

# The Relevance of Progressive Law to Legal Reasoning in Indonesia

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## Abstract

Legal rules and law enforcement in Indonesia are heavily influenced by the legal system inherited from the Dutch colonial era. Many of the colonial regulations are still in effect today, even though they are no longer appropriate to the conditions of Indonesian society. The aim of writing this article is to analyze the contribution of progressive law to legal reasoning in Indonesia. This article was written using a type of normative research with a conceptual approach. The results of this research are that Dutch inherited law, which is based on positivist thinking, is often rigid and procedural. So, there is less attention to aspects of substantive justice. It is hoped that the presence of progressive law will be able to reconstruct legislative regulations in Indonesia so that they realize substantive justice and not just procedural justice.

**Keywords:** progressive law; substantive justice; reconstruction

## Introduction

Law is a social rule that regulates relationships between individuals in society. Law develops together with social rules that originate from moral guidelines within humans, based on the beliefs held, social rules that emerge in society, customs and so on. There is a strong relationship between law and social rules, so that there are times when law enforcement occurs inconsistencies between law and social rules (Salam, 2015). Law enforcement is empirical implementation in society by enforcers who interpret the results of cases that occur. In the process of interpreting the law, it is important to uphold three elements, namely justice, legal certainty and expediency. These three elements need to be considered and implemented in the law enforcement process, so that they do not cause inequality.

Expectations for law enforcement, especially judges, are not only able to provide procedural justice based on law, but also prioritize substantive justice. Substantive justice does not mean that judges ignore statutory regulations, but judges can ignore statutory regulations if they do not provide a sense of justice, of course by referring to formal laws that provide a sense of justice and guarantee legal certainty (Isnantiana, 2017).

Judges are a profession that plays a role in realizing justice. Judges have the authority to decide a case based on their discretion. Judges also in enforcing the law must always look at existing values, because values play a very important role in enforcing the law and providing justice.<sup>2</sup> The role of the judge in this case is not only as a mouthpiece for the law (*La bouche de la loi*), carrying out what is intended. is in the law, but judges have the freedom to interpret a case based on social values.



Article 24 paragraph 1 of the 1945 Constitution states that judicial power is an independent power to administer justice to uphold law and justice. Law Number 48 of 2009 concerning Judicial Power explains the guidelines for judges that in exercising judicial power, judges are obliged to explore the values that exist in society. In reality, some cases forget the essence of this article, because they prioritize the *lex scripta* written in positive legal regulations (legal-positivism) (Busthami, 2018).

Enforcing the law uses a *lex scripta* approach and is not procedurally wrong. However, the elements put forward cannot be felt, because they are not optimal in providing justice in society. In some cases, this situation has become controversial, causing reactions from the public. Several legal cases that were decided using conventional methods and prioritizing procedural justice can give the following reactions from the public: (Kompas, 2020)

1. Samirin's grandfather took 1.9 kilograms of rubber from a well-known tire company with a loss of Rp. 17,000,-. He had to stay in prison for 2 (two) months and 4 (four) days by the Simalungun District Court Decision;
2. Grandmother Saulia, aged 92 (ninety two) years, had to stay in prison for 1 (one) month and 14 (fourteen) days after the verdict from the Balige District Court. He was punished for cutting down a durian tree with a diameter of 5 inches and taking the wood to repair his ancestor's grave;
3. Grandma Asyani, 70 years old, a resident of Situbondo, who had to spend time in prison for taking wood from a garden that Perhutani claimed was hers.

The case as an example above shows that there needs to be efforts made by law enforcers to uphold the values of substantive justice. The above conditions also disturb people's sense of justice, it is as if justice is defeated by the rigidity of the law. Judges cannot do anything because judges only follow the law (*La bouche de l aloi*), judges carry out what is in the law, even the judge's independence which is a characteristic of the rule of law is not visible and is defeated by the superiority of the law. which is stiff (Maruf & Harefa, 2023). Seeing this condition makes many people blame the judges, but the judges themselves are often disturbed because they cannot find a solution to cases like the one above.

In the current legal situation, if we still apply legal-positivism, which views law as limited to regulations alone, what happens is that law serves certain interests, not substantive justice and the people at large, so that the purpose of law is to realize justice. far from expected. The application of law in Indonesia needs to use legal concepts that uphold substantive justice, so that the legal objectives of realizing justice and welfare of the people are achieved. Progressive law, which has a concept for humans and society, not for its own sake, is an alternative that should be used for law enforcement

## Introducing Progressive Law

Progressive law first appeared in an article published in Kompas daily June 15 2002 with the title "Indonesia Needs Progressive Law Enforcement". Progressive law then appeared as a book published in 2006 with the titles "Dissecting Progressive Law", "Progressive Law: A



Synthesis of Indonesian Law (2009)" and "Progressive Law Enforcement (2010)". All written works related to progressive law were written and developed by Satjipto Raharjo (Aulia, 2018).

Satjipto Rahardjo is an academic who pays close attention to paradigm shifts in law. Inspired by the shift from Newton's theory which sees causal relationships linearly, mathematically, mechanically and deterministically to modern quantum theory (which sees everything as being in a relative or non-constant condition). This concept is used to explain social situations, especially legal science. Basically, what happened was that there was a significant change in the law which he formulated with the phrase "from simple to complex" and "from fragmented to unified". This is interpreted as a holistic view in legal science. This holistic view provides a visionary awareness that something in a certain order has parts that are interrelated and with other parts in a system (Muhammad Rustamaji, 2017).

The idea of progressive law emerged as an antithesis to modern law. Progressive law rejects the flow of *rechtsdogmatiek* (legal dogmatics) and analytical jurisprudence. This school emphasizes law as a building of rules. The laws in these two schools are far from the actual reality in an ever-changing society. The school of legal dogmatics or written law emphasizes the discovery of law, because legal dogmatics is limited to determining the rules of the game, the rest depends on the ability and how a lawyer builds a rational and logical legal construction according to law based on legal principles and legal doctrines (Halim & Patria Setyawan, 2024).

The view of progressive law emphasizes that law is not just text. Progressive law places behavior as a much more important factor in law than regulations that are nothing more than text (Patria & Kurniawan, 2022). The legal scheme from behavior to text makes the law stagnant, hard and rigid (*lex dura sed tamen scripta*). Legal texts are not fully trusted as representations of social life. Social life emerged because humans started living together thereby building a society. From social life, law is born. Society is the entity that causes the law to operate. Without social life, the law becomes lifeless, if it is not alive then the law is just text. A progressive way of law rejects rigid attachment to regulatory texts, but instead relies on human behavior, of course in this case good behavior (Rhiti, 2016).

Progressive law provides an understanding that law exists not only for the law itself, but for a larger and broader goal, namely human dignity, happiness, prosperity, human glory and humanity. Progressive law not only obeys formal bureaucratic procedural but also material-substantive. Law is also not an absolute and final institution, because law is always in process and becoming (law as a process, law making). In an effort to explain the theory of progressive law, it is explained that it is human interests (based on experience) that must be the central point of legal attention, rather than the opposite, humans must submit themselves to the law as explained in legal-positivism (Rhiti & Setyawan, 2023). This method makes progressive law place certainty, justice and expediency in one line. But what is no less important is the character of progressive law which adheres to conscience and rejects material slavery.

Law for humans is a form of "juridical humanism" progressive law that emphasizes respect for humans in a radical, non-utilitarian way and does not recognize sacrifice for a small number of humans (Setyawan & Rhiti, 2022). The way of law that relies on interactions between members of society gives rise to a law called interactional law which is a substantial way of law.



This interaction is a process that produces a pattern in society and functions as a law. Law substantially does not require an institution that makes the law (hierarchically of norms), but law appears spontaneously (spontaneously generated) in societal interactions. Substantial law is still needed even though social conditions are increasingly structured in a formal-rational way, but it still exists together and side by side with formal-textual law (Mukhidin, 2014).

Progressive law is referred to as law that is more pro-people and pro-justice (substantial). People and justice are two socio-political moral entities that have important meaning in the Indonesian legal order. This law must be remembered that it is not necessarily free from existing regulations. Rather, it collaborates with existing regulations, but what is prioritized is sensitivity to behavior and the social impact of the law itself. This shows that the aim of this law is to achieve certainty, justice and benefit.

Judges are normatively given the freedom by law to judge according to their beliefs without being influenced by anyone or anything. Judges have the freedom to decide cases based on their thoughts and conscience (Akbar, 2023). Judges also hold the value of being free from intervention by other parties outside the court unless this is included in statutory regulations. In making decisions, judges should not only use written law but must pay attention to living values and fulfill the sense of justice of the community concerned or the social environment.

According to progressive law, judges must prioritize justice and truth for the sake of humanity rather than adhering rigidly to regulatory certainty. The behavior of judges through their decisions must encourage social improvement and harmony, and this is said to be one of the progressive characteristics. This is in line with the thoughts of Kusnu Goesniadhie who says that the concept of law is very broad, even though various formulations and writings have referred to and quoted the opinions of scholars, as well as philosophers who try to provide a definition or forms of understanding of law. In practice, it is not uncommon to encounter misunderstandings and misinterpretations, which have even given new interpretations to the law itself. He further said that basically a good law is a law that is able to accommodate and distribute justice to the people it regulates. The close relationship between law and the socio-cultural values of society turns out that good law is law that reflects the values that live in society (Hertoni, 2016).

Legal desires are carried out through humans on the basis of their analysis. Humans who carry out law enforcement occupy an important and very decisive position. What the law says and promises, ultimately becomes a reality through law enforcement. It can also be said that legal work is seen by law enforcement officials in interpreting the law itself. The existence of friction in society can a priori be said to be due to differences in the interpretation of the law by law enforcement officials.

From the explanation above, it is clear that the judge's task is not merely to interpret the law (rule making) but furthermore he also finds and makes laws (judge made law and rule breaking) to establish justice, both through interpretation and construction methods. . With these two methods, it is possible for judges to have the freedom to contemplate in the context of search, enlightenment and liberation in order to realize the goal of law, namely justice. The profession as a judge makes it possible to think and act outside the box by using logical reasoning supported by the language of the heart to further develop a legal text. Judges are given the freedom to no



longer adhere to the sound of the text of statutory regulations, but on condition that the judge does not ignore the law as a building block of the legal system so that it does not lose control. If the judge is willing and able to carry out all stages in legal interpretation.

## Conclusion

The existence of law in society is useful for serving human needs and aims to provide justice, legal certainty and benefit. The idea of progressive law emerged to emphasize that law is not just text, but places more importance on behavior or humanity as a factor in law. Progressive law not only adheres to formal bureaucratic procedural matters but also substantive material. This law must be remembered that it is not necessarily free from existing regulations. Rather, it collaborates with existing regulations, but what is prioritized is sensitivity to behavior and the social impact of the law itself.

Judges as parties tasked with enforcing the law have the freedom to decide cases based on their thoughts and conscience. In making decisions, judges should not only use written law but must pay attention to living values and fulfill the sense of justice of the community concerned or the social environment. Judges have an important and strategic role in spreading justice for people with their courage to carry out rule breaking. This noble mission will be realized if judges dedicate themselves as guardians and enforcers of justice. Legal interpretation that is carried out seriously is an implementation of the spirit of progressive law, namely the spirit of liberation to find and realize justice in the text of laws which are sometimes unclear or do not yet have regulations.

The suggestion that is emphasized from the results of this research is that this tradition of progressive legal thinking needs to continue to be encouraged, so that it truly becomes the law among judges in handling criminal cases, resulting in judges' decisions being fair, correct and protecting the interests of society. Judges when deciding criminal cases in court should not be too captive to the law, by violating the law it is possible to obtain justice, as long as the judge can be accountable for his decision. There is a need to insert progressive legal teaching materials/methods in Law Universities that open students' insight into legal issues in a holistic manner and train social sensitivity.

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