

## Legal Philosophy Perspectives on Abortion Regulation in Indonesia

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### Abstract

Abortion in Indonesia is a complex legal issue involving moral, religious, and human rights dimensions. Regulations in the Criminal Code, Health Law, and Government Regulation No. 61 of 2014 demonstrate tension between protecting the right to life of the fetus and respecting women's rights to bodily autonomy and reproductive health. This research analyzes abortion regulations from legal philosophy perspectives – natural law, legal positivism, and progressive law – and assesses the extent to which regulations reflect substantive justice. The method employed is normative legal research with statutory, conceptual, and theoretical approaches. Research findings indicate that natural law emphasizes the fetus's right to life as a natural right, legal positivism focuses on the certainty of written rules, while progressive law encourages responsiveness to social needs, particularly protecting women from the risks of illegal abortion. The perspectives of major religions in Indonesia generally reject abortion, although positive law provides limited exceptions for medical emergencies and pregnancies resulting from rape. Abortion regulation in Indonesia faces a normative dilemma as the law tends to be repressive while social reality demands greater protection for women. Regulatory reform that is more humanistic and progressive is needed, emphasizing balance between protecting the fetus's right to life and fulfilling women's rights to achieve substantive justice in accordance with Pancasila legal ideals and the constitution.

## INTRODUCTION

Abortion is a legal issue that generates controversy, both nationally and globally. This issue is not only related to medical aspects, but also touches the realm of morality, ethics, religion, and legal philosophy.<sup>1</sup> Simply put, abortion can be understood as the act of terminating a pregnancy before the fetus has the ability to survive outside the womb. This practice raises fundamental questions about the right to life, bodily autonomy, and the extent to which the state has the authority to regulate the private sphere of its citizens, reflecting the classic relationship between law, morality, and individual freedom.<sup>2</sup> Unlike previous studies that primarily focus on the legal status of abortion or its religious implications, this paper offers a novel contribution by integrating three major legal philosophy frameworks, natural law, legal positivism, and progressive law, to critically assess the normative dilemmas in Indonesia's abortion regulation. Furthermore, it introduces a comparative analysis of religious perspectives and proposes a reform model grounded in Pancasila legal ideals and substantive justice, which has not been comprehensively explored in existing literature.

In the Indonesian context, abortion regulation has a complex normative framework. Both the old and new Criminal Codes still regulate abortion as a criminal offense through Articles 346-349, with imprisonment threats for perpetrators and those who assist. However, social developments and medical needs have led to exceptions in Law Number 36 of 2009 concerning Health and Government Regulation Number 61 of 2014 concerning Reproductive Health. Article 75 paragraph (2) of the Health Law provides exceptions for abortion in two conditions: the existence of medical emergency indications that threaten the life of the mother or fetus, and pregnancy resulting from rape that has the potential to cause severe psychological trauma.<sup>3</sup> This regulation demonstrates a legal compromise between moral norms and the protection of human rights, particularly women's rights to safe health services.

Abortion regulation in Indonesia represents tension between two fundamental values: the fetus's right to life, which is considered inherent from conception, and women's rights to bodily autonomy and reproductive health as part of human rights. From a natural law perspective, the validity of law must be based on morality and universal principles, where the right to life is viewed as a natural right that cannot be

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<sup>1</sup> Abdul Djamil, *Psikolog Dalam Hukum*, Jakarta: Amirco, 1984, hlm.118

<sup>2</sup> Simbolon, Cahaya. "Problem Relasi Hukum dan Moral dalam Legitimasi Tindak Aborsi pada Perempuan Korban Pemerkosaan di Indonesia." *LEVIOPUS: Legal Review of Palapa Justicia* 1.1: 1-23

<sup>3</sup> Titik Triwulan. "Analisis Hukum Islam Terhadap Praktik Aborsi bagi Kehamilan Tidak Diharapkan (KTD) Akibat Perkosaan Menurut Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan." (2009).

violated.<sup>4</sup> Legal positivism emphasizes that law consists of written rules in legislation, so the validity of abortion depends entirely on the provisions of the Criminal Code, Health Law, and Government Regulation on Reproductive Health.<sup>5</sup> Meanwhile, progressive law views that law must be sensitive to societal dynamics, and abortion regulation in Indonesia is considered insufficient in accommodating protection for women, particularly regarding the risks of illegal abortion.<sup>6</sup>

As a legal state based on Pancasila and the 1945 Constitution, Indonesia places humanitarian values as the foundation for legal formulation. The second principle of Pancasila demands balance between protecting the fetus's right to life and respecting women's dignity. Articles 28A and 28H of the 1945 Constitution guarantee the right to life and the right to health for every person. Social reality shows that abortion cannot be viewed solely from the perspective of legal prohibition, as many cases occur due to limited access to contraception, rape, or difficult economic conditions. If the law only focuses on repressive aspects without considering substantive justice, illegal abortion practices will continue to occur with high medical risks for women.

The study of legal philosophy in abortion regulation becomes crucial to examine the extent to which positive law reflects the values of justice in society, to understand how law can balance the protection of the fetus's right to life with women's rights, and to assess whether Indonesian law needs to move toward a more progressive direction.<sup>7</sup> Thus, abortion regulation is not merely a formal legal matter, but also a legal philosophy issue containing a struggle of values and principles of justice, requiring in-depth analysis so that law can become an instrument of protection for all parties in accordance with Pancasila's legal ideals and the constitution. Based on this background, this research will examine two main problems. First, the main challenges in implementing abortion law related to the protection of human rights. Second, how legal philosophy views women's rights over their bodies in relation to the legalization of abortion in cases of pregnancy resulting from rape.

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<sup>4</sup> Royhan, J., & Gaisan, S. (2024). Hukum dan Moralitas: Dimensi Filosofis dalam Penegakan Hukum. *Praxis: Jurnal Filsafat Terapan*, 2(01).

<sup>5</sup> Fitriani, N. (2024). Pengaruh The Pure Theory of Law dalam perkembangan hukum positivisme di Indonesia. *Das Sollen: Jurnal Kajian Kontemporer Hukum Dan Masyarakat*, 2(01)

<sup>6</sup> Khairunnisa, M., Kefi, K. M. U., Makraja, F., & Nimah, R. (2024). Aborsi Di Persimpangan Hukum Dan Agama: Perspektif Politik Hukum Kesehatan dan Islam di Indonesia. *Usrotuna: Journal of Islamic Family Law*, 1(2), 178-211

<sup>7</sup> Sinaulan, Ramlani Lina (2021) Buku Filsafat Hukum. cetakan kedua. Zahir publishing, yogyakarta

## **METHOD**

This research will be more focused by employing a normative legal method with statutory, conceptual, and theoretical approaches. The statutory approach is used to examine the legal framework governing abortion in Indonesia, such as the Criminal Code, Law Number 36 of 2009 concerning Health, and Government Regulation Number 61 of 2014 concerning Reproductive Health. The conceptual approach is employed to analyze the relationship between the fetus's right to life and women's rights over their bodies, while the theoretical approach utilizes legal philosophy theories such as natural law, legal positivism, and human rights to assess the alignment of abortion regulation with the principles of morality, justice, and human dignity.

## **RESULT AND DISCUSSION**

### **1. The Main Challenges in Implementing Abortion Law Related to Human Rights Protection**

Abortion regulation in Indonesia still demonstrates tension between the protection of the fetus's right to life and women's rights to bodily autonomy and reproductive health.<sup>8</sup> The provisions of both the old and new Criminal Codes that emphasize the prohibition of abortion often clash with medical needs and social realities, particularly in cases of rape and pregnancies that threaten the mother's life.

The implementation of the Health Law<sup>9</sup> faces obstacles in socialization, understanding among law enforcement officials, and limitations of medical facilities. From a human rights perspective, the greatest challenge is how the state balances the rights of the fetus with women's rights so that the law is not only repressive but also protects human dignity comprehensively. The implementation of abortion law in Indonesia still faces normative dilemmas. On one hand, the Criminal Code, which is oriented toward prohibition, aims to protect the fetus as a living entity from conception. This can be drawn from the Hippocratic Oath<sup>10</sup>, "I will respect every human life from the moment of conception," which is an oath that must be upheld by all colleagues in the medical field and carries a pro-life connotation. However, on the other hand, social conditions demand recognition of women's rights to their bodies and reproductive health. The challenge that arises is how the law can maintain a balance between these two

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<sup>8</sup> Puspitasari, N. P. R., Sepud, I. M., & Karma, N. M. S. (2021). Tindak Pidana Aborsi Akibat Perkosaan. *Jurnal Preferensi Hukum*, 2(1), 135-139

<sup>9</sup> UU Kesehatan No. 36 Tahun 2009 Jo. PP No. 61 Tahun 2014

<sup>10</sup> Dewi, Ratna Winahyu Lestari. "Wajib Simpan Rahasia Kedokteran Versus Kewajiban Hukum Sebagai Saksi Ahli." *Perspektif* 18, no. 3 (2013): 136-147

fundamental values without sacrificing one of them. This demonstrates the limitations of positive law, which still tends to be repressive, as well as the need for legal reform that is more responsive to social contexts.

However, in Indonesian positive law that discusses abortion and rape<sup>11</sup>, as stated in Government Regulation Number 61 of 2014 concerning women's reproductive health regarding exceptions for pregnancy resulting from rape, it reads: "Abortion due to rape as referred to in paragraph (1) letter b can only be performed if the gestational age is at most 40 (forty) days calculated from the first day of the last menstruation." In this context, this means there is recognition of human rights for the pregnant woman. This provision provides human rights space for women who are rape victims, but in practice, it creates a new dilemma. The 40-day time limit is often considered unrealistic because victims often only realize their pregnancy after this period has passed. Consequently, access to safe abortion is very limited, giving rise to the risk of illegal abortion that threatens women's health and lives.

In the discourse on law and human rights, the issue of abortion occupies a highly complex position because it involves two equally fundamental interests – the protection of the fetus's right to life and the protection of women's rights to their bodies and reproductive health. Normatively, both the old and new Criminal Codes in Indonesia emphasize the prohibition of abortion to maintain the value of life from conception. However, in practice, medical needs and social conditions often present emergency situations, especially in cases of pregnancy resulting from rape or when the mother's life is threatened. This is where an unavoidable normative dilemma lies: positive law tends to be repressive in regulating abortion, while human rights demand recognition of women's rights so they are not sacrificed. This struggle cannot be separated from Indonesia's socio-cultural context, which is laden with religious values. Therefore, analysis of religious perspectives becomes important, as the teachings of major religions in Indonesia not only shape individual morality but also influence the direction of policy and legal practice in society.

In Islam, citing Surah Al-Isra 17:33<sup>12</sup>, "Do not kill the soul which Allah has forbidden, except with just cause," and Al-An'am 6:151<sup>13</sup>, "Do not kill those whom Allah has forbidden, except with just cause," these verses indicate that Islam emphasizes the prohibition of abortion.

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<sup>11</sup> Anggara, B. (2021). Harmonisasi Pengaturan Aborsi Di Indonesia. *Jurnal Hukum Saraswati*, 3(1)

<sup>12</sup> Departemen Agama Republik Indonesia. (2012). *Al-Qur'an dan terjemahannya*. Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an

<sup>13</sup> *Ibid.*

In the Christian tradition, both Catholic and Protestant, abortion is generally viewed as a violation of the sanctity of life bestowed by God from the beginning of creation. In the Holy Scripture, this view is supported by, among others, Jeremiah 1:5:<sup>14</sup> "Before I formed you in your mother's womb, I knew you, and before you were born, I consecrated you." This verse affirms that human life has been known and given meaning by God even before birth, so the fetus is treated as a person with full dignity. Similarly, Mazmur 139:13,16<sup>15</sup> expresses the religious awareness that God forms life from within the womb: "For you created my inmost being; you knit me together in my mother's womb... in your book they were all written, the days fashioned for me, when as yet there were none of them." This biblical narrative demonstrates how closely Christian faith is connected with respect for life from conception.

The Catholic Church formulates this teaching consistently in the Catechism of the Catholic Church<sup>16</sup> (CCC 2270-2271), which states that human life must be respected absolutely from the moment of conception, and abortion is a moral crime. Meanwhile, within the Protestant sphere, the Communion of Churches in Indonesia (PGI) officially rejects the legalization of abortion regulated in Government Regulation No. 61 of 2014 concerning Reproductive Health. In its statement, PGI emphasizes that the fetus in the womb is a life that cannot be terminated unilaterally and states that the government does not have the moral authority to determine that a fetus can be sacrificed for certain reasons. Thus, both Catholics and Protestants in Indonesia affirm a pro-life position, although among Protestants there is limited pastoral discussion regarding extreme conditions such as pregnancy resulting from rape or threats to the mother's life.

In Hindu teachings, abortion is viewed as a violation of the principle of ahimsa (non-violence). Hindu scriptures<sup>17</sup> place life as something sacred from the beginning of creation. Atharva Veda X.1.29 explicitly states: "Do not kill the innocent baby." Similarly, in Manu Smṛti, abortion or bhrūṇa-hatyā is classified as a grave sin that taints the sanctity of life. Therefore, in Indonesian Hindu tradition, the fetus is viewed as a soul that must be protected, and the act of abortion is considered a violation of moral obligations and the law of karma. Nevertheless, in socio-religious practice, Hindus continue to emphasize the importance of purification efforts and prayers in cases of miscarriage or fetal loss as a form of spiritual recovery and respect for life.

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<sup>14</sup> Lembaga Alkitab Indonesia. (2014). Alkitab: Terjemahan Baru. Jakarta: Lembaga Alkitab Indonesia

<sup>15</sup> *Ibid.*

<sup>16</sup> Randy Alcorn, *Pro-life Answers to Prochoice Arguments* (Sisters, Oregon: Multnomah Publishers, 2000), p. 296

<sup>17</sup> Titib, I. M. (1996). *Weda: Sabda suci yang abadi*. Surabaya: Paramita

In the Buddhist perspective, the first *sīla* or commitment not to kill living beings becomes the primary basis for rejecting abortion. A devotee commits: "I undertake to train myself to avoid killing living beings." Additionally, in *Dhammapada* 129-130<sup>18</sup>, it is stated: "... one should not kill or cause killing." This teaching places abortion as an act that violates the first precept, as the fetus is viewed as a living being that has the potential to achieve enlightenment. However, in modern Buddhist ethical discourse, there is room for more contextual consideration, such as regarding intention, medical conditions, or threats to the mother's life. Thus, although the normative Buddhist position tends to be pro-life, in social practice there are nuances that consider the aspect of compassion (*karuṇā*) toward the mother.

In Confucian teachings, the principle of *ren* (仁) or humaneness emphasizes respect for life and the moral obligation to protect the weak. Mencius 2A:6<sup>19</sup> affirms the depiction of human compassionate instinct: "If someone sees a child falling into a well, compassion arises spontaneously." This teaching illustrates that the sense of humanity guides humans to save life. Additionally, in *Analects Lunyu* 15:23, there is an ethical command: "What you do not wish for yourself, do not do to others." Based on this, abortion in the Confucian perspective is viewed as a form of denial of humanity because it eliminates the potential of life that should be protected. Nevertheless, modern ethical discourse in the Confucian community in Indonesia also emphasizes the importance of maintaining balance between protection of the fetus and the safety of the mother, in line with the principle of harmony (*he*), which is the main foundation of social life according to Confucian teachings.

In legal philosophy, the issue of abortion can be understood through three basic principles. The ontological principle emphasizes the essence of life itself. The main question is when life should be considered to exist and be protected. Indonesian positive law places life from conception as the starting point of legal protection, which is reflected in the Criminal Code and health regulations. The epistemological principle highlights the basis of legal truth: should law be based on universal natural law, namely morality and eternal humanitarian values, or on positive law formed by the state. In the case of abortion, natural law emphasizes unconditional protection of life, while positive law provides limited exceptions in cases of medical emergencies or pregnancy resulting from rape. The axiological principle speaks to the purpose of law, namely whether abortion regulation emphasizes legal certainty to protect the fetus or justice and benefit for women

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<sup>18</sup> Narada Thera. (1993). *Dhammapada: Kitab syair kebenaran* (Terj. oleh Bhikkhu Santosa). Jakarta: Yayasan Dhammadipa Arama

<sup>19</sup> Gunawan, S. (2001). *Analek Konfusius*. Jakarta: Yayasan Bina Darma

and society at large. These three principles show that the abortion issue is not only a normative matter but also laden with ethical, social, and cultural dimensions.

From the perspective of legal philosophy principles and religious teachings in Indonesia, there appears to be normative agreement that life from conception must be respected. Islam, Catholicism, Protestantism, Hinduism, Buddhism, and Confucianism generally reject abortion based on their respective scriptures and moral principles. However, Indonesian positive law opens limited exceptions, such as in Government Regulation 61/2014, which permits abortion in cases of medical emergencies and rape with certain gestational age limits. This is where a dilemma arises: how can the law maintain a balance between the fetus's right to life and women's rights to their bodies and reproductive health without sacrificing either one.

## **2. Legal Philosophy Perspectives on Women's Rights over Their Bodies in Abortion Legislation Due to Rape**

Legal philosophy<sup>20</sup> is a discipline that seeks to explore the foundations, purposes, and values that should underlie positive law. One important school of thought in legal philosophy is Natural Law. This view has its roots in Ancient Greece through the thoughts of philosophers such as Aristotle and Cicero, then developed within the Christian tradition by Thomas Aquinas, and reached its modern form in natural rights theory.

Generally, natural law argues that law does not merely originate from the will of rulers or written regulations, but must be based on universal moral values and natural human rights<sup>21</sup>. In this view, there is a law that is higher and precedes man-made law, namely law that originates from human reason and nature itself. Therefore, a rule can only be called just if it aligns with the principles of morality and universal justice.

In the context of research on abortion, natural law asserts that the right to life is a natural right inherent in every human being from the womb. Life is considered a fundamental gift that must not be violated. Based on this, abortion is in principle considered contrary to natural law because it eliminates the life of a living being that has human potential.

However, in the development of modern natural law thinking, discourse has emerged regarding exceptions in cases of moral or medical emergencies. For example, when the continuation of the fetus's life threatens the mother's safety, or when pregnancy

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<sup>20</sup> Bismar Nasution, *Bahan Kuliah Filsafat Hukum Sekolah Pascasarjana Universitas Sumatera Utara*, Medan, 2007, hlm. 45

<sup>21</sup> Tri Rusmala Ratnawati, 2022, *Aborsi dan Hak Hidup Janin dalam Perspektif Hak Asasi Manusia dan Kesehatan*, *Juris Humanity: Jurnal Riset dan Kajian Hukum Hak Asasi Manusia*, 1(1)



occurs as a result of rape that causes severe trauma. In such situations, natural law is no longer understood rigidly, but must be considered within the framework of the principles of justice, human dignity, and the greater good.

Thus, the natural law perspective provides a strong normative foundation in the debate about abortion: it emphasizes respect for the fetus's right to life, while opening space for ethical reflection on extreme situations where protection of the mother is also an equally important moral demand. This perspective is relevant as an entry point to examine how Indonesian positive law regulates abortion, and the extent to which these regulations reflect universal moral values and principles of justice.

Therefore, natural law indirectly re-emphasizes its assessment that the fetus's right to life is natural, but still provides exceptions in emergency situations, such as pregnancy resulting from rape that causes severe suffering for women. Turning to the legal positivism perspective, it views law as a closed normative system that applies hierarchically. A regulation is valid if it is made in accordance with the procedures determined by higher norms, ultimately leading to the *grundnorm* or basic norm. Thus, the validity of law is determined only by the internal logic of the legal system, not by external considerations such as morality or religion.

In the context of regulation in Indonesia, the legal positivism perspective affirms that the legality of abortion is entirely determined by statutory provisions, such as the Criminal Code and the Health Law, which serve as sources of research in this regard. As long as abortion is performed in accordance with the requirements and instructions of applicable law, it is legally valid; conversely, if performed outside these provisions, it is considered a criminal act, without the need to debate moral or ethical aspects beyond the legal text.

Therefore, legal positivism provides a clear framework for assessing abortion practices: law is viewed only from the perspective of formal legality, not from the perspective of morality or humanitarian values. This perspective is relevant to explain how the state, through its legal instruments, establishes strict boundaries regarding whether or not an abortion procedure may be performed.

The third perspective to be discussed in this research is Progressive Law. In addition to natural law and positivism, one important school of thought in contemporary legal philosophy is Progressive Law.<sup>22</sup> This idea was popularized by Prof. Satjipto Rahardjo,

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<sup>22</sup> Junaedi, O. (2025). Relasi Antara Moralitas Dan Hukum: Perspektif Filsafat Hukum Kontemporer. *Lex Laguens: Jurnal Kajian Hukum Dan Keadilan*, 3(1), 204–216

a prominent Indonesian legal figure. Progressive law was born as a critique of law that is rigid, formalistic, and often unable to address society's need for justice.

The essence of progressive law is the view that law is made for humans, not humans for law. This means that law should not be understood merely as normative text written in legislation, but must be seen as a means to achieve substantive justice and the welfare of the people. Therefore, progressive law demands that law always be responsive to changing times, social realities, and societal needs.

Within the framework of progressive law<sup>23</sup>, law enforcers are given space to interpret and apply law more flexibly with an orientation toward humanitarian values and a sense of justice. This approach is based on the assumption that positive law is not always sufficient to resolve complex societal problems, so courage is needed to "deviate" from legal texts for the sake of higher humanitarian purposes.

Regarding the issue of abortion, the progressive law perspective emphasizes the importance of protecting women's dignity, reproductive health, and safety from illegal abortion practices that are actually more dangerous. Progressive law views that strict prohibition of abortion without considering social, medical, and psychological aspects can actually create new injustices. Therefore, law should open more space for exceptions oriented toward protecting human rights, particularly women's rights to live healthily, be free from suffering, and obtain safe medical services.

Thus, the progressive law philosophy provides a relevant framework for assessing abortion regulation in Indonesia. It encourages law not to stop at repressive statutory texts, but to be able to transform into an instrument of substantive justice, in accordance with Pancasila's legal ideals that place humanity and social justice as the main foundations of legal formulation.

## CONCLUSION

Abortion in Indonesia is a complex issue because it involves legal, moral, religious, and human rights dimensions. The regulations contained in the Criminal Code, Health Law, and Government Regulation No. 61 of 2014 demonstrate tension between the protection of the fetus's right to life, which is viewed as natural, and the state's obligation to protect women's rights, particularly regarding reproductive health.<sup>24</sup> From a legal philosophy perspective, natural law affirms that the fetus's right to life is absolute and

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<sup>23</sup> D. Stretton, 2008, *Defending life: a moral and legal case against abortion choice* by Francis J Beckwith. *Journal of Medical Ethics*, Vol. 34, Issue. 11, p. 793

<sup>24</sup> Firdawaty, L. (2017). *Aborsi dalam Perspektif Hak Asasi Manusia dan Hukum Islam (Analisis terhadap Peraturan Pemerintah No. 61 tahun 2014 tentang Kesehatan Reproduksi)*. *Al-Adalah*, 14(1), 107-130

inviolable, legal positivism emphasizes the certainty of written rules, while progressive law emphasizes the importance of adapting law to social needs and protecting women. The views of major religions in Indonesia generally reject abortion because they regard life as sacred from conception. Nevertheless, positive law continues to provide opportunities for exceptions in certain circumstances, such as medical emergencies or pregnancy resulting from rape. Thus, the greatest challenge in abortion regulation is finding a balance between protecting the fetus and fulfilling women's rights, so that the law can deliver substantive justice, not merely normative certainty.

A more comprehensive reform of abortion regulation is needed, taking into account the balance between moral values, religious teachings, and human rights. The provisions regarding the time limit for abortion due to rape should be re-evaluated to avoid limiting victims' access to safe health services. In addition, enhancing the capacity of law enforcement officials, medical personnel, and public education is key to the effective implementation of the law. A humanistic and progressive legal approach needs to be prioritized, placing maternal safety and women's protection as priorities, and encouraging cross-disciplinary dialogue so that the resulting regulations reflect substantive justice. This study contributes a novel perspective by integrating legal philosophy frameworks, natural law, legal positivism, and progressive law, with a comparative analysis of religious teachings in Indonesia. Unlike prior works that focus solely on doctrinal or medical aspects, this paper offers a multidimensional normative critique and proposes reform grounded in Pancasila legal ideals. By emphasizing the need for humanistic and responsive regulation, it advances the discourse on abortion law beyond formal legality toward substantive justice and inclusive legal development.

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