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## Realizing Substantive Justice Enforcement Through the Implementation of Progressive Law

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### **Abstrak**

Sebagian besar sistem hukum di Indonesia masih dipengaruhi oleh warisan hukum kolonial, yang tetap berlaku hingga kini dengan berbagai modifikasi. Dominasi hukum positif yang diwarisi dari sistem kolonial ini mengedepankan keadilan prosedural formal, namun sering kali mengabaikan aspek substansial dari keadilan itu sendiri. Akibatnya, hukum di Indonesia mengalami kemerosotan dan memerlukan perubahan mendasar untuk keluar dari pola pikir konvensional yang kaku. Penelitian ini mengkaji konsep hukum progresif, sebuah pemikiran yang diperkenalkan oleh Satjipto Rahardjo. Hukum progresif berfokus pada pendekatan yang lebih fleksibel dalam menemukan hukum dengan mengeksplorasi nilai-nilai yang berkembang dalam masyarakat. Perspektif ini dianggap lebih relevan dengan kebutuhan masyarakat Indonesia, karena memberikan ruang bagi hukum untuk berkembang sesuai dengan dinamika sosial yang ada. Dalam penelitian ini, penulis menyoroti pemahaman mengenai hukum progresif di Indonesia serta relevansinya dalam memberikan pertimbangan hukum bagi hakim dalam memutus perkara. Pendekatan yang digunakan adalah yuridis normatif, yang mengandalkan studi literatur dan data sekunder sebagai sumber utama analisis. Diharapkan, hasil penelitian ini dapat memberikan kontribusi teoritis yang bermanfaat bagi perkembangan ilmu hukum, khususnya dalam mendorong pemikiran yang lebih dinamis dan sesuai dengan realitas sosial.

**Kata kunci:** Hukum Progresif, Penegakan Hukum, Keadilan Substantif

## Abstract

A significant portion of Indonesia's legal system is still influenced by colonial legal heritage, which remains in effect today with various modifications. The dominance of positive law inherited from the colonial system prioritizes procedural justice, often neglecting the substantive aspects of justice itself. As a result, Indonesia's legal system has experienced a decline and requires fundamental changes to break free from the rigid conventional mindset. This study examines the concept of progressive law, a legal theory introduced by Satjipto Rahardjo. Progressive law emphasizes a more flexible approach in discovering the law by exploring the values that evolve within society. This perspective is considered more relevant to the needs of Indonesian society, as it allows the law to develop in accordance with social dynamics. In this research, the author highlights the understanding of progressive law in Indonesia and its relevance in providing legal considerations for judges in decision-making. The approach used is normative juridical, relying on literature studies and secondary data as the primary sources of analysis. It is expected that the findings of this study will contribute theoretically to the development of legal science, particularly in fostering a more dynamic and socially relevant legal thought.

**Keywords:** Progressive Law, Law Enforcement, Substantive Justice

## A. Introduction

Law is a set of social norms that regulate relationships between individuals in society to create order and justice. Over time, law evolves in alignment with social dynamics, culture, and the moral values upheld by society. Law does not stand alone but is rooted in the social norms that develop, including moral guidelines inherent in individuals, beliefs, customs, and long-standing traditions (Rahadjo, 2006). The relationship between law and social norms is very strong, so in practice, there are often discrepancies between formal law and the social norms prevailing in society.

These discrepancies may arise due to several factors, such as the rigidity of legal rules that fail to accommodate evolving social values or differing interpretations of justice between positive law and societal perspectives. In some cases, laws enforced based on written regulations may conflict with local wisdom and values that are more widely accepted by the community. As a result, dissatisfaction with law enforcement emerges, potentially undermining the legitimacy of the legal system itself. Therefore, a more adaptive and flexible legal approach is needed, such as the concept of progressive law, which prioritizes substantive justice over mere adherence to formal legal procedures (Sumirat, 2021). Thus, law does not function solely as a tool for social control but also as a means to reflect genuine human values and justice in society.

Law enforcement is the actual implementation of law in society by law enforcement officers based on their understanding of the cases that occur. In the process of legal interpretation, it is essential to ensure that three key aspects are maintained: justice, legal certainty, and benefit (Sutrisno et al., 2020). These three aspects must be considered and implemented in the law enforcement process to prevent imbalances.

Judges play a crucial role in upholding justice. They have the authority to render decisions on cases based on their discretion. In the enforcement of law, judges must always consider the prevailing values in society, as these values play a significant role in ensuring that law enforcement aligns with the principles of justice (Yunanto, 2019). The role of a judge in the judicial system is not limited to merely interpreting the law and mechanically applying written legal provisions. Instead, judges have the freedom to interpret and understand a case by taking into account the social values that evolve within society. Consequently, the decisions they make are not solely based on existing legal provisions but also reflect substantive justice that aligns with the prevailing social and moral context.

The expectation for law enforcement, particularly for judges, is not only to provide procedural justice based on legislation but to prioritize substantive justice. Substantive justice does not mean that judges disregard legal regulations; rather, they may set aside a legal provision if it fails to deliver a sense of justice. However, this must still be guided by formal legal principles that ensure both justice and legal certainty (Martadinata & Ahmadi, 2020).

Article 24, Paragraph 1 of the 1945 Constitution states that judicial power is an independent authority responsible for administering justice to uphold law and fairness. Furthermore, Law No. 48 of 2009 on Judicial Power outlines the guidelines for judges, emphasizing that in exercising their judicial authority, they must explore and consider the values that exist within society. However, in practice, some cases overlook the essence of this provision by prioritizing *lex scripta*, or the written text of legal regulations, in accordance with the principles of legal positivism.

Enforcing the law using the *lex scripta* approach and procedural methods is not inherently wrong. However, such an approach often fails to fully deliver justice that aligns with societal values, making it less impactful. In some cases, this situation has sparked controversy and triggered public reactions. Several legal cases resolved through conventional methods, emphasizing procedural justice, have led to strong public responses, including: (Najoan et al., 2021)

1. In 2009, Mbok Minah was sentenced to a one month and 15 days probationary period for stealing three cocoa beans worth Rp 2,100,-.
2. In 2009, 76-year-old Klijo was detained for stealing a bunch of klutuk bananas worth Rp 2,000,-.
3. In 2015, Nenek Asyani was sentenced to one year and three months of probation and fined Rp 500 million for cutting down seven trees that had already been felled five years earlier. This case sparked public outrage, protests, and even caught the attention of the Minister of Environment and Forestry, who expressed disagreement with the prosecutor's charges.
4. In 2017, Baiq Nuril, an honorary teacher and victim of sexual harassment by her school principal, was sentenced to six months in prison and fined Rp 500 million under the Electronic Information and Transactions Law (ITE Law).
5. In 2018, 92-year-old Nenek Saulina was sentenced to one month and 14 days in prison after being accused of damaging plants.

The cases mentioned above highlight the urgent need for law enforcement officials to uphold substantive justice. These situations have also disturbed the public's sense of fairness, as if justice has been overshadowed by the rigidity of legal provisions. Judges often find themselves unable to act beyond the constraints of legislation, merely enforcing what is explicitly stated in the law. As a result, judicial independence—one of the fundamental principles of a rule-of-law state—appears to be diminished, overtaken by the dominance of rigid legal statutes (Ismayawati, 2021). Seeing this situation, many people tend to blame the judges. However, the judges themselves often feel troubled, as they are unable to find a way out of such cases.

The opposite situation occurred in the case of Rahmat Khadir and Ronny Bugis, who were sentenced to 2 years and 1.5 years in prison for the acid attack on Novel Baswedan. Indonesia's Attorney General, Sanitiar Burhanuddin, also commented on the court's verdict in this case. He stated that there was nothing wrong with the ruling against the two defendants, explaining that the prosecution's demands were based on factual evidence and that the court's verdict was not significantly different from the prosecutor's request. However, the judge's considerations during the trial did not take into account the social impact of the case, despite the widespread public concern. This was particularly significant because the victim, Novel Baswedan, was a senior investigator at the Corruption Eradication Commission (KPK) and was carrying out his duties in combating corruption in Indonesia (Khasanah & Faris, 2018).

In the current legislative legal system, if the legal-positivism approach continues to be applied—where law is viewed solely as a set of written regulations—it risks serving specific interests rather than ensuring substantive justice for the broader public. As a result, the fundamental purpose of law in achieving justice becomes increasingly distant from its intended goal. To ensure that the legal system in Indonesia truly upholds justice and the well-being of the people, the implementation of law must adopt a framework that prioritizes substantive justice. Progressive law, which is centered on human beings and society rather than serving its own rigid structure, presents itself as a viable alternative. This approach should be embraced in law enforcement to create a system that is fair, dynamic, and responsive to the needs of society.

This article will explore judges' understanding of progressive legal theory and its application in the cases they handle, as well as the realization of substantive justice in the implementation of progressive law in a case.

## B. Methodology

Referring to the topic and issues discussed earlier, this study employs a normative legal research approach, which focuses on the study of legal norms (Dr. H. Salim HS, S.H., M.S., Erlies Septiana Nurbani, S.H., 2018). The study focuses on the content analysis of legislation regarding judicial authority. In its implementation, this research utilizes a conceptual approach, statutory approach, and comparative law approach (Jonaedi Efendi dan Johnny Ibrahim, 2018). The type of data used in this research is secondary data, which is derived from legal norms, regulations, and relevant literature. Data collection is conducted through library research by studying books, articles, and statutory regulations. Once the materials are gathered, the data is then analyzed using qualitative analysis.

## C. Result and Discussion

### The Significance of Implementing Progressive Law to Achieve Substantive Justice

Progressive law was first introduced in an article published in Kompas on June 15, 2002, titled "Indonesia Needs Progressive Law Enforcement." The concept of progressive law was later developed into books, starting with "Membedah Hukum Progresif" (2006), followed by "Hukum Progresif: Sebuah Sintesa Hukum Indonesia"\* (2009), and "Penegakan Hukum Progresif" (2010). All writings related to progressive law were authored and developed by Satjipto Rahardjo (Aulia, 2018),

Satjipto Rahardjo was an academic who closely observed paradigm shifts in the field of law. He drew inspiration from the transition in scientific thought, from Newtonian theory—which views causal relationships in a linear, mathematical, mechanical, and deterministic manner—to modern quantum theory, which perceives everything as relative and non-constant. He applied this concept to explain social dynamics, particularly in legal studies. Fundamentally, his perspective highlighted a significant transformation in the legal field, which he described with the phrases "from simplicity to complexity" and "from compartmentalization to unity." This perspective is understood as a holistic approach to legal science. The holistic view fosters a visionary awareness that within a given structure, each component is interconnected and functions as part of a unified system (Marilang, 2017).

The concept of progressive law emerged as an antithesis to modern legal thought. Progressive law rejects the doctrines of *rechtsdogmatiek* (legal dogmatism) and *analytical jurisprudence*, both of which emphasize law as a rigid structure of rules and regulations. These traditional legal schools are often detached from the ever-evolving realities of society. Legal dogmatism, or written law, focuses primarily on legal discovery, as it is confined to establishing the rules of the game. Beyond that, the outcome depends on the ability of legal practitioners to construct rational and logical legal arguments based on legal principles and doctrines.

The dominance of law in Indonesia is a legacy of colonialism. This factor has led to a highly positivistic legal paradigm and law enforcement system in Indonesia, including the judicial perspective. However, other legal systems, such as customary law and Islamic law, are considered more suitable for the Indonesian people. Adopting a legal system left by the colonial rulers does not necessarily align with the legal traditions of the colonized nation. Robert B. Seidman introduced the concept of "the law of the non-transferable law," arguing that statutory laws originating from a particular country, which are formulated based on specific socio-cultural conditions, cannot simply be applied to a different group of people with distinct socio-cultural awareness (Santoso, 2007).

The perspective of progressive law emphasizes that law is not merely a collection of texts. Instead, progressive law places greater importance on behavior as a fundamental factor in legal practice, rather than relying solely on regulations that are nothing more than written texts (Rhiti, 2016). The legal framework that transforms behavior into text causes the law to become stagnant, rigid, and inflexible (*lex dura sed tamen scripta*—the law is harsh, but it is written). Legal texts are not entirely trusted as an accurate representation of social life. Social life emerges because humans begin living together, thereby forming a society. From this communal existence, law is born. Society is the entity that enables the law to function. Without social life, the law becomes lifeless; if it is lifeless, then it remains merely a collection of texts. A progressive approach to law rejects rigid adherence to written regulations and instead relies on human behavior—specifically, good and just behavior—as the guiding principle (Akbar, 2023).

Progressive law emphasizes that law exists not merely for its own sake but for a greater and broader purpose—namely, human dignity, happiness, well-being, human honor, and

humanity itself. Progressive law does not solely adhere to formal bureaucratic procedures but also upholds material-substantive justice. Furthermore, law is not an absolute or final institution, as it is continuously in the process of evolving and becoming (law as a process, law is making). In explaining the theory of progressive law, it is asserted that human interests—based on lived experiences—should be the central focus of legal considerations. It is not the other way around, where humans are subjugated to the law, as emphasized in legal positivism (Hidayat, 2019). This approach positions legal certainty, justice, and utility on the same level within progressive law. However, equally important is the distinctive characteristic of progressive law, which remains firmly grounded in conscience and rejects servitude to material interests.

Law for humanity represents the "juridical humanism" of progressive law, which emphasizes a radical respect for human beings, is non-utilitarian, and does not sacrifice a minority for the benefit of others (Rhiti, 2016). A legal approach that relies on interactions among members of society gives rise to what is known as interactional law, a form of substantive law. This interaction serves as a process that generates patterns within society, functioning as law itself. Substantive law, in essence, does not require a formal institution to create legal norms (hierarchy of norms); rather, it emerges spontaneously (spontaneously generated) through social interactions. Even as social conditions become increasingly structured in a formal-rational manner, substantive law remains essential, coexisting alongside formal-textual law in a complementary and parallel manner (Aulia, 2018).

Progressive law is recognized as a legal framework that is more people-oriented and justice-driven (substantively). The principles of the people and justice are two essential socio-political moral entities within Indonesia's legal order. However, it is important to note that progressive law is not entirely free from existing regulations. Instead, it collaborates with established legal provisions while prioritizing sensitivity to human behavior and the social impact of the law itself. This approach underscores that the ultimate goal of progressive law is to achieve legal certainty, justice, and social benefit.

### **The Importance of Judges' Understanding of Progressive Law in Delivering Substantively Just Verdict**

Judges are normatively granted the freedom by law to adjudicate based on their convictions without influence from anyone or anything. They have the independence to render decisions based on their reasoning and conscience (MONTEIRO, 2021). Judges must uphold their values free from external intervention, except when stipulated by legal regulations. In rendering decisions, judges should not rely solely on written law but also consider the prevailing societal values and ensure that their rulings align with the sense of justice within the affected community or social environment.

In line with this provision, one of the fundamental principles of a rule of law state is the guarantee of an independent judiciary, free from external influence, to administer justice and uphold law and fairness. Article 24, paragraph (1) of the 1945 Constitution of the Republic of Indonesia explicitly states that judicial power is independent in carrying out judicial functions to enforce law and justice (Sudiyana & Suswoto, 2018).

The implementation of normative provisions does not always fully reflect the reality in practice. Certain individuals fail to fulfill their role as judges in achieving the true purpose of law enforcement, which is to uphold justice in accordance with the principle of "For the Sake of Justice Based on the Almighty God." From this perspective, a judge handling a case is inevitably influenced by the values they uphold. These value choices ultimately determine the quality of a judicial decision, which is perceived as just and fair.

According to progressive law, judges must prioritize justice and truth for the sake of humanity over rigid adherence to legal certainty. Through their rulings, judges should promote social improvement and harmony, which is considered one of the defining characteristics of progressive law.

This aligns with the thoughts of Kusnu Goesniadhie, who argues that the concept of law is broad, even though various formulations and writings often refer to and cite scholars and philosophers who attempt to define or conceptualize law. In practice, misunderstandings and misinterpretations are not uncommon, sometimes even leading to entirely new interpretations of the law itself. Furthermore, he states that, fundamentally, a good law is one that can accommodate and distribute justice to the people it governs. The close relationship between law and the social and cultural values of society suggests that good law is one that reflects the values that live within the community (S., 2010).

In the context of sentencing objectives, the imposition of punishment generally stems from either the offender's past actions or considerations for the future. If based on past actions, the purpose of punishment is retribution. However, if oriented towards future interests, the objective of sentencing is to rehabilitate and reform the offender's behavior (Purnomo, 2017).

Although behavior takes precedence over regulations, this does not mean that positive legal rules are entirely unnecessary. In the context of law enforcement in Indonesia, responsive law emphasizes that enforcement cannot be carried out half-heartedly. Upholding the law is not merely about implementing legislation but also requires social sensitivity. Law is not solely about rules (logic & rules); it also involves other forms of reasoning. The mere application of jurisprudence is insufficient—law enforcement must be enriched with insights from social sciences.

Legal intentions are carried out by individuals based on their analysis. Those responsible for law enforcement hold a crucial role and significantly influence its implementation. What the law states and promises ultimately becomes reality through the actions of law enforcers. It can also be said that the function of law is reflected in how law enforcement officials interpret it. Social friction often arises due to differences in how these officials perceive and apply the law (Ansori, 2018).

The concept of progressive law emphasizes a legal perspective that places human factors above regulations. There are three main reasons why progressive legal thought has not yet been fully integrated into the regulatory framework of law enforcement in Indonesia, such as: (Riwanto, 2018)

1. Limited Understanding of Progressive Law Among Lawmaker

The level of understanding of progressive law is influenced by the educational background and expertise of legislators, particularly members of the Indonesian House of Representatives (DPR), who are responsible for drafting legislation. The formation of laws within the DPR is primarily handled by Commission III, which focuses on legal matters. Their duties and authority include drafting and discussing laws that shape Indonesia's legal system.

2. Low Moral Integrity in the Formation and Enforcement of Law

Law enforcement officers are human, making it impossible to fully ascertain their true motives when carrying out legal enforcement. If lawmakers and law enforcers perform their duties effectively and ethically, the legal process will yield significant benefits for society, reflecting their strong moral integrity. Conversely, if lawmakers and enforcers act in a corrupt or deviant manner, it can be concluded that they lack moral integrity, or at the very least, possess weak moral values. When morality is absent or deficient in legal formation and enforcement, it can be said that Indonesia's legal system is not built on a strong moral foundation.

3. Political Influence on Lawmaking and Law Enforcement

Legal politics play a crucial role in both the legislative process and the implementation of laws. In the governance of a nation, state objectives are framed within the legal system. Legal policies are democratically established through political institutions as a reflection of the people's representation. Legal politics serve as an official guideline or legal policy, determining which laws will be enacted, amended, or replaced to achieve the broader goals of the state.

Given these factors, it is crucial for judges to issue rulings based on the principles of progressive law. A judge's duty is not merely to interpret laws (rule making) but also to discover and shape the law (judge-made law and rule breaking) in order to uphold justice. This can be achieved through interpretative and constructive methods, which provide judges with the freedom to engage in contemplation, exploration, and liberation in pursuit of justice—the ultimate goal of the legal system.

The judicial profession allows for thinking and acting beyond conventional boundaries (out of the box) by applying logical reasoning supported by intuition and moral consciousness. Judges have the discretion to go beyond the literal text of legal provisions, provided they do not disregard the legal framework as a structured system. This ensures that judicial decisions remain within a controlled and accountable legal order. If judges are willing and capable of conducting thorough legal interpretation, they can play an instrumental role in advancing justice in society.

## D. Conclusion

The existence of law in society serves to meet human needs and aims to provide justice, legal certainty, and social benefits. The concept of progressive law emerges to emphasize that law is not merely a written text but rather prioritizes human behavior and values as essential factors in legal practice. Progressive law does not solely adhere to formal, procedural, and bureaucratic aspects but also considers substantive and material justice.

It is important to note that progressive law does not operate entirely independent of existing regulations. Instead, it collaborates with them while prioritizing sensitivity to social behavior and the real-world impact of legal enforcement. Judges, as the enforcers of law, have the freedom to render decisions based on both reasoning and moral conscience. In delivering justice, judges should not rely solely on written laws but must also consider the prevailing societal values and the broader sense of justice within the community.

Judges play a crucial and strategic role in promoting justice for the people, particularly through their courage in engaging in rule-breaking when necessary. This noble mission can only be realized if judges dedicate themselves as guardians and enforcers of justice. Serious legal interpretation reflects the essence of progressive legal thought—a spirit of liberation aimed at discovering and realizing justice, even within unclear legal texts or in cases where no explicit regulations exist.

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