

**ANALISIS YURIDIS TERHADAP *SURROGATE MOTHER* DALAM
PERSPEKTIF HUKUM PIDANA INDONESIA**



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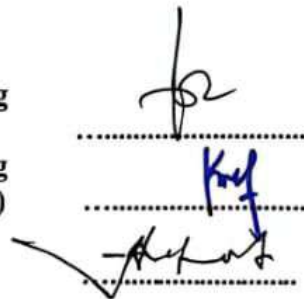
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RINGKASAN ARTIKEL ILMIAH

Praktik *surrogate mother* atau ibu pengganti di Indonesia merupakan solusi medis bagi pasangan infertil untuk mendapatkan keturunan, namun keberadaannya menimbulkan problematika hukum yang kompleks. Berdasarkan UU Nomor 17 Tahun 2023 tentang Kesehatan dan Permenkes Nomor 2 Tahun 2025, praktik peminjaman rahim secara tegas dilarang. Meski dilarang, regulasi kesehatan tersebut saat ini hanya memuat sanksi administratif seperti teguran tertulis atau pencabutan izin, tanpa adanya ancaman pidana yang spesifik bagi para pelakunya. Hal ini menciptakan kekosongan norma hukum pidana yang dapat memicu ketidakpastian hukum serta potensi eksploitasi terhadap perempuan dan anak.

Untuk mengisi kekosongan hukum tersebut, penegak hukum dapat melakukan interpretasi dengan menerapkan UU Pemberantasan Tindak Pidana Perdagangan Orang (TPPO) dan UU Perlindungan Anak. Praktik surogasi komersial dinilai memenuhi unsur delik dalam UU TPPO, seperti perekrutan dan penyalahgunaan posisi rentan ekonomi untuk eksploitasi organ reproduksi. Sementara itu, dokter atau tenaga medis yang terlibat dalam proses ini dapat dimintai pertanggungjawaban pidana berdasarkan prinsip personal liability melalui pasal-pasal dalam KUHP, misalnya terkait pemalsuan dokumen medis, serta sanksi profesi yang merujuk pada Kode Etik Kedokteran Indonesia. Penelitian ini menyimpulkan perlunya regulasi khusus yang mengintegrasikan sanksi pidana proporsional guna melindungi semua pihak dan memberikan kepastian hukum yang selaras dengan nilai-nilai di Indonesia.

Kata Kunci: Ibu Pengganti, Hukum Pidana Indonesia Kekosongan Hukum

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*present, trusting your choices, and believing in your self are supposed
You're exactly what you to be".*

Date: 12 March 2026

Manuscript Acceptance Letter

ID: 4771

Dear: **Sintia Siregar, Kiki Kristanto, Karlinae D. Bangas. Agus Mulyawan**
Universitas Palangka Raya

Thank You your submission to your journal!

We are pleased to inform you that your paper entitled “**A LEGAL ANALYSIS OF SURROGATE MOTHERS FROM THE PERSPECTIVE OF INDONESIAN CRIMINAL LAW**” reviewed by 2 reviewers and had a positive opinion. This paper has been accepted for publication at the peer-reviewed *Multidisciplinary Output Research For Actual and International Issue (MORFAI JOURNAL)* to Published in

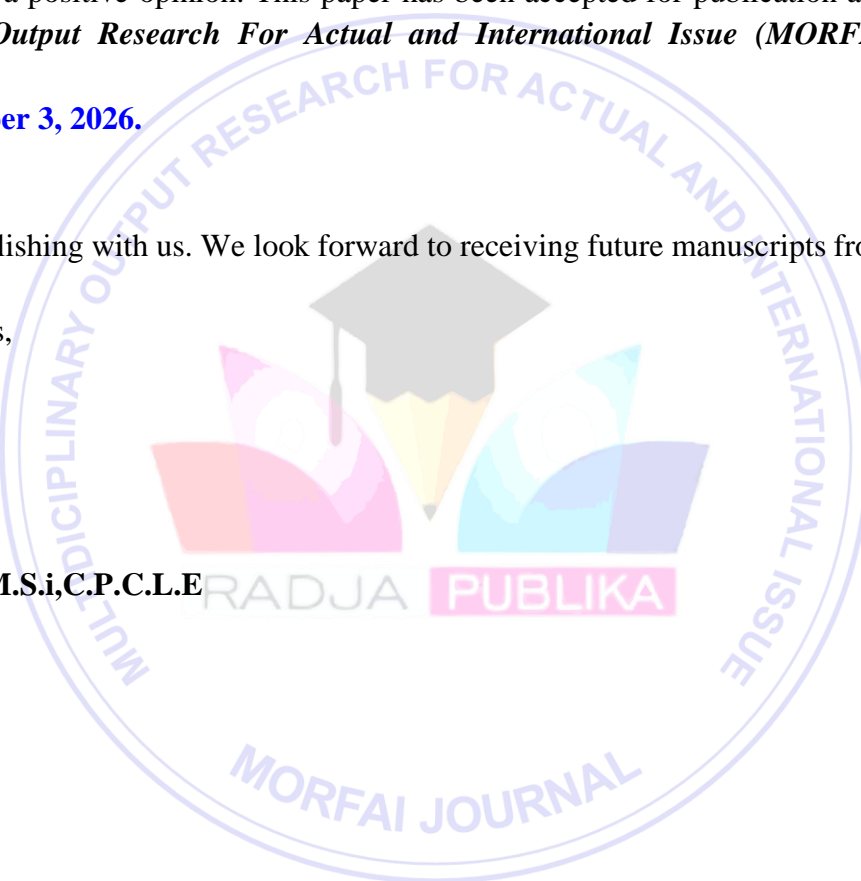
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Thank you for publishing with us. We look forward to receiving future manuscripts from you.

With warm regards,



Irada Sinta, SP.,M.S.i,C.P.C.L.E
Editor in Chief



A LEGAL ANALYSIS OF SURROGATE MOTHERS FROM THE PERSPECTIVE OF INDONESIAN CRIMINAL LAW

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Abstract

The practice of *surrogacy* is a solution for infertile couples, but it creates legal problems in Indonesia. This normative juridical research analyzes Indonesian criminal law regulations regarding the practice of *surrogacy* and the criminal liability of doctors involved. The results show that although Law Number 17 of 2023 concerning Health and Ministerial Regulation No. 2 of 2025 prohibit the practice of womb borrowing, these provisions only regulate administrative sanctions without clear criminal threats, thus creating a vacuum in criminal law norms. To anticipate this legal vacuum, the Law on the Eradication of the Crime of Human Trafficking and the Law on Child Protection can be implemented through legal interpretation. The criminal liability of doctors is based on the principle of personal liability through articles in the Criminal Code, as well as professional sanctions based on the Indonesian Code of Medical Ethics. This research concludes that Indonesia needs special regulations that integrate proportional criminal sanctions to provide legal certainty and protect all parties involved.

Keywords: *Surrogate Mother, Indonesian Criminal Law, Legal Vacuum*

INTRODUCTION

Background

Modern developments have driven human progress in various areas of life, including medicine, particularly genetics, through the use of science and technology. One example is the opportunity for couples with genetic fertility issues to continue having children. ¹Advances in health, particularly medicine, have provided solutions for many couples through the use of medical technology. This progress has been realized through the discovery of a new method of artificial insemination known as *in vitro fertilization* (IVF).² Children are a very precious gift for every married couple and are the main hope for every family. The continuation of offspring is expressly regulated in Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia, then reaffirmed in Article 10 paragraph (1) of Law Number 39 of 1999 concerning Human Rights. Although continuing offspring is one of the human rights guaranteed and protected by law, in reality not all married couples have the opportunity to have children easily. In fact, many of them are not blessed with children due to infertility problems. ³Research results show that around 10% of married couples experience the inability to have children due to infertility problems, and have very little chance of adopting a child. This condition causes these couples to experience despair, which ultimately encourages them to look for other alternatives to have children.⁴ One of the medical innovations that has emerged to address infertility is *in vitro fertilization* (IVF) technology, or test tube baby programs. Medical technology related to test tube baby programs was discovered in the 1970s and developed with the aim of addressing infertility issues in married couples.

¹Santoso, A., Sutarno, S., & Pramono, B. (2025). *Provision of Reproductive Services with Assistance*. Indonesian Journal of Social Sciences, 6 (4), 1136–1149.

²Daud, N. (2023). *The Concept of In-Vitro Fertilization (IVF) According to Modern Medicine*. International Journal of Academic Research in Business & Social Sciences, 13 (6).

³Sanjaya, AW (2023). *Legal Aspects of Surrogacy from the Perspective of Civil Law and Criminal Law*. Jurnal Rechtsens, 5(2), 36-47

⁴Adane, TB, Berhanu, KZ, & Sewagegn, AA (2024). *Infertile Women of Ethiopia : Psychological Challenges and Coping Strategies*. Medicine.

A LEGAL ANALYSIS OF SURROGATE MOTHERS FROM THE PERSPECTIVE OF INDONESIAN CRIMINAL LAW

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Along with rapid advances in *in vitro fertilization* (IVF) techniques, the concept of surrogacy emerged.⁵ According to Hukum Online, based on *Black's Law Dictionary 9th Edition*, the definition of a *surrogate mother* is a woman who carries out the functions of pregnancy and giving birth to a child for another person, especially a woman who agrees to provide her womb to carry an embryo during pregnancy, usually on behalf of an infertile couple, and who relinquishes any parental rights she may have after the child's birth.⁶ In this practice, there is generally an agreement that regulates the rights and obligations between *the surrogate mother* and the couple who use her services. *The Surrogacy Agreement* or surrogacy agreement is the basis for the implementation of surrogacy itself.⁷ There are two categories of surrogacy: Traditional Surrogacy and Gestational Surrogacy. In Traditional Surrogacy, a woman undergoes insemination with the father's sperm, then carries and cares for the baby for the couple. In this type, the surrogate mother is the baby's biological mother, using her own egg fertilized by the father's sperm. In Gestational Surrogacy, the embryo is implanted into the surrogate mother's uterus, so the woman giving birth is not genetically related to the child.⁸

Despite offering a solution for infertile couples, the practice of *surrogacy* in Indonesia has sparked intense public debate regarding its ethics, morals, and legality. Socially and religiously, this practice is often considered a violation of established norms, raising fundamental questions about children's identity, family relationships, and the potential exploitation of women.⁹ The practice of surrogacy is already widespread in Indonesia, but it remains largely unrevealed because it does not raise issues.¹⁰ One example of a *surrogate mother practice case* that occurred in Indonesia involved artist Zarima Mirafsur in January 2009. This case was first revealed through national media reports, where Zarima was suspected of renting her womb for *in vitro fertilization* (IVF) to several businessmen, and received compensation in the form of a luxury car and cash of 50 million Rupiah as compensation for the agreement, as stated by her former lawyer, Ferry Juan.¹¹ However, Zarima Mirafsur vehemently denied all allegations, declaring them baseless rumors intended to damage her reputation as an artist. The case quickly gained public attention due to the celebrity involvement, making it an iconic example of the potential social controversy posed by surrogacy amidst unclear legal regulations.

Procedurally, the case was confined to media coverage without significant involvement in formal legal proceedings, such as police investigations or court hearings, likely due to a lack of concrete evidence or pressure to dismiss the issue. Consequently, no court decision or official resolution was published, making the case a historical landmark primarily discussed in the context of medical ethics and reproductive rights studies. This incident sparked intense public discussion about the ethics and legality of commercial *surrogacy*, which until now has not been explicitly regulated by Indonesian law, despite being frequently associated with violations of religious and moral norms. This case exemplifies the challenges to the regulation of *surrogacy* in Indonesia, where the practice often operates in a gray area between medical necessity and economic exploitation, and calls for a more comprehensive legal framework to protect all parties involved.¹² Based on the provisions contained in Law Number 17 of 2023 concerning Health, (hereinafter abbreviated as the Health Law) in Article 58, which states:

Assisted reproduction can only be carried out by legally married couples with the following provisions:

- a. the result of fertilization of sperm and ovum from the husband and wife concerned is implanted in the uterus of the wife from where the ovum originated;
- b. carried out by medical personnel who have the expertise and authority; and
- c. carried out at certain Health Service Facilities.

⁵ Malindi, LW (2020). *Legal Protection for Surrogate Mothers Who Bind Themselves to a Surrogacy Agreement in Indonesia*. HPE Journal, 8(1), 36-51

⁶ Pasha, KM, (2025, July 31). *Can a Surrogate Mother Agreement be Conducted in Indonesia ?* Hukum Online.com. <https://www.hukumonline.com/klinik/a/bolehkah-setujuan-surrogate-mother-dilakukan-di-indonesia-lt4c562a3b4bba4/>, accessed January 4, 2025, at 10:28 WIB

⁷ Ridlo, HR, & Hardiyani, RT (2022). *Medical, Legal, and Social Aspects of the Surrogate Mother Phenomenon*. 3 (1), 42.

⁸ Rajagukguk, SL, Hartono, MS, & Windari, RA (2025). *Legal Analysis of Criminal Sanctions for Surrogacy Practices (Comparative Study of Indonesia and France)*. Journal of Law and the Nation, 4 (1), 86-97.

⁹ Hudaya, S.G., & Adjie, H. (2024). *Surrogate Mother Rental Agreement Made Before a Notary*. IBLAM Law Review.

¹⁰ Prastiono, RAK, & Handoko, WW (2022). *Legality of the Status of Leasehold Contracts from the Perspective of Civil Law in Indonesia*. Notary, 15 (2), 909-921.

¹¹ *Uterine Rental in Indonesia is Done Secretly*. (2010, June 5). Accessed on October 03 2025 from the scientific article <https://health.detik.com/ibu-dan-anak/d-1370505/sewa-rahim-di-indonesia-dilakukan-diam-diam>

¹² *Ibid.*, p. 4.

This provision clearly contradicts the practice of surrogacy, where there is no legal marriage bond, and fertilization takes place outside the body and the results are implanted into another woman's uterus.¹³ On February 20, 2025, the Ministry of Health issued a new regulation through Minister of Health Regulation Number 2 of 2025 concerning the Implementation of Reproductive Health Efforts (hereinafter abbreviated as Permenkes No. 2 of 2025). In the previous regulation, there was no provision prohibiting the practice of womb rental.¹⁴ However, in the latest Minister of Health Regulation, Article 45 paragraph (5) states:

"In providing assisted reproductive technology services, it is prohibited to provide egg donation services, spermatozoa donation services, embryo donation services, ovary or tissue donation services, testicular or tissue donation services, and uterus borrowing services."¹⁵ Although the latest regulations explicitly prohibit the practice of womb borrowing, these provisions do not include criminal penalties for violators. The sanctions imposed are solely administrative, including written warnings, administrative fines, and license revocation, primarily aimed at healthcare facilities and medical personnel. To date, the practice of surrogacy in Indonesia remains uncertain, creating a legal vacuum regarding the regulation of criminal sanctions.¹⁶ Although Article 58 of the Health Law and Article 45 of Minister of Health Regulation No. 2 of 2025 regulate this matter, these provisions are considered insufficiently clear because they do not include criminal sanctions for those who carry out the practice.¹⁷ Thus, to address regulatory uncertainty in Indonesia, this study focuses on analyzing the regulations governing surrogacy practices, as well as analyzing the provisions of criminal sanctions that can be imposed on the parties involved. These parties include surrogate mothers, married couples who utilize these services, and doctors or medical personnel who carry out *surrogacy practices*.¹⁸ Based on the background described above, this issue is important to examine in a study entitled "Juridical Analysis of Surrogacy from the Perspective of Indonesian Criminal Law."

Formulation of the problem

Based on the problem background above, the problem formulation in this research is as follows:

1. How does Indonesian Criminal Law regulate the practice of *surrogacy* ?
2. What is the criminal responsibility of doctors who practice *surrogacy* ?

METHODS

This study uses a Normative Juridical research method that analyzes problems based on legal norms, rules, and doctrines. Regarding the legal issues to be discussed and tried to find answers, the author uses the *statute approach* as the main method that aims to identify and analyze the provisions of relevant laws and regulations in the perspective of Indonesian criminal law related to *surrogate mothers*, especially regulations within the scope of criminal law such as the Criminal Code, as well as other relevant regulations such as the Health Law and the Child Protection Law, in order to identify the hierarchy of norms, consistency, and legal loopholes that will give rise to criminal implications. The *conceptual approach* is used as a support to explore basic concepts such as reproductive rights, women's autonomy, and medical ethics that underlie *surrogate mothers*, so that the analysis is not only limited to the text of the law but also to a broader philosophical and juridical understanding. Primary data is obtained from formal legal sources such as laws and government regulations, while secondary data comes from legal literature, scientific journals, reference books, and Indonesian criminal law doctrine.¹⁹

¹³Harland, SR (2023). *Inheritance Rights of Children from Surrogacy According to Indonesian Laws and Regulations*. Journal of Legal Evidence, 2 (3), 17–23.

¹⁴Siregar, D., Hia, PD, Hulu, T., Lund, M., & Laia, MAP (2024). *Evaluation of the Uterine Rental Law and Its Impact on the Status of Born Children*. Independent: Scientific Journal of the Faculty of Law, Lamongan Islamic University, 12 (1), 45–61.

¹⁵Febrianti, VBA, & Budiarsih, B. (2022). Recommendations for Uterine Rental Policy from a Human Rights Perspective in Indonesia. *Jurnal Birokrasi: Journal of Law and Socio-Political Governance in Indonesia*, 2 (2), 870–882.

¹⁶Puspitasari, DE (2022). *Legal Status of Surrogacy in Indonesia*. *Civil Law Review*, Batulis Civil Law Review, 3 (1), 19.

¹⁷Zubaidah, DA (2024). *Surrogacy in the Multidimensional Perspective of Legislation in Indonesia*. *Posita*, 2 (2), 53–62.

¹⁸Prastiyo, WE, & Swardhana, GM. nd *Opportunities for Legalizing Surrogacy Between the Right to Have Children and the Loopholes in Human Trafficking*.

¹⁹Zaharnika, RFA (2021). *Legal Analysis of the Implementation of the Surrogate Mother Agreement Reviewed from a Positive Legal Perspective*. *Mimbar Justitia Law Journal*.

Discussion

Indonesian Criminal Law Regulations on Surrogate Mother Practices

The practice of surrogacy can be viewed as a criminal act in Indonesia, even though there is no criminal law specifically mentioning "surrogacy." This criminalization arises from various interrelated legal and ethical perspectives. In Indonesian criminal law, *surrogacy* is not directly mentioned in either the old Criminal Code or the National Criminal Code (Law No. 1 of 2023), so law enforcement often relies on interpretations of general articles to criminalize this article, which then creates significant legal uncertainty. *Surrogacy* involves an agreement whereby a woman (*the surrogate*) carries and gives birth to a child for another person, which can include commercial or altruistic aspects. While the practice of *surrogacy* is not explicitly prohibited, it can have criminal implications if it is deemed to violate the principles of child protection, reproductive exploitation, human trafficking, or the misuse of medical reproductive technology.²⁰ The Health Law establishes basic rules governing the provision of health services, including reproductive health, the rights and obligations of health workers, and the state's authority to oversee reproductive-related medical practices. Meanwhile, Minister of Health Regulation No. 2 of 2025 provides more details on the provision of reproductive health services throughout life, encompassing technical guidelines and service quality standards that must be met. However, both the Health Law and the Minister of Health Regulation tend to establish a framework for medical services and ethics, rather than detailing the criminal aspects of *surrogacy* (for example, sanctions for parties involved in *surrogacy practices* , or specific criminal offenses related to the exploitation of surrogate mothers).²¹

Surrogacy is a clear example of a criminal law issue that is not clearly regulated by law. Therefore, to resolve this issue, legal interpretation by judges is necessary. As Sudikno Mertokusumo stated, when laws are incomplete or unclear, judges must seek and find the appropriate law. One way to find the law is through interpretation. The purpose of using interpretation broadly is not only to legalize whether a medical procedure is permissible or not, but more importantly, to provide normative legal certainty.²² To provide legal certainty and fill the gap in norms, Law Number 21 of 2007 concerning the Eradication of Criminal Acts of Human Trafficking (hereinafter abbreviated as the TPPO Law) can be applied to the practice of *surrogate mother* , with the threat of imprisonment of at least 3 years and a maximum of 15 years and a fine of at least 120 million Rupiah and a maximum of 600 million Rupiah. From a criminal law perspective, the practice of commercial *surrogate mother* has the appropriate elements of the crime as stated in Article 2 paragraph (1) of the TPPO Law ²³which states that:

"Any person who recruits, transports, shelters, sends, transfers or receives a person by means of threats of violence, use of violence, kidnapping, confinement, forgery, fraud, abuse of power or a position of vulnerability, debt bondage or giving payments or benefits even with the consent of a person who holds control over another person, for the purpose of exploiting that person in the territory of the Republic of Indonesia, shall be punished with imprisonment for a minimum of 3 (three) years and a maximum of 15 (fifteen) years and a fine of a minimum of Rp. 120,000,000.00 (one hundred and twenty million rupiah) and a maximum of Rp. 600,000,000.00 (six hundred million rupiah)."

The first element that must be fulfilled is the "recruitment" process for prospective *surrogates* , which is generally carried out through a selection mechanism with certain criteria, either through fertility clinics, intermediary institutions, or informal channels. The second element, namely "abuse of vulnerable positions," is very relevant considering that the majority of women who are willing to become *surrogates* come from low-income groups who experience financial vulnerability, so their decision to rent out their wombs cannot be categorized as free and conscious consent in the true sense.²⁴ Furthermore, the element of exploitation as stated in Article 1 number 7 of the Human Trafficking Law which includes "physical exploitation" and "sexual exploitation" can be applied broadly to encompass the exploitation of women's reproductive organs in the practice of *surrogacy* . The uterus, as a woman's reproductive organ, is exploited for the benefit of other parties (*intended parents*) with financial rewards, which essentially represents a form of commodification of women's bodies and the use of body organs for economic gain.²⁵

²⁰Medical, legal, and social aspects of the surrogate mother phenomenon. (2022). 3(1), 42.

²¹ Prastiyo, *Op. Cit* .

²²Hudaya, *Op. Cit* .

²³Mangatur, J., Simanungkalit, P., & Sadat, A. (2023). *Efforts to Prevent and Overcome the Crime of Human Trafficking* . Syntax Literate: Indonesian Scientific Journal.

²⁴Pasaribu, YH (2023). *Criminal Responsibility for Human Traffickers* . Journal of Education, Humanities and Social Sciences.

²⁵ Simanunkalit, *Op. Cit*

The explanation of Article 1 number 7 of the Human Trafficking Law states that sexual exploitation includes prostitution and various other forms of sexual exploitation, which in criminal law doctrine can be defined as any kind of use of sexual and reproductive organs for economic purposes or the benefit of another party. In this context, the practice of *surrogacy* meets the criteria of exploitation because it involves the systematic and structured use of women's reproductive functions with monetary compensation, thus placing women's bodies as objects of commercial transactions. The Human Trafficking Law essentially aims to protect human dignity from all forms of exploitation and commodification of the human body. This principle is in line with the aim of the prohibition of *surrogacy*, which is intended to prevent the exploitation of women's reproductive organs and the commodification of the pregnancy process.²⁶ In addition, Law Number 35 of 2014 concerning Child Protection (hereinafter abbreviated as the Child Protection Law) can also be applied to the practice of *surrogacy*, although this law does not specifically regulate or prohibit the practice. This law aims to protect children's basic rights, such as the right to identity, name, citizenship, and legal family relationships. In the practice of *surrogacy*, where a woman carries and gives birth to a child for other parents, legal issues can arise regarding the child's status, such as who is recognized as the legal parent. In addition, there is a risk of exploitation of the surrogate mother or even child trafficking if done commercially.²⁷

law also emphasizes the protection of children from the womb, so if *surrogacy* is not clearly regulated, it could conflict with the law's goal of protecting children from violence, discrimination, and the loss of rights to a biological or legal family. Therefore, although there are no specific regulations regarding *surrogacy* in Indonesia, the implementation of the Child Protection Law must ensure that this practice prioritizes the best interests of children, avoids commercialization, and is carried out transparently in accordance with the law, as also frequently reminded by the Indonesian Child Protection Commission (KPAI) regarding ethical and legal aspects.²⁸ In comparison, countries like India have clearly regulated *surrogacy through the Surrogacy (Regulation) Act 2021*, which permits altruistic (non-commercial) practices with strict rules to prevent exploitation. Commercial *surrogacy* is prohibited and carries a prison sentence of up to 10 years and a fine of 1 billion Rupiah, as it is considered a violation of women's human rights. This is similar to human trafficking in Indonesia, but with a focus on monitoring reproductive clinics to prevent embryo trafficking. ²⁹In contrast, Indonesia lacks specific regulations, which poses the risk of inconsistent law enforcement.³⁰

Other countries with clearer regulations, such as the UK, define *surrogacy* as a non-commercial agreement, with custody of the baby automatically granted to the parents who commissioned the baby, and commercial violations punishable by up to three years in prison. The UK approach emphasizes preventing exploitation and prioritizes reparations over harsh punishment, in contrast to Indonesia's more repressive approach with no specific mechanism for recognizing the rights of *surrogate babies*. In the United States, regulations vary from state to state. For example, California allows *surrogacy contracts* with a light penalty for breach of contract, while New York prohibits them entirely with a penalty of up to five years in prison. This flexible approach avoids the automatic cancellation of a *surrogate contract*, which in Indonesia can result in the baby losing inheritance rights under inheritance law.³¹ Overall, these countries have more progressive legal models, combining medical ethics with proportionate penalties. Meanwhile, Indonesia needs specific legislation that aligns the new provisions in the 2023 Health Law and Ministerial Regulation No. 2 of 2025 with the Criminal Code to prevent a legal vacuum that could lead to injustice in law enforcement regarding *surrogacy practices*.³²

Criminal Liability for Doctors Who Practice Surrogacy

Criminal liability for doctors who practice *surrogacy* in Indonesia is still a complex issue because positive law (both the Health Law and Minister of Health Regulation No. 2 of 2025) has not regulated criminal sanctions for

²⁶Siregar, D., Gulo, Y., Laia, Y., Halawa, A., Laia, N., Buulolo, YH, Zebua, H., Laia, K., Zega, S., & Laia, A. (2023). *Basis for Judges' Considerations in Sentencing Perpetrators Who Provide Shelter for the Exploitation of People in the Territory of the Republic of Indonesia*. 1(2), 268–275.

²⁷Qintarawati, A. (2023). *Protection of Surrogate Mothers from the Perspective of Human Rights Law in Indonesia*.

²⁸Heriyanto, DSN, & Gasimzadeh, U. (2024). *A Prophetic Law Approach to Reconciling Indonesia's Uneasy Relationship with Cross-border Surrogacy*. *Prophetic Law Review*, 6(1), 1–23.

²⁹Hibino, Y. (2023). *The advantages and disadvantages of altruistic and commercial surrogacy in India*. *Philosophy, Ethics, and Humanities in Medicine*, 18(1).

³⁰Alit, IG, & Nurindahwati, Z. (2024). *Law Enforcement of Criminal Acts of Fraud Through Electronic Media by The Electronic Information Technology Law (UU ITE) in the Jurisdiction of The Karangasem Resort Police*.

³¹Susila, ME, & Morgan, KR (2022). *Comparative Legal Analysis of Surrogacy Between Indonesia and India*. *Jurnal Bina Mulia Hukum*, 7(1), 114–126.

³²Hibino, Op. Cit.

doctors who handle *surrogacy practices*,³³ but only regulates administrative sanctions (based on Article 76 of Minister of Health Regulation No. 2 of 2025) which reads

- (1) Every Medical Personnel, Health Personnel and Health Service Facility who violates the provisions as referred to in Article 45 paragraph (4) and paragraph (5), Article 49 paragraph (8) and paragraph (9) will be subject to administrative sanctions by the Minister, governor or regent/mayor in accordance with their authority in the form of:
 - a. written warning
 - b. administrative fines; and/or
 - c. revocation of permit.
- (2) The types of administrative sanctions as referred to in paragraph (1) may be imposed in stages.

In Article 1 paragraph (1) of the National Criminal Code (regarding the principle of legality which states that a person cannot be punished unless there are existing laws and regulations before the act is committed), however, Article 2 paragraph (1) provides a provision that Article 1 paragraph (1) does not reduce the application of living law in society (living law). Thus, Article 2 paragraph (1) provides legal reinforcement for the medical actions of *surrogate mothers* that even though the act has not been formally regulated, according to the law living in society, the act in question is considered to be criminally punishable (because it is considered to violate religious norms and community morals, so legally there is no reason not to give sanctions (criminal) to this practice.³⁴

The elements of a criminal act in the practice of *surrogacy* carried out by a doctor include subjective and objective elements that must be met in order to be held criminally responsible. The subjective element in the form of error (*mens rea*) can be in the form of intent (*dolus*) or negligence (*culpa*), where the doctor knows or should have known that the practice of *surrogacy* is prohibited but still does it. The objective element in the form of an act (*actus reus*) includes medical actions carried out by the doctor in facilitating, implementing, or assisting the *surrogacy process*, whether through artificial insemination, *in vitro fertilization*, embryo transfer, or other medical actions aimed at realizing pregnancy in the surrogate mother. These two elements must be met cumulatively so that the doctor can be found guilty and subject to criminal sanctions in accordance with the provisions of applicable laws and regulations.³⁵

The criminal liability of doctors involved in *surrogacy practices* is based on the principle of *personal liability*, where each doctor is responsible for his or her own actions. Under Indonesian criminal law, a person can only be punished if they meet the requirements for being responsible, have committed a prohibited act, and have committed an error in the form of intent or negligence. As legal subjects with specialized expertise and practicing a profession strictly regulated by law, doctors are obligated to understand and comply with all provisions of the laws and regulations governing medical practice. Ignorance of the law (*ignorantia juris non excusat*) cannot be used as a justification or excuse for criminal liability. Therefore, doctors who practice *surrogacy* cannot avoid criminal liability by claiming ignorance of the prohibition.³⁶

The form of participation (*deelneming*) in the criminal act of *surrogacy* also needs to be considered in the context of the doctor's criminal liability. Based on the provisions of Article 55 and Article 56 of the Old Criminal Code, a doctor can be responsible as a perpetrator (*pleger*), who orders it to be done (*doen pleger*), who participates in it (*medepleger*), or who persuades (*uitlokker*). In addition, a doctor can also be held responsible as an assistant (*medeplichtige*) if they provide assistance during the practice. In the practice of *surrogacy*, there are generally several parties involved, such as a married couple who want a child, a surrogate mother, a doctor, supporting medical personnel, and possibly a third party who facilitates it. The doctor who actively performs the medical procedure is the main perpetrator who can be held responsible for the heaviest criminal liability, while other medical personnel who assist can be held responsible as an accessory to the crime.³⁷ According to the Indonesian Medical Code of Ethics issued by the Indonesian Medical Association,

³³ Pasha, KM, (2025, September, 22) *The Responsibility of Doctors Who Handle Surrogate Mothers*. Hukum Online.com. <https://www.hukumonline.com/klinik/a/pertanggung-dokter-yang-menangani-surrogate-mother-1t5934e8fb3cdf/>? Accessed October 15, 2025

³⁴ Herwig, C. (2022). The Criminal Law Regulation of Surrogacy Accessory Crime. *African and Asian Studies*, 21(1–2), 58–89.

³⁵ Piersanti, V., Marchesini, D., Pelagatti, E., Caruso, A., Sciuttini, F., & La Greca, M. (2025). The Criminalization of Surrogacy in Italy: Legal Framework, Ethical Tensions, and European Perspectives. 176(4), 515–519.

³⁶ Gultom, M. (2022). *Criminal Liability of Doctors in Carrying Out Their Profession According to the Criminal Code*. *Visi Sosial Humaniora*, 3(2), 198–214.

³⁷ Alfaresi, MB, Abdullah, MZ, & Sarbaini, S. (2024). Criminal Liability of Medical Personnel Who Perform Abortions.

the practice of *surrogacy* for commercial purposes is prohibited because it risks exploiting women and children and violates the principle of non-harm. If a doctor is involved, they could be subject to criminal sanctions under the Criminal Code, such as Article 263 concerning document falsification if there is manipulation of medical data or birth certificates.³⁸ Thus, doctors who engage in this practice face serious legal risks, including criminal prosecution, professional sanctions, and revocation of their licenses. To avoid liability issues, doctors must adhere to medical ethics, which emphasize the importance of informed consent and prohibit commercialization. Going forward, Indonesia needs to create specific regulations clarifying the legal standing of surrogacy, so that this practice no longer falls into an unclear legal area and poses a criminal risk to medical personnel.³⁹

Conclusion

1. The rapid development of medical science and technology is not balanced with the legal provisions in Indonesia, thus giving rise to various legal issues in the medical field, one of which is *surrogacy*. The act of *surrogacy* not only violates the legal principles in force in Indonesia, but also the state ideology, namely Pancasila. Therefore, surrogacy cannot be implemented in Indonesia. The Health Law and Minister of Health Regulation No. 2 of 2025 expressly prohibit this practice, including embryo donation and womb rental, but the sanctions imposed are solely administrative, without clear criminal threats for perpetrators, thus creating legal uncertainty and potential abuse. In anticipating the legal vacuum regarding the practice of surrogacy in the field of criminal law, the instruments that can be applied are the Human Trafficking Law and the Child Protection Law.
2. The criminal liability of doctors practicing surrogacy in Indonesia is complex due to the lack of explicit criminal sanctions in health legislation. Although the Health Law and Ministerial Regulation No. 2 of 2025 prohibit the practice, the sanctions provided are only administrative. However, doctors can still be held criminally liable under the principle of *personal liability* through the interpretation of articles in the Criminal Code, such as Article 263 concerning document falsification, as well as provisions in the Human Trafficking Law and the Child Protection Law if the practice contains elements of human trafficking or endangers children's rights. In addition to criminal sanctions, doctors also face the risk of professional sanctions under the Indonesian Code of Medical Ethics, which prohibits commercial *surrogacy* for violating the principle of non-maleficence. The subjective element of intent or negligence and the objective element of medical actions facilitating the practice of *surrogacy* must be cumulatively met to prove a doctor's culpability. Therefore, a clearer legal framework is needed to provide legal certainty for medical personnel and prevent the misuse of assisted reproductive practices.

Suggestion

To address the existing legal vacuum, the government should immediately draft a specific law on *surrogacy* that integrates proportionate criminal sanctions, with a focus on *altruistic (non-commercial) surrogacy* to prevent exploitation, similar to models in India and the UK. Increase oversight by the Ministry of Health and the Indonesian Child Protection Commission (KPAI) of medical reproductive facilities, including ethics training for medical personnel to prevent violations. Conduct further multidisciplinary studies (legal, medical, and social) to evaluate the impact of *surrogacy* on human rights, and encourage public discussions that incorporate Indonesian religious and cultural perspectives to build regulatory consensus.

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³⁸Chukreev, V. (2022). *On The Criminal Law Measures Of Regulation Of Surrogacy In Foreign Countries*. Vestnik Rossijskogo Universiteta Družby Narodov, 26(2), 419–432.

³⁹Budiono, A., Ngestingrum, AH, Iriani, DU, Al Mamun, A., Rizka, RLD, & Kurnianingsih, M. (2023). *Legal Protection Policy for Obstetricians-Gynecologists in Cases of Maternal, Perinatal, and Neonatal Mortality*. Novelty Law Journal, 14(1), 1.

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No.	Aspek Yang Dinilai	Nilai		Keterangan
		Angka	Huruf	
1.	Sistematika	80		
2.	Isi (Content)	80		
3.	Analisis	80		LULUS
4.	Bahasa	80		
5.	Aktualisasi/Relevansi	80		
6.	Kemampuan Mempertahankan	80		

Catatan Perbaikan :

1. Nilai Akhir : Jumlah /aspek yang dinilai

2. Standar Penilaian :

80-100 = A

75-79 = B+

70-74 = B

65-69 = C+

56-64 = C

40-55 = D

< 40 = E

Palangka Raya, 11 Februari 2026

Pembimbing

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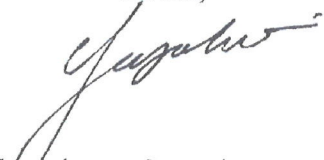
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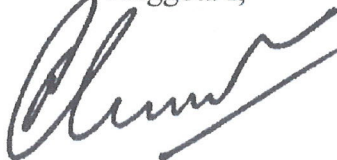
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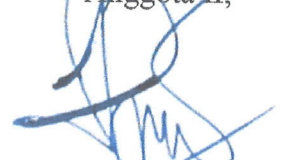
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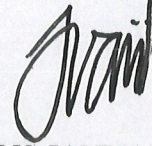
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Abstract

The practice of *surrogacy* is a solution for infertile couples, but it creates legal problems in Indonesia. This normative juridical research analyzes Indonesian criminal law regulations regarding the practice of *surrogacy* and the criminal liability of doctors involved. The results show that although Law Number 17 of 2023 concerning Health and Ministerial Regulation No. 2 of 2025 prohibit the practice of womb borrowing, these provisions only regulate administrative sanctions without clear criminal threats, thus creating a vacuum in criminal law norms. To anticipate this legal vacuum, the Law on the Eradication of the Crime of Human Trafficking and the Law on Child Protection can be implemented through legal interpretation. The criminal liability of doctors is based on the principle of personal liability through articles in the Criminal Code, as well as professional sanctions based on the Indonesian Code of Medical Ethics. This research concludes that Indonesia needs special regulations that integrate proportional criminal sanctions to provide legal certainty and protect all parties involved.

Keywords: *Surrogate Mother, Indonesian Criminal Law, Legal Vacuum*

INTRODUCTION

Background

Modern developments have driven human progress in various areas of life, including medicine, particularly genetics, through the use of science and technology. One example is the opportunity for couples with genetic fertility issues to continue having children. ¹Advances in health, particularly medicine, have provided solutions for many couples through the use of medical technology. This progress has been realized through the discovery of a new method of artificial insemination known as *in vitro fertilization* (IVF).² Children are a very precious gift for every married couple and are the main hope for every family. The continuation of offspring is expressly regulated in Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia, then reaffirmed in Article 10 paragraph (1) of Law Number 39 of 1999 concerning Human Rights. Although continuing offspring is one of the human rights guaranteed and protected by law, in reality not all married couples have the opportunity to have children easily. In fact, many of them are not blessed with children due to infertility problems. ³Research results show that around 10% of married couples experience the inability to have children due to infertility problems, and have very little chance of adopting a child. This condition causes these couples to experience despair, which ultimately encourages them to look for other alternatives to have children.⁴ One of the medical innovations that has emerged to address infertility is *in vitro fertilization* (IVF) technology, or test tube baby programs. Medical technology related to test tube baby programs was discovered in the 1970s and developed with the aim of addressing infertility issues in married couples.

¹Santoso, A., Sutarno, S., & Pramono, B. (2025). *Provision of Reproductive Services with Assistance*. Indonesian Journal of Social Sciences, 6 (4), 1136–1149.

²Daud, N. (2023). *The Concept of In-Vitro Fertilization (IVF) According to Modern Medicine*. International Journal of Academic Research in Business & Social Sciences, 13 (6).

³Sanjaya, AW (2023). *Legal Aspects of Surrogacy from the Perspective of Civil Law and Criminal Law*. Jurnal Rechtsens, 5(2), 36-47

⁴Adane, TB, Berhanu, KZ, & Sewagegn, AA (2024). *Infertile Women of Ethiopia : Psychological Challenges and Coping Strategies*. Medicine.

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Along with rapid advances in *in vitro fertilization* (IVF) techniques, the concept of surrogacy emerged.⁵ According to Hukum Online, based on *Black's Law Dictionary 9th Edition*, the definition of a *surrogate mother* is a woman who carries out the functions of pregnancy and giving birth to a child for another person, especially a woman who agrees to provide her womb to carry an embryo during pregnancy, usually on behalf of an infertile couple, and who relinquishes any parental rights she may have after the child's birth.⁶ In this practice, there is generally an agreement that regulates the rights and obligations between the *surrogate mother* and the couple who use her services. *The Surrogacy Agreement* or surrogacy agreement is the basis for the implementation of surrogacy itself.⁷ There are two categories of surrogacy: Traditional Surrogacy and Gestational Surrogacy. In Traditional Surrogacy, a woman undergoes insemination with the father's sperm, then carries and cares for the baby for the couple. In this type, the surrogate mother is the baby's biological mother, using her own egg fertilized by the father's sperm. In Gestational Surrogacy, the embryo is implanted into the surrogate mother's uterus, so the woman giving birth is not genetically related to the child.⁸

Despite offering a solution for infertile couples, the practice of *surrogacy* in Indonesia has sparked intense public debate regarding its ethics, morals, and legality. Socially and religiously, this practice is often considered a violation of established norms, raising fundamental questions about children's identity, family relationships, and the potential exploitation of women.⁹ The practice of surrogacy is already widespread in Indonesia, but it remains largely unrevealed because it does not raise issues.¹⁰ One example of a *surrogate mother practice case* that occurred in Indonesia involved artist Zarima Mirafsur in January 2009. This case was first revealed through national media reports, where Zarima was suspected of renting her womb for *in vitro fertilization* (IVF) to several businessmen, and received compensation in the form of a luxury car and cash of 50 million Rupiah as compensation for the agreement, as stated by her former lawyer, Ferry Juan.¹¹ However, Zarima Mirafsur vehemently denied all allegations, declaring them baseless rumors intended to damage her reputation as an artist. The case quickly gained public attention due to the celebrity involvement, making it an iconic example of the potential social controversy posed by surrogacy amidst unclear legal regulations.

Procedurally, the case was confined to media coverage without significant involvement in formal legal proceedings, such as police investigations or court hearings, likely due to a lack of concrete evidence or pressure to dismiss the issue. Consequently, no court decision or official resolution was published, making the case a historical landmark primarily discussed in the context of medical ethics and reproductive rights studies. This incident sparked intense public discussion about the ethics and legality of commercial *surrogacy*, which until now has not been explicitly regulated by Indonesian law, despite being frequently associated with violations of religious and moral norms. This case exemplifies the challenges to the regulation of *surrogacy* in Indonesia, where the practice often operates in a gray area between medical necessity and economic exploitation, and calls for a more comprehensive legal framework to protect all parties involved.¹² Based on the provisions contained in Law Number 17 of 2023 concerning Health, (hereinafter abbreviated as the Health Law) in Article 58, which states:

Assisted reproduction can only be carried out by legally married couples with the following provisions:

- a. the result of fertilization of sperm and ovum from the husband and wife concerned is implanted in the uterus of the wife from where the ovum originated;
- b. carried out by medical personnel who have the expertise and authority; and
- c. carried out at certain Health Service Facilities.

⁵ Malindi, LW (2020). *Legal Protection for Surrogate Mothers Who Bind Themselves to a Surrogacy Agreement in Indonesia*. HPE Journal, 8(1), 36-51

⁶ Pasha, KM, (2025, July 31). *Can a Surrogate Mother Agreement be Conducted in Indonesia ?* Hukum Online.com. <https://www.hukumonline.com/klinik/a/bolehkah-setujuan-surrogate-mother-dilakukan-di-indonesia-lt4c562a3b4bba4/>, accessed January 4, 2025, at 10:28 WIB

⁷ Ridlo, HR, & Hardiyani, RT (2022). *Medical, Legal, and Social Aspects of the Surrogate Mother Phenomenon*. 3 (1), 42.

⁸ Rajagukguk, SL, Hartono, MS, & Windari, RA (2025). *Legal Analysis of Criminal Sanctions for Surrogacy Practices (Comparative Study of Indonesia and France)*. Journal of Law and the Nation, 4 (1), 86-97.

⁹ Hudaya, S.G., & Adjie, H. (2024). *Surrogate Mother Rental Agreement Made Before a Notary*. IBLAM Law Review.

¹⁰ Prastiono, RAK, & Handoko, WW (2022). *Legality of the Status of Leasehold Contracts from the Perspective of Civil Law in Indonesia*. Notary, 15 (2), 909-921.

¹¹ Uterine Rental in Indonesia is Done Secretly. (2010, June 5). Accessed on October 03 2025 from the scientific article <https://health.detik.com/ibu-dan-anak/d-1370505/sewa-rahim-di-indonesia-dilakukan-diam-diam>

¹² Ibid., p. 4.

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This provision clearly contradicts the practice of surrogacy, where there is no legal marriage bond, and fertilization takes place outside the body and the results are implanted into another woman's uterus.¹³ On February 20, 2025, the Ministry of Health issued a new regulation through Minister of Health Regulation Number 2 of 2025 concerning the Implementation of Reproductive Health Efforts (hereinafter abbreviated as Permenkes No. 2 of 2025). In the previous regulation, there was no provision prohibiting the practice of womb rental.¹⁴ However, in the latest Minister of Health Regulation, Article 45 paragraph (5) states:

"In providing assisted reproductive technology services, it is prohibited to provide egg donation services, spermatozoa donation services, embryo donation services, ovary or tissue donation services, testicular or tissue donation services, and uterus borrowing services."¹⁵ Although the latest regulations explicitly prohibit the practice of womb borrowing, these provisions do not include criminal penalties for violators. The sanctions imposed are solely administrative, including written warnings, administrative fines, and license revocation, primarily aimed at healthcare facilities and medical personnel. To date, the practice of surrogacy in Indonesia remains uncertain, creating a legal vacuum regarding the regulation of criminal sanctions.¹⁶ Although Article 58 of the Health Law and Article 45 of Minister of Health Regulation No. 2 of 2025 regulate this matter, these provisions are considered insufficiently clear because they do not include criminal sanctions for those who carry out the practice.¹⁷ Thus, to address regulatory uncertainty in Indonesia, this study focuses on analyzing the regulations governing surrogacy practices, as well as analyzing the provisions of criminal sanctions that can be imposed on the parties involved. These parties include surrogate mothers, married couples who utilize these services, and doctors or medical personnel who carry out *surrogacy practices*.¹⁸ Based on the background described above, this issue is important to examine in a study entitled "Juridical Analysis of Surrogacy from the Perspective of Indonesian Criminal Law."

Formulation of the problem

Based on the problem background above, the problem formulation in this research is as follows:

1. How does Indonesian Criminal Law regulate the practice of *surrogacy* ?
2. What is the criminal responsibility of doctors who practice *surrogacy* ?

METHODS

This study uses a Normative Juridical research method that analyzes problems based on legal norms, rules, and doctrines. Regarding the legal issues to be discussed and tried to find answers, the author uses the *statute approach* as the main method that aims to identify and analyze the provisions of relevant laws and regulations in the perspective of Indonesian criminal law related to *surrogate mothers*, especially regulations within the scope of criminal law such as the Criminal Code, as well as other relevant regulations such as the Health Law and the Child Protection Law, in order to identify the hierarchy of norms, consistency, and legal loopholes that will give rise to criminal implications. The *conceptual approach* is used as a support to explore basic concepts such as reproductive rights, women's autonomy, and medical ethics that underlie *surrogate mothers*, so that the analysis is not only limited to the text of the law but also to a broader philosophical and juridical understanding. Primary data is obtained from formal legal sources such as laws and government regulations, while secondary data comes from legal literature, scientific journals, reference books, and Indonesian criminal law doctrine.¹⁹

¹³Harland, SR (2023). *Inheritance Rights of Children from Surrogacy According to Indonesian Laws and Regulations*. Journal of Legal Evidence, 2 (3), 17–23.

¹⁴Siregar, D., Hia, PD, Hulu, T., Lund, M., & Laia, MAP (2024). *Evaluation of the Uterine Rental Law and Its Impact on the Status of Born Children*. Independent: Scientific Journal of the Faculty of Law, Lamongan Islamic University, 12 (1), 45–61.

¹⁵Febrianti, VBA, & Budiarsih, B. (2022). Recommendations for Uterine Rental Policy from a Human Rights Perspective in Indonesia. *Jurnal Birokrasi: Journal of Law and Socio-Political Governance in Indonesia*, 2 (2), 870–882.

¹⁶Puspitasari, DE (2022). *Legal Status of Surrogacy in Indonesia*. *Civil Law Review*, Batulis Civil Law Review, 3 (1), 19.

¹⁷Zubaidah, DA (2024). *Surrogacy in the Multidimensional Perspective of Legislation in Indonesia*. *Posita*, 2 (2), 53–62.

¹⁸Prastiyo, WE, & Swardhana, GM. nd *Opportunities for Legalizing Surrogacy Between the Right to Have Children and the Loopholes in Human Trafficking*.

¹⁹Zaharnika, RFA (2021). *Legal Analysis of the Implementation of the Surrogate Mother Agreement Reviewed from a Positive Legal Perspective*. *Mimbar Justitia Law Journal*.

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Discussion

Indonesian Criminal Law Regulations on Surrogate Mother Practices

The practice of surrogacy can be viewed as a criminal act in Indonesia, even though there is no criminal law specifically mentioning "surrogacy." This criminalization arises from various interrelated legal and ethical perspectives. In Indonesian criminal law, *surrogacy* is not directly mentioned in either the old Criminal Code or the National Criminal Code (Law No. 1 of 2023), so law enforcement often relies on interpretations of general articles to criminalize this article, which then creates significant legal uncertainty. *Surrogacy* involves an agreement whereby a woman (*the surrogate*) carries and gives birth to a child for another person, which can include commercial or altruistic aspects. While the practice of *surrogacy* is not explicitly prohibited, it can have criminal implications if it is deemed to violate the principles of child protection, reproductive exploitation, human trafficking, or the misuse of medical reproductive technology.²⁰ The Health Law establishes basic rules governing the provision of health services, including reproductive health, the rights and obligations of health workers, and the state's authority to oversee reproductive-related medical practices. Meanwhile, Minister of Health Regulation No. 2 of 2025 provides more details on the provision of reproductive health services throughout life, encompassing technical guidelines and service quality standards that must be met. However, both the Health Law and the Minister of Health Regulation tend to establish a framework for medical services and ethics, rather than detailing the criminal aspects of *surrogacy* (for example, sanctions for parties involved in *surrogacy practices* , or specific criminal offenses related to the exploitation of surrogate mothers).²¹

Surrogacy is a clear example of a criminal law issue that is not clearly regulated by law. Therefore, to resolve this issue, legal interpretation by judges is necessary. As Sudikno Mertokusumo stated, when laws are incomplete or unclear, judges must seek and find the appropriate law. One way to find the law is through interpretation. The purpose of using interpretation broadly is not only to legalize whether a medical procedure is permissible or not, but more importantly, to provide normative legal certainty.²² To provide legal certainty and fill the gap in norms, Law Number 21 of 2007 concerning the Eradication of Criminal Acts of Human Trafficking (hereinafter abbreviated as the TPPO Law) can be applied to the practice of *surrogate mother* , with the threat of imprisonment of at least 3 years and a maximum of 15 years and a fine of at least 120 million Rupiah and a maximum of 600 million Rupiah. From a criminal law perspective, the practice of commercial *surrogate mother* has the appropriate elements of the crime as stated in Article 2 paragraph (1) of the TPPO Law ²³which states that:

"Any person who recruits, transports, shelters, sends, transfers or receives a person by means of threats of violence, use of violence, kidnapping, confinement, forgery, fraud, abuse of power or a position of vulnerability, debt bondage or giving payments or benefits even with the consent of a person who holds control over another person, for the purpose of exploiting that person in the territory of the Republic of Indonesia, shall be punished with imprisonment for a minimum of 3 (three) years and a maximum of 15 (fifteen) years and a fine of a minimum of Rp. 120,000,000.00 (one hundred and twenty million rupiah) and a maximum of Rp. 600,000,000.00 (six hundred million rupiah)."

The first element that must be fulfilled is the "recruitment" process for prospective *surrogates* , which is generally carried out through a selection mechanism with certain criteria, either through fertility clinics, intermediary institutions, or informal channels. The second element, namely "abuse of vulnerable positions," is very relevant considering that the majority of women who are willing to become *surrogates* come from low-income groups who experience financial vulnerability, so their decision to rent out their wombs cannot be categorized as free and conscious consent in the true sense.²⁴ Furthermore, the element of exploitation as stated in Article 1 number 7 of the Human Trafficking Law which includes "physical exploitation" and "sexual exploitation" can be applied broadly to encompass the exploitation of women's reproductive organs in the practice of *surrogacy* . The uterus, as a woman's reproductive organ, is exploited for the benefit of other parties (*intended parents*) with financial rewards, which essentially represents a form of commodification of women's bodies and the use of body organs for economic gain.²⁵

²⁰Medical, legal, and social aspects of the surrogate mother phenomenon. (2022). 3(1), 42.

²¹ Prastiyo, *Op. Cit* .

²²Hudaya, *Op. Cit* .

²³Mangatur, J., Simanungkalit, P., & Sadat, A. (2023). *Efforts to Prevent and Overcome the Crime of Human Trafficking* . Syntax Literate: Indonesian Scientific Journal.

²⁴Pasaribu, YH (2023). *Criminal Responsibility for Human Traffickers* . Journal of Education, Humanities and Social Sciences.

²⁵ Simanunkalit, *Op. Cit*

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The explanation of Article 1 number 7 of the Human Trafficking Law states that sexual exploitation includes prostitution and various other forms of sexual exploitation, which in criminal law doctrine can be defined as any kind of use of sexual and reproductive organs for economic purposes or the benefit of another party. In this context, the practice of *surrogacy* meets the criteria of exploitation because it involves the systematic and structured use of women's reproductive functions with monetary compensation, thus placing women's bodies as objects of commercial transactions. The Human Trafficking Law essentially aims to protect human dignity from all forms of exploitation and commodification of the human body. This principle is in line with the aim of the prohibition of *surrogacy*, which is intended to prevent the exploitation of women's reproductive organs and the commodification of the pregnancy process.²⁶ In addition, Law Number 35 of 2014 concerning Child Protection (hereinafter abbreviated as the Child Protection Law) can also be applied to the practice of *surrogacy*, although this law does not specifically regulate or prohibit the practice. This law aims to protect children's basic rights, such as the right to identity, name, citizenship, and legal family relationships. In the practice of *surrogacy*, where a woman carries and gives birth to a child for other parents, legal issues can arise regarding the child's status, such as who is recognized as the legal parent. In addition, there is a risk of exploitation of the surrogate mother or even child trafficking if done commercially.²⁷

law also emphasizes the protection of children from the womb, so if *surrogacy* is not clearly regulated, it could conflict with the law's goal of protecting children from violence, discrimination, and the loss of rights to a biological or legal family. Therefore, although there are no specific regulations regarding *surrogacy* in Indonesia, the implementation of the Child Protection Law must ensure that this practice prioritizes the best interests of children, avoids commercialization, and is carried out transparently in accordance with the law, as also frequently reminded by the Indonesian Child Protection Commission (KPAI) regarding ethical and legal aspects.²⁸ In comparison, countries like India have clearly regulated *surrogacy through the Surrogacy (Regulation) Act 2021*, which permits altruistic (non-commercial) practices with strict rules to prevent exploitation. Commercial *surrogacy* is prohibited and carries a prison sentence of up to 10 years and a fine of 1 billion Rupiah, as it is considered a violation of women's human rights. This is similar to human trafficking in Indonesia, but with a focus on monitoring reproductive clinics to prevent embryo trafficking.²⁹ In contrast, Indonesia lacks specific regulations, which poses the risk of inconsistent law enforcement.³⁰

Other countries with clearer regulations, such as the UK, define *surrogacy* as a non-commercial agreement, with custody of the baby automatically granted to the parents who commissioned the baby, and commercial violations punishable by up to three years in prison. The UK approach emphasizes preventing exploitation and prioritizes reparations over harsh punishment, in contrast to Indonesia's more repressive approach with no specific mechanism for recognizing the rights of *surrogate babies*. In the United States, regulations vary from state to state. For example, California allows *surrogacy contracts* with a light penalty for breach of contract, while New York prohibits them entirely with a penalty of up to five years in prison. This flexible approach avoids the automatic cancellation of a *surrogate contract*, which in Indonesia can result in the baby losing inheritance rights under inheritance law.³¹ Overall, these countries have more progressive legal models, combining medical ethics with proportionate penalties. Meanwhile, Indonesia needs specific legislation that aligns the new provisions in the 2023 Health Law and Ministerial Regulation No. 2 of 2025 with the Criminal Code to prevent a legal vacuum that could lead to injustice in law enforcement regarding *surrogacy practices*.³²

Criminal Liability for Doctors Who Practice Surrogacy

Criminal liability for doctors who practice *surrogacy* in Indonesia is still a complex issue because positive law (both the Health Law and Minister of Health Regulation No. 2 of 2025) has not regulated criminal sanctions for

²⁶Siregar, D., Gulo, Y., Laia, Y., Halawa, A., Laia, N., Bualolo, YH, Zebua, H., Laia, K., Zega, S., & Laia, A. (2023). *Basis for Judges' Considerations in Sentencing Perpetrators Who Provide Shelter for the Exploitation of People in the Territory of the Republic of Indonesia*. 1(2), 268–275.

²⁷Qintarawati, A. (2023). *Protection of Surrogate Mothers from the Perspective of Human Rights Law in Indonesia*.

²⁸Heriyanto, DSN, & Gasimzadeh, U. (2024). *A Prophetic Law Approach to Reconciling Indonesia's Uneasy Relationship with Cross-border Surrogacy*. *Prophetic Law Review*, 6(1), 1–23.

²⁹Hibino, Y. (2023). *The advantages and disadvantages of altruistic and commercial surrogacy in India*. *Philosophy, Ethics, and Humanities in Medicine*, 18(1).

³⁰Alit, IG, & Nurindahwati, Z. (2024). *Law Enforcement of Criminal Acts of Fraud Through Electronic Media by The Electronic Information Technology Law (UU ITE) in the Jurisdiction of The Karangasem Resort Police*.

³¹Susila, ME, & Morgan, KR (2022). *Comparative Legal Analysis of Surrogacy Between Indonesia and India*. *Jurnal Bina Mulia Hukum*, 7(1), 114–126.

³²Hibino, Op. Cit.

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doctors who handle *surrogacy practices*,³³ but only regulates administrative sanctions (based on Article 76 of Minister of Health Regulation No. 2 of 2025) which reads

(1) Every Medical Personnel, Health Personnel and Health Service Facility who violates the provisions as referred to in Article 45 paragraph (4) and paragraph (5), Article 49 paragraph (8) and paragraph (9) will be subject to administrative sanctions by the Minister, governor or regent/mayor in accordance with their authority in the form of:

- a. written warning
- b. administrative fines; and/or
- c. revocation of permit.

(2) The types of administrative sanctions as referred to in paragraph (1) may be imposed in stages.

In Article 1 paragraph (1) of the National Criminal Code (regarding the principle of legality which states that a person cannot be punished unless there are existing laws and regulations before the act is committed), however, Article 2 paragraph (1) provides a provision that Article 1 paragraph (1) does not reduce the application of living law in society (living law). Thus, Article 2 paragraph (1) provides legal reinforcement for the medical actions of *surrogate mothers* that even though the act has not been formally regulated, according to the law living in society, the act in question is considered to be criminally punishable (because it is considered to violate religious norms and community morals, so legally there is no reason not to give sanctions (criminal) to this practice.³⁴

The elements of a criminal act in the practice of *surrogacy* carried out by a doctor include subjective and objective elements that must be met in order to be held criminally responsible. The subjective element in the form of error (*mens rea*) can be in the form of intent (*dolus*) or negligence (*culpa*), where the doctor knows or should have known that the practice of *surrogacy* is prohibited but still does it. The objective element in the form of an act (*actus reus*) includes medical actions carried out by the doctor in facilitating, implementing, or assisting the *surrogacy process*, whether through artificial insemination, *in vitro fertilization*, embryo transfer, or other medical actions aimed at realizing pregnancy in the surrogate mother. These two elements must be met cumulatively so that the doctor can be found guilty and subject to criminal sanctions in accordance with the provisions of applicable laws and regulations.³⁵

The criminal liability of doctors involved in *surrogacy practices* is based on the principle of *personal liability*, where each doctor is responsible for his or her own actions. Under Indonesian criminal law, a person can only be punished if they meet the requirements for being responsible, have committed a prohibited act, and have committed an error in the form of intent or negligence. As legal subjects with specialized expertise and practicing a profession strictly regulated by law, doctors are obligated to understand and comply with all provisions of the laws and regulations governing medical practice. Ignorance of the law (*ignorantia juris non excusat*) cannot be used as a justification or excuse for criminal liability. Therefore, doctors who practice *surrogacy* cannot avoid criminal liability by claiming ignorance of the prohibition.³⁶

The form of participation (*deelname*) in the criminal act of *surrogacy* also needs to be considered in the context of the doctor's criminal liability. Based on the provisions of Article 55 and Article 56 of the Old Criminal Code, a doctor can be responsible as a perpetrator (*pleger*), who orders it to be done (*doen pleger*), who participates in it (*medepleger*), or who persuades (*uitlokker*). In addition, a doctor can also be held responsible as an assistant (*medeplichtige*) if they provide assistance during the practice. In the practice of *surrogacy*, there are generally several parties involved, such as a married couple who want a child, a surrogate mother, a doctor, supporting medical personnel, and possibly a third party who facilitates it. The doctor who actively performs the medical procedure is the main perpetrator who can be held responsible for the heaviest criminal liability, while other medical personnel who assist can be held responsible as an accessory to the crime.³⁷ According to the Indonesian Medical Code of Ethics issued by the Indonesian Medical Association,

³³ Pasha, KM, (2025, September, 22) *The Responsibility of Doctors Who Handle Surrogate Mothers*. Hukum Online.com. <https://www.hukumonline.com/klinik/a/pertanggung-dokter-yang-menangani-surrogate-mother-lt5934e8fb3cdf/>? Accessed October 15, 2025

³⁴ Herwig, C. (2022). The Criminal Law Regulation of Surrogacy Accessory Crime. *African and Asian Studies*, 21(1–2), 58–89.

³⁵ Piersanti, V., Marchesini, D., Pelagatti, E., Caruso, A., Sciuttini, F., & La Greca, M. (2025). The Criminalization of Surrogacy in Italy: Legal Framework, Ethical Tensions, and European Perspectives. 176(4), 515–519.

³⁶ Gultom, M. (2022). *Criminal Liability of Doctors in Carrying Out Their Profession According to the Criminal Code*. *Visi Sosial Humaniora*, 3(2), 198–214.

³⁷ Alfaresi, MB, Abdullah, MZ, & Sarbaini, S. (2024). Criminal Liability of Medical Personnel Who Perform Abortions.

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the practice of *surrogacy* for commercial purposes is prohibited because it risks exploiting women and children and violates the principle of non-harm. If a doctor is involved, they could be subject to criminal sanctions under the Criminal Code, such as Article 263 concerning document falsification if there is manipulation of medical data or birth certificates.³⁸ Thus, doctors who engage in this practice face serious legal risks, including criminal prosecution, professional sanctions, and revocation of their licenses. To avoid liability issues, doctors must adhere to medical ethics, which emphasize the importance of informed consent and prohibit commercialization. Going forward, Indonesia needs to create specific regulations clarifying the legal standing of surrogacy, so that this practice no longer falls into an unclear legal area and poses a criminal risk to medical personnel.³⁹

Conclusion

1. The rapid development of medical science and technology is not balanced with the legal provisions in Indonesia, thus giving rise to various legal issues in the medical field, one of which is *surrogacy*. The act of *surrogacy* not only violates the legal principles in force in Indonesia, but also the state ideology, namely Pancasila. Therefore, surrogacy cannot be implemented in Indonesia. The Health Law and Minister of Health Regulation No. 2 of 2025 expressly prohibit this practice, including embryo donation and womb rental, but the sanctions imposed are solely administrative, without clear criminal threats for perpetrators, thus creating legal uncertainty and potential abuse. In anticipating the legal vacuum regarding the practice of surrogacy in the field of criminal law, the instruments that can be applied are the Human Trafficking Law and the Child Protection Law.
2. The criminal liability of doctors practicing surrogacy in Indonesia is complex due to the lack of explicit criminal sanctions in health legislation. Although the Health Law and Ministerial Regulation No. 2 of 2025 prohibit the practice, the sanctions provided are only administrative. However, doctors can still be held criminally liable under the principle of *personal liability* through the interpretation of articles in the Criminal Code, such as Article 263 concerning document falsification, as well as provisions in the Human Trafficking Law and the Child Protection Law if the practice contains elements of human trafficking or endangers children's rights. In addition to criminal sanctions, doctors also face the risk of professional sanctions under the Indonesian Code of Medical Ethics, which prohibits commercial *surrogacy* for violating the principle of non-maleficence. The subjective element of intent or negligence and the objective element of medical actions facilitating the practice of *surrogacy* must be cumulatively met to prove a doctor's culpability. Therefore, a clearer legal framework is needed to provide legal certainty for medical personnel and prevent the misuse of assisted reproductive practices.

Suggestion

To address the existing legal vacuum, the government should immediately draft a specific law on *surrogacy* that integrates proportionate criminal sanctions, with a focus on *altruistic (non-commercial) surrogacy* to prevent exploitation, similar to models in India and the UK. Increase oversight by the Ministry of Health and the Indonesian Child Protection Commission (KPAI) of medical reproductive facilities, including ethics training for medical personnel to prevent violations. Conduct further multidisciplinary studies (legal, medical, and social) to evaluate the impact of *surrogacy* on human rights, and encourage public discussions that incorporate Indonesian religious and cultural perspectives to build regulatory consensus.

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³⁸Chukreev, V. (2022). *On The Criminal Law Measures Of Regulation Of Surrogacy In Foreign Countries*. Vestnik Rossijskogo Universiteta Družby Narodov, 26(2), 419–432.

³⁹Budiono, A., Ngestiningrum, AH, Iriani, DU, Al Mamun, A., Rizka, RLD, & Kurnianingsih, M. (2023). *Legal Protection Policy for Obstetricians-Gynecologists in Cases of Maternal, Perinatal, and Neonatal Mortality*. Novelty Law Journal, 14(1), 1.

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