody for humanitarian grounds, including pregnancy. The lack of legal rules results in uneven treatment of pregnant women, contingent upon the discretion of law enforcement officials, the availability of resources, and the socio-political factors associated with each case. This indicates that the safeguarding of pregnant women's human rights within the criminal justice system remains ad hoc, without a systematic structure and grounded in specific legal standards.

Pregnancy can serve as a mitigating factor in sentencing, as demonstrated in the Gorontalo District Court Decision Number 106/Pid.B/2023/PN Gto; however, this does not ensure comprehensive protection of the rights of pregnant women and fetuses during detention or punishment. This circumstance engenders a disparity between the legal tenets of justice and the actual safeguarding of fundamental person rights, including the right to health, the right to security, the right to humane treatment, and the right to fetal development, which ought to be ensured by the state. If pregnancy is not considered a standard for special treatment within the criminal justice system, pregnant women may be subjected to harsh, discriminatory, and possibly rights-violating treatment.

Comparative analysis of the legal systems in countries like Russia, England, and Canada reveals that numerous jurisdictions have embraced a humanistic approach to the sentencing of pregnant women, including deferred sentences, alternative penalties such as probation or conditional sentences, and a clear prohibition against incarcerating pregnant women for minor offenses. These nations acknowledge that the criminal justice system must not only rigorously implement the law but also serve as a mechanism for safeguarding human values and fundamental rights. Regrettably, the Indonesian legal system remains deficient in this aspect, while normatively acknowledging the rights of unborn children via numerous laws and regulations.

The adoption of the New Criminal Code by Law Number 1 of 2023 offers the prospect of a more humanitarian approach to law enforcement. The New Criminal Code mandates that judges, while determining a punishment, must take into account the personal circumstances of the offender, which may indirectly include pregnancy. Furthermore, Article 100 allows for the deferral of the execution of certain penalties, including the death penalty, for persons with exceptional circumstances. Nevertheless, once again, in the absence of operational derivative laws and explicit technical recommendations from the Supreme Court governing the treatment of pregnant women, these measures have failed to provide effective protection of human rights. Consequently, the enforcement of criminal liability for pregnant women within the Indonesian criminal justice system remains at a critical juncture between legal formalities and the safeguarding of human rights.

In this framework, the state should recognize pregnant women not just as legal agents accountable for their actions but also as persons with distinct needs and rights necessitating enhanced protection. The Indonesian criminal justice system requires redesigning to incorporate human rights principles as minimum standards throughout all phases of the legal process—from investigation and prosecution to trial and the execution of criminal penalties—while acknowledging pregnancy as a factor in ensuring equitable and non-discriminatory treatment. Without the execution of structural and normative changes, the enforcement of the law would perpetuate systematic injustices against vulnerable populations, including pregnant women, so undermining the fundamental principles of a legal state that champions human dignity.

## Conclusion

The enforcement of criminal liability for pregnant women within the Indonesian legal framework encounters significant problems, both in normative and practical dimensions. While Indonesian positive law acknowledges the idea of equality before the law, specific and systematic protections for vulnerable groups, like pregnant women, remain unregulated. The enforcement of criminal sanctions against pregnant women often neglects their fundamental rights and the rights of the fetuses they bear, particularly concerning health, humane treatment, and the preservation of life. The human rights paradigm that champions human dignity and safeguards vulnerable populations has not been thoroughly incorporated into the criminal justice system. Consequently, extensive legal reform is essential, including modifications to statutes and regulations, including the Criminal Code, Criminal Procedure Code, and the Corrections Law, along with the provision of explicit technical recommendations by the Supreme Court and other ministries. These measures are crucial to establish the concepts of substantive justice and human rights protection as the fundamental basis for addressing pregnant women within the criminal justice system, making the Indonesian legal framework more responsive, compassionate, and equitable.

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