



The Use of Progressive Law Phrase in Constitutional Court Decisions: Context, Meaning, and Implication

Penggunaan Frasa Hukum Progresif dalam Putusan Mahkamah Konstitusi: Konteks, Makna, dan Implikasi

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Abstract

As an influential legal idea, Satjipto Rahardjo's progressive law has colored various legal discourses and practices in Indonesia. Court decisions, as legal texts that record and summarize the trial process, also show that litigants, experts, and court judges often use this legal idea. This research will examine how progressive legal phrases are used in court decisions and whether the users have considered their underlying assumptions, pillars, or principles. This research is limited to Constitutional Court decisions in law review cases. The use of progressive legal phrases is generally accompanied by several progressive legal assumptions proposed by Satjipto Rahardjo. However, these are selected and used partially according to the needs and interests of their users, and thus can have bias implications when compared and examined comprehensively based on other assumptions or pillars.

Abstrak

Sebagai gagasan hukum yang berpengaruh luas, pemikiran hukum progresif dari Satjipto Rahardjo mewarnai berbagai diskursus hukum akademis maupun praksis di Indonesia. Putusan pengadilan sebagai teks hukum yang merekam dan merangkum proses persidangan, juga menunjukkan gagasan hukum ini kerap digunakan oleh pihak yang berperkara, ahli, dan hakim yang mengadili. Penelitian ini dilakukan untuk memeriksa bagaimana sebetulnya frasa hukum progresif digunakan dalam putusan pengadilan, dan apakah asumsi, pilar, atau prinsip yang mendasarinya telah dipertimbangkan oleh penggunanya. Studi ini dibatasi pada putusan Mahkamah Konstitusi dalam perkara pengujian undang-undang. Penelitian ini menunjukkan, penggunaan frasa hukum progresif secara umum telah mempertimbangkan sebagian asumsi hukum progresif sebagaimana yang dikemukakan Satjipto Rahardjo. Namun, asumsi tersebut telah dipilah dan digunakan secara parsial sesuai dengan kebutuhan dan kepentingan penggunanya, sehingga bisa berimplikasi bias tatkala disandingkan dan ditelaah secara lebih komprehensif pada asumsi lainnya.



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A. INTRODUCTION

1. Background

This article examines the phrase “progressive law” in Constitutional Court decisions. This discussion is in response to the frequent use of the phrase in court decisions, not only by the Constitutional Court but also by the Supreme Court and its subordinate judicial bodies. Progressive legal thought, as conceived by Satjipto Rahardjo, was built on certain assumptions, pillars, and principles. As a result, this article aims to investigate whether the assumptions underlying progressive legal thought have been considered whenever it is used as part of a legal argument in an adjudicatory process by both the parties and the judges adjudicating the case.

Progressive law is a legal thought proposed by Satjipto Rahardjo, and it has seen rapid development at the Universitas Diponegoro Law Faculty, where he spent years teaching.¹ It was conceived as a response to the ongoing breakdown of the rule of law, and thus it advocated for an unconventional way of doing the law, that is, by breaking free and taking a leap in doing the law.² Among the ways of ‘breaking free’ and ‘taking a leap’ is to treat legal texts as documents that must be read, not only by using legal reasoning in and of itself but also by considering social realities.³

It is undeniable that progressive legal thought has significantly impacted Indonesian legal studies, both academically and in the context of legal practice. Academically, it is demonstrated by a variety of literature that attempts to explain and discuss the concept of progressive legal thought,⁴ and some even use it as a tool for analyzing specific legal issues.⁵ Its influence in the context of legal practice was marked by its use in rulemaking and rule enforcement, including through judicial decisions. M. Syamsudin, for example, has advocated for a judicial legal culture founded on progressive legal thought.⁶

The phrase “progressive law” has been used by the parties and the judges in several court decisions, as explored and analyzed in this research. It is commonly used in an adjudicatory

¹ Satjipto Rahardjo taught at Universitas Diponegoro from 1961 until he died in 2010. His full biography can be read in, for example, Awaludin Marwan, *Satjipto Rahardjo: Sebuah Biografi Intelektual dan Pertarungan Tafsir terhadap Filsafat Hukum Progresif* (Yogyakarta & Semarang: Thafa Media & Satjipto Rahardjo Institute, 2013), 10-21.

² Satjipto Rahardjo, *Membedah Hukum Progresif* (Jakarta: Penerbit Buku Kompas, 2006), 9-10; Satjipto Rahardjo, “Hukum Progresif: Hukum yang Membebaskan,” *Jurnal Hukum Progresif* 1, no. 1 (2005): 1-24.

³ Satjipto Rahardjo, *Hukum dalam Jagat Ketertiban* (Jakarta: UKI Press, 2006), 163-77.

⁴ This is most easily seen in the citations of various works by Satjipto. According to a Google Scholar account in the name of Satjipto Rahardjo, whose email was verified at Diponegoro University, the citations of his work have reached 23.140 with an h-index of 50 as of today (May 2023).

⁵ Using the keyword ‘progressive law’ on a search engine like Google will quickly bring up a plethora of works on the subject.

⁶ M. Syamsudin, *Budaya Hukum Hakim Berbasis Hukum Progresif* (Jakarta: Kencana Prenada Media Group, third edition, 2012); M. Syamsudin, “Rekonstruksi Perilaku Etik Hakim dalam Menangani Perkara Berbasis Hukum Progresif,” *Jurnal Hukum Ius Quia Iustum* 18, special edition (2011): 127-45; M. Syamsudin, “Rekonstruksi Pola Pikir Hakim dalam Memutuskan Perkara Korupsi Berbasis Hukum Progresif,” *Jurnal Dinamika Hukum* 11, no. 1 (2011): 11-21.

proceeding because an argument is always needed to support or justify specific outcomes. Therefore, the stance or claim advanced by both parties and judges could be justified and held accountable through argumentative and convincing legal reasoning.⁷

However, regarding progressive legal thought, it is critical to examine whether Satjipto Rahardjo's assumptions, pillars, or principles have been used correctly or considered proportionally in court decisions. Because, after the initiator died, there have been issues with the term "progressive law" being used arbitrarily to simply identify the law or the workings of laws that are not bound by legal texts.⁸ This research will examine both the context and meaning of the phrase "progressive law" in court decisions, so that it can be answered whether progressive legal thought was genuinely used by subjects as the basis of legal argument or is it simply used arbitrarily.

Numerous studies on "progressive legal thought" and "court decisions" have been conducted, including studies by Pusat Studi Konstitusi (PUSaKO) (2010),⁹ Martitah (2012),¹⁰ Hwian Christianto (2013),¹¹ Suwito (2015),¹² Muh. Ridha Hakim (2016),¹³ and Bayu Setiawan (2018).¹⁴ However, these studies only use progressive legal thought to analyze specific court decisions. In other words, these court decisions were chosen regardless of whether the phrase "progressive law" was used—which most of them were not—and then analyzed using progressive legal thought as a tool of analysis. This article differs from previous studies in that it investigates progressive law through its use in court decisions.

This article starts with a brief explanation of Satjipto Rahardjo's progressive legal thought. The intention is to understand the assumptions, pillars, or principles that form the foundation of progressive legal thought. Subsequently, the article examines the usage of the term "progressive law" in decisions made by the Constitutional Court, focusing on the timing, subjects, and contexts in which it is employed. Lastly, the article concludes by examining the compatibility between the term "progressive law" and the underlying assumptions of progressive legal thought.

⁷ Legal reasoning is essentially a systematized thinking activity aimed at obtaining the most argumentative and accountable decision in a specific case. Shidarta, *Hukum Penalaran dan Penalaran Hukum: Akar Filosofis* (Yogyakarta: Genta Publishing, 2013), 124.

⁸ M. Zulfa Aulia, "Hukum Progresif dari Satjipto Rahardjo: Riwayat, Urgensi, dan Relevansi," *Undang: Jurnal Hukum* 1, no. 1 (2018), 183.

⁹ Pusat Studi Konstitusi Universitas Andalas, "Perkembangan Pengujian Perundang-undangan di Mahkamah Konstitusi (Dari Berpikir Hukum Tekstual ke Hukum Progresif), Research Results in Collaboration with Mahkamah Konstitusi, 2010.

¹⁰ Martitah, "Progresivitas Hakim Konstitusi dalam Membuat Putusan (Analisis terhadap Keberadaan Putusan Mahkamah Konstitusi yang Bersifat Positive Legislature)," *Masalah-Masalah Hukum* 41, no. 2 (2012): 315-25.

¹¹ Hwian Christianto, "Penafsiran Hukum Progresif dalam Perkara Pidana," *Mimbar Hukum* 23, no. 3 (2013): 479-500.

¹² Suwito, "Putusan Hakim yang Progresif dalam Perkara Perdata (Telaah 'Kasus Pohon Mangga')," *Hasanuddin Law Review* 1, no. 1 (2015): 101-13.

¹³ Muh. Ridha Hakim, "Implementasi Rechtsvinding yang Berkarakteristik Hukum Progresif," *Jurnal Hukum dan Peradilan* 5, no. 2 (2016): 227-48.

¹⁴ Bayu Setiawan, "Penerapan Hukum Progresif oleh Hakim untuk Mewujudkan Keadilan Substantif Transendensi," in *Hukum Transendental: Pengembangan dan Penegakan Hukum di Indonesia*, ed. Absori, et. al. (Yogyakarta: Genta Publishing, 2018), 159-79.

2. Research Questions

The research questions are as follows: first, what is the frequency, subject, and context of the phrase progressive law in Constitutional Court decisions? Second, have the assumptions or pillars underlying the concept of progressive legal thought been considered in Constitutional Court decisions when using the phrase progressive law?

3. Research Methods

This study examines court decisions, specifically the legal ideas or theories used by the parties as part of legal arguments in support of their arguments or claims. As such, this research is doctrinal legal research.¹⁵ All decisions of the Constitutional Court in cases reviewing laws that contain the phrase ‘progressive law’ or ‘progressive’ but about ‘progressive law’ are the subject of this study. This is necessary to emphasize because, in several decisions, the word progressive was found but not concerning progressive law as referred to in this article, for example, ‘progressive realization,’ ‘progressive tax,’ and ‘progressive footprint.’ By mentioning ‘court decision,’ this study also limits its scope of study to the content of the decision’s text. Thus, detailed facts in the trial will be disregarded here if they are not included in the decision’s text. However, by understanding that a court decision is a legal text that records and summarizes the trial process,¹⁶ it can even be equated with a scientific work, which means it was created using correct and accurate procedures, data, analysis, and research methods, the words contained therein can be deemed to describe and represent the process that occurred in court.

B. DISCUSSION/ANALYSIS

1. Progressive Legal Thought in a Nutshell

Progressive law is a legal thought initiated and developed by Satjipto Rahardjo, lecturer and professor at Universitas Diponegoro, Semarang. He used this term for the first time in an article entitled “Indonesia Butuhkan Penegakan Hukum Progresif (Indonesia Needs Progressive Law Enforcement),” which was published in the *Kompas Daily* on June 15, 2002. Following that, Satjipto advanced the concept of progressive law in several works. The phrase ‘progressive law’ appears as part of the title of several books, including *Membedah Hukum Progresif* (Dissecting Progressive Law), published by Penerbit Buku Kompas in 2006, *Hukum Progresif: Sebuah Sintesa Hukum Indonesia* (Progressive Law: A Synthesis of Indonesian Law) published by Genta Publishing in 2009, and *Penegakan Hukum Progresif* (Progressive Law Enforcement) published by Penerbit Buku Kompas in 2010.

In his various works, progressive law is actually associated by Satjipto with various labels. According to Shidarta, progressive law has been referred to as Satjipto on multiple

¹⁵ A court decision study is essentially doctrinal research. See: Shidarta, “Putusan Pengadilan sebagai Objek Penulisan Artikel Ilmiah,” *Undang: Jurnal Hukum* 5, no. 1 (2022), 110.

¹⁶ Tim Penyusun, *Hukum Acara Mahkamah Konstitusi* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 57-8.

occasions. It has also been called an ‘intellectual movement,’ a ‘paradigm,’ a ‘concept of the practice of law,’ ‘progressive legal science,’ and—he has no objection when his students call it—‘legal theory.’¹⁷

Apart from these various labels or predicates, progressive law stems from Satjipto Rahardjo’s concern about the legal situation, which is not improving. Satjipto believes that a downturn and setback occurred, which led to disappointment with the law itself. This situation, which he describes as a downturn and decline, is reflected, among other things, in the lack of honesty, empathy, and dedication from those who enforce the law, and what is even more prevalent is the judicial mafia and the commercialization of law.¹⁸

Satjipto was inspired to offer progressive legal ideas in response to the disappointing legal situation that did not bring people closer to happiness. With progressive law, various deteriorating and declining conditions will be changed more quickly, fundamentally, and meaningfully. According to Satjipto, progressive law is a method of law that is simple, namely to free, both in the way of thinking and acting in law, so that it can let the law just flow (*panta rei*, everything flows) to complete its duties to serve humans and humanity.¹⁹

As an idea, progressive legal thought is based on certain assumptions, pillars, or principles.²⁰ Among these pillars, the first author of this article categorizes them as “law for humans, not law for humans,” “practicing law substantially and not artificially,” and “practicing law holistically and not skeletonically.”²¹

Shidarta identified ten keywords related to progressive legal thought in greater detail. These keywords, also known as postulates in progressive legal thought, are:²²

1. Progressive law must be for humans, not humans for law.
2. Progressive law must be for the people and justice.
3. Progressive law must be intended to lead humans to prosperity and happiness.
4. Progressive law is constantly evolving (law as a process, law in the making).
5. Progressive law emphasizes good living as an excellent legal basis.

¹⁷ Shidarta, “Posisi Pemikiran Hukum Progresif dalam Konfigurasi Aliran-aliran Filsafat Hukum: Sebuah Diagnosis Awal,” in *Satjipto Rahardjo dan Hukum Progresif: Urgensi dan Kritik*, ed. Myrna A. Safitri, Awaludin Marwan, and Yance Arizona (Jakarta: Epistema dan HuMa, 2011), 52-3.

¹⁸ Satjipto Rahardjo, *Membedah Hukum Progresif* (Jakarta: Penerbit Buku Kompas, 2006), 9-10.

¹⁹ Satjipto Rahardjo, *Biarkan Hukum Mengalir: Catatan Kritis tentang Pergulatan Manusia dan Hukum* (Jakarta: Penerbit Buku Kompas, 2007), 139-47.

²⁰ Satjipto never mentioned some of the points explained as assumptions, pillars, or principles in this article. This designation is made to make it easier to determine which progressive legal structure is made up of assumptions, pillars, or principles. However, Satjipto did mention progressive legal thought characteristics, for example, he mentioned five. To begin, “law is for humans” is the progressive legal paradigm. Second, progressive legal thought rejects the legal status quo. Third, progressive legal thought promotes legal methods that provide and open doors for exemption from formal law. Fourth, progressive legal thought places a high value on the role of human behavior in the legal system. Fifth, progressive legal thought is a legal system that is constantly striving to improve itself so that it can serve and bring people prosperity and happiness. Rahardjo, *Biarkan Hukum Mengalir*, 139-47.

²¹ Aulia, “Hukum Progresif dari Satjipto Rahardjo,” 166-71.

²² Shidarta, “Posisi Pemikiran Hukum Progresif dalam Konfigurasi Aliran-aliran Filsafat Hukum,” 55-8.

6. Progressive law is responsive in nature.
7. Progressive law encourages public participation.
8. Progressive law creates a legal state that is conscience-driven.
9. Progressive law is carried out with spiritual intelligence.
10. Progressive law demolishes, replaces, and liberates.

Recognizing the difference in identifying the number of assumptions or pillars—where one identifies them in a broader scope, while the other is more detailed—the following section will present the three pillars in general. First, “law for humans, not humans for the law”: Satjipto wishes to position the relationship between humans and law within this first pillar. If the relationship is framed as ‘law is for humans,’ then the law signifies its existence for something bigger and broader, namely humans and humanity.²³ This relationship has implications for how the law is practiced. Law and legal texts should not be treated as final and sacred but can be disregarded if the main interest here, namely “humans and humanity,” requires it. If the relationship is reversed, ‘humans for law,’ the law becomes the primary goal, and humans must follow the patterns contained in the law.²⁴

The second pillar is ‘practicing law substantially and not artificially.’ Practicing law substantially is a behavior-based method of practicing law that prioritizes actions. On the other hand, practicing law artificially is a method that relies on written laws or regulations and prioritizes them. Satjipto advocated for a greater emphasis on practicing law substantially. Because the foundation or fundamental of the law is found in the human being himself, namely human behavior, rather than in regulations or the legal system. Satjipto used an example: of the thousands of judges; their behavior distinguished them. In other words, behavior distinguishes one judge from the other. Satjipto stated that to judge correctly; human behavior must first be good.²⁵

However, substantial engagement in practicing law does not imply ignoring or simply disregarding the text of legal regulations. Indeed, Satjipto has repeatedly stated that progressive legal thought does not regard law as finished or final. If this is the case, law and

²³ Rahardjo, *Hukum Progresif*, 5.

²⁴ Compare this to Dworkin’s concept of “rights as trumps,” which places individual rights as a trump to negate collective interests or goals that are used to justify reducing these individual rights. In the context of constitutional adjudication, this concept requires that balancing individual rights with other interests be prohibited. Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury Academic, 2013), 4; Jamal Greene, “Rights as Trumps?,” *Harvard Law Review* 132, no. 1 (2018), 32; Jacob Weinrib, “When Trumps Clash: Dworkin and the Doctrine of Proportionality,” *Ratio Juris* 30, no. 2 (2017): 342.

²⁵ Satjipto Rahardjo, *Hukum dan Perilaku*, 49-55. Compare this to Ronald Dworkin’s ideas on “moral reading,” which seeks to draw interpretation toward abstract moral principles contained in positive law and then requires judges or law enforcers to find the best conception of these abstract moral principles. Dworkin proposes an ideal judge figure, Judge Hercules, who is capable of constructing the best interpretation to resolve difficult cases faced by society based on substantive and procedural justice. Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996), 7-12; Dworkin, *Taking Rights Seriously*, 150; Arvinth Rai, “Dworkin’s Hercules as a Model for Judges,” *Manchester Review of Law, Crime and Ethics* 6 (2017): 61.

the practice of law will become more rigid, and human and humanitarian interests must also adhere to this rigid legal scheme. However, Satjipto acknowledged that the demands and developments of the times cannot be ignored, which means practicing law artificially. In order to be more substantial, the regulation must be interpreted not only through the logic of the regulations but also through societal reality. Therefore, legal interpretation serves to make artificial law more equitable. It connects rigid and static regulations with the life and development of society today and in the future.²⁶

The third pillar is 'practicing law holistically and not skeletically.' A holistic approach to the law requires or unites law with the environment, nature, or larger order of life. Meanwhile, practicing law in a skeletal manner is a method of practicing law that is incomplete or only in parts. In practice, the skeletal approach to practicing law leads to dissatisfaction with problem resolution.²⁷

When the law is practiced holistically, it becomes intertwined with the environment, nature, or the larger order of life. As a result, it might seem that the law occupies just a single corner of society's broader order. Instead of being supreme, the law in holistic legal practice must be shared and interact with other domains, such as economics, politics, and more. In this way, law and other fields must interact and complement each other to maintain and create order.²⁸

A brief description of the pillars, or assumptions or principles, of this progressive legal thought to demonstrate that the use of 'progressive law' legal arguments in legal discourse, including in an adjudication process, should also use and consider its pillars as a whole or proportionally. It is not appropriate to use progressive legal arguments to support only one position while ignoring its pillars, which must be considered as a whole. Typically,

²⁶ Rahardjo, *Hukum dalam Jagat Ketertiban*, 163-77. Compare this to the school of thought known as legal realism, which holds that a judge should not only focus on the law, but also on the facts of the cases he adjudicates. The main characteristics of the legal realism school are the following: the view of law as a tool for achieving certain social goals; a social-scientific approach to law; efforts to transform legal education to improve legal practice; and initiatives to advance a progressive political agenda through the use of law. Brian Leiter then divides the legal realism school into two branches: sociological legal realism and idiosyncratic legal realism. The fundamental distinction between the two stems from the question of how to explain why judges react to the facts of a case in the manner that they do. The sociological branch concludes that in this case, various "social" forces influence judges to respond to facts similarly and predictably. The idiosyncratic branch contends that the judge's psychology or personality influences his or her response to facts. Brian Leiter, "American Legal Realism," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin P. Golding and William A. Edmundson (Oxford: Blackwell Publishing, 2006), 52-56; Brian Z. Tamanaha, "Understanding Legal Realism," *Texas Law Review* 87, no. 4 (2009), 737.

²⁷ Rahardjo, *Hukum dalam Jagat Ketertiban*, 25-36.

²⁸ Rahardjo, *Hukum dalam Jagat Ketertiban*, 97. Juga lihat: Satjipto Rahardjo, *Hukum dan Perubahan Sosial; Suatu Tinjauan Teoretis serta Pengalaman-pengalaman di Indonesia* (Yogyakarta: Genta Publishing, third edition, 2009), 258. This is consistent with Brian Tamanaha's belief that legal institutions are highly dependent on the social and historical context of society, making it difficult for the law to guarantee the establishment of order in society on its own. To function properly, legal institutions require social stability, favorable economic conditions, cultural behavior that promotes the rule of law, and political stability. Brian Z. Tamanaha, "The Primacy of Society and the Failures of Law and Development," *Cornell International Law Journal* 44, no. 2 (2011): 215-24.

progressive law is only referred to support an attitude that is detached and independent of the text of legal regulations. In contrast, the human dimension, legal substance, and its relation to social order are frequently ignored.

2. The Use of “Progressive Law” Phrase in Constitutional Court Decisions: Frequency, Subject, and Context

The Constitutional Court is a state institution whose existence was regulated in the 1945 Constitution²⁹ and further reinforced through Law Number 24 of 2003 on Constitutional Court.³⁰ The Court was established as a guardian and final interpreter of the 1945 Constitution. The establishment of this new judicial body marked a new era in the nation’s judicial system, enabling previously impossible cases to be adjudicated and resolved by the Court,³¹ one of which was the judicial review of laws (*undang-undang*) against the Constitution.³²

Judicial review of laws is essentially a mechanism to preserve and uphold the law’s constitutionality. This concept is widely accepted as a modern rule of law mechanism that provides checks and balances against government officials’ arbitrary use of power.³³ This review mechanism is also the result of modern ideas about a democratic government system founded on the principles of the rule of law, the principle of separation of powers, and the protection and promotion of human rights.³⁴

A law whose constitutionality is being examined is a legal product of the legislators, namely the DPR and the President. On the other hand, the institution that conducted this review process is part of the judicial branch. As a result, the authority granted to the reviewing body by the Constitution is as legal as the authority granted to the legislature to make laws.³⁵ The results of the Constitutional Court’s review are corrections to legislative products contrary to the Constitution so that a law does not deviate from the Constitution.³⁶

Efforts to protect and uphold the law’s constitutionality necessitate the Constitutional Court prioritizing substantive justice over procedural justice. However, this does not imply that the Constitutional Court must then depart arbitrarily from the provisions of the law.

²⁹ Article 24 paragraph (2) and Article 24C.

³⁰ Law Number 24 of 2003 has been amended three times by Law Number 8 of 2011, Law Number 4 of 2014, and Law Number 7 of 2020.

³¹ Bambang Sutiyoso, “Pembentukan Mahkamah Konstitusi sebagai Pelaku Kekuasaan Kehakiman di Indonesia,” *Jurnal Konstitusi* 7, no. 6 (2010): 26.

³² Muhammad Siddiq Armia, “Constitutional Court and Judicial Review: Lesson Learned for Indonesia,” *Negara Hukum* 8, no. 1 (2017), 107; Hamid Chalid, “Dualism of Judicial Review in Indonesia: Problems and Solutions,” *Indonesia Law Review* 7, no. 3 (2017): 368-9.

³³ Jimly Asshiddiqie, *Model-model Pengujian Konstitusional di Berbagai Negara* (Jakarta: Konstitusi Press, 2005), 2.

³⁴ Asshiddiqie, *Model-model Pengujian Konstitusional di Berbagai Negara*, 8-9.

³⁵ Harjono, *Konstitusi sebagai Rumah Bangsa: Pemikiran Hukum Dr. Harjono, S.H., M.C.L. Wakil Ketua MK* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008), 487.

³⁶ Mohammad Mahrus Ali, *Tafsir Konstitusi: Menguji Konstitusionalitas dan Legalitas Norma* (Depok: Rajawali Pers, 2019), 68.

This departure is only possible if the content “captures” the Constitutional Court’s belief in upholding justice. As a result, the Constitutional Court is sometimes forced to break through and disregard the ‘stop signs’ to make decisions in pursuit of substantive justice.³⁷

The Constitutional Court’s method or model of practice for achieving substantive justice demonstrates the creativity of judges in law enforcement. This creativity is intended to bridge the legal gap so that judges must make legal breakthroughs even if it means breaking the rules. This breakthrough is expected to achieve human goals through the operation of the law, thereby promoting people’s happiness.³⁸ In this context, the law enforcement conducted by the Constitutional Court can be classified as progressive law enforcement.³⁹

Suppose the Constitutional Court’s law enforcement is progressive law enforcement, indicating that the Constitutional Court adheres to progressive law.⁴⁰ How was the phrase progressive law used in the Constitutional Court’s decisions? The following sections will present the decisions in judicial review cases containing progressive law, who used it, and in what context. Before presenting the various data, it should be stated that this research limits its search to the phrases ‘progressive law’ or ‘progressive’ in relation to progressive law. This is significant because the phrase ‘progressive’ appears in several decisions but not about progressive law, such as ‘progressive realization,’ ‘progressive tax,’ and others.

First, 43 Constitutional Court decisions containing the phrase ‘progressive law’ were found, as shown in Table 1.

³⁷ Moh. Mahfud MD, “Problematika Putusan MK yang Bersifat Positive Legislature,” introduction in Martitah, *Mahkamah Konstitusi: Dari Negative Legislature ke Positive Legislature?* (Jakarta: Konstitusi Press, 2013), xv-ii. Lihat juga: Mahkamah Konstitusi Republik Indonesia, “Mengawal Demokrasi Menegakkan Keadilan Substantif,” Refleksi Kinerja MK 2009 Proyeksi 2010, Jakarta, 29 December 2009, among others, mentions on p. 4: “In carrying out its authority..., the Constitutional Court emphasizes that it does not only rely on the formal legality of laws in adjudicating, but also has the responsibility to realize the objectives of the legal norms themselves, namely justice, legal certainty, and benefit” and p. 5: “When deciding cases with a constitutional mandate, the Constitutional Court is not only focused on the words of the law, which sometimes contradict and ignore legal certainty and justice. The Constitutional Court is required to seek substantive justice, which the 1945 Constitution, laws, general principles of the constitution, and judiciary recognize exist.”

³⁸ Martitah, *Mahkamah Konstitusi: Dari Negative Legislature ke Positive Legislature?* (Jakarta: Konstitusi Press, 2013), 181; Wahyu Nugroho, “Rule Breaking dan Integritas Penegak Hukum Progresif dalam Pemberantasan Korupsi Pejabat Daerah,” *Jurnal Yudisial* 7, no. 1 (2014), 85; Agus Budi Susilo, “Penegakan Hukum yang Berkeadilan dalam Perspektif Filsafat Hermeneutika Hukum: Suatu Alternatif Solusi terhadap Problematika Penegakan Hukum di Indonesia,” *Perspektif* 16, no. 4 (2011): 220-1.

³⁹ Martitah, “Progresivitas Hakim Konstitusi,” 324; Theunis Roux, “Indonesia’s Judicial Review Regime in Comparative Perspective,” *Constitutional Review* 4, no. 2 (2018), 210. Concerning the Constitutional Court’s decision and progressive law enforcement, some studies refer to it as a form of judicial activism, for example, Pan Mohamad Faiz, “Dimensi Judicial Activism dalam Putusan Mahkamah Konstitusi,” *Jurnal Konstitusi* 13, no. 2 (2016), 423-4. Judicial activism is a term usually associated with legal breakthroughs by judges through court decisions, and it has at least five meanings in the history of its use, namely (1) nullification of constitutional acts of other branches, (2) failure to comply with precedents, (3) judicial legislation, (4) departure from accepted methods of interpretation, and (5) results-oriented adjudication (Keenan D. Kmiec, “The Origin and Current Meanings of ‘Judicial Activism,’” *California Law Review* 92, no. 5 [2004]: 1444).

⁴⁰ According to Mahfud MD, the Constitutional Court’s chief justice at the time, “the Court currently adheres to progressive law,” as cited by Pusat Studi Konstitusi, “Perkembangan Pengujian Perundang-undangan,” 2.

Table 1.
Constitutional Court Decisions Containing the Phrase “Progressive Law”⁴¹

No.	Decision	Law(s) Reviewed	Date
1	16/PUU-VI/2008	Law Number 4 of 2004 on Judicial Power	15/8/2008
2	132/PUU-VII/2009	Law Number 10 of 2008 on General Elections for the Members of the DPR, DPD, and DPRD	29/12/2009
3	140/PUU-VII/2009	Law Number 1/PNPS/1965 of 1965 on Prevention of Misuse and/or Blasphemy of Religion	19/4/2010
4	120/PUU-VII/2009	Law Number 32 of 2004 on Regional Government as Amended by Law Number 12 of 2008	20/4/2010
5	151/PUU-VII/2009	Law Number 39 of 2008 on State Ministry	3/6/2010
6	64/PUU-VIII/2010	Law Number 48 of 2009 on Judicial Power, Law Number 14 of 1985 on Supreme Court, Law Number 3 of 2009 on the Second Amendment to Law Number 14 of 1985 on Supreme Court, and Law Number 8 of 1981 on Criminal Procedural Law	28/2/2011
7	3/PUU-VIII/2010	Law Number 27 of 2007 on Management of Coastal Zone and Small Islands	16/6/2011
8	72/PUU-VIII/2010	Law Number 41 of 1999 on Forestry	6/10/2011
9	80/PUU-IX/2011	Law Number 15 of 2011 on General Elections	4/1/2012
10	56/PUU-IX/2011	Law Number 8 of 1981 on Criminal Procedure Code	15/3/2012
11	85/PUU-IX/2011	Law Number 32 of 2004 on Regional Government	27/3/2012
12	16/PUU-IX/2011	Law Number 8 of 1981 on Criminal Procedural Law	11/4/2012
13	92/PUU-X/2012	Law Number 27 of 2009 on MPR, DPR, DPD, and DPRD and Law Number 12 of 2011 on Establishment of Laws and Regulations	27/3/2013

⁴¹ To make it easier and simpler to write, the serial number column in this table, which is in the far left column, will be used to describe the case’s decision. For example, if decision number 16/PUU-VI/2008 is in serial number 1, it will be referred to as ‘Case 1 Decision’. And so on until number 43.

No.	Decision	Law(s) Reviewed	Date
14	110/PUU-X/2012	Law Number 11 of 2012 on the Juvenile Criminal Justice System	28/3/2013
15	24/PUU-XI/2013	MPR Decree Number 1/MPR/2003 on Review of Substance and Legal Status of MPRS Decree and MPR Decree from 1960 through 2002	10/9/2013
16	21/PUU-XI/2013	Law Number 8 of 1981 on Criminal Procedure Code	6/3/2014
17	34/PUU-XI/2013	Law Number 8 of 1981 on Criminal Procedure Code	6/3/2014
18	36/PUU-XI/2013	Law Number 8 of 1981 on the Criminal Procedure Code, Law Number 48 of 2009 on Judicial Power, and Law Number 3 of 2009 on the Second Amendment to Law Number 14 of 1985 on Supreme Court	6/3/2014
19	53/PUU-XII/2014	Law Number 42 of 2008 on General Elections of the President and Vice President	3/7/2014
20	77/PUU-XII/2014	Law Number 8 of 2010 on Prevention and Eradication of Money Laundering Crime	12/2/2015
21	33/PUU-XIII/2015	Law Number 8 of 2015 on Amendment to Law Number 1 of 2015 on Stipulation of Government Regulation in Lieu of Law Number 1 of 2014 on Elections of Governor, Regent, and Mayor to Become Law	8/7/2015
22	58/PUU-XIII/2015	Law Number 8 of 2015 on Amendment to Law Number 1 of 2015 on Stipulation of Government Regulation in Lieu of Law Number 1 of 2014 on Elections of Governor, Regent, and Mayor to Become Law	9/7/2015
23	70/PUU-XIII/2015	Law Number 8 of 2015 on Amendment to Law Number 1 of 2015 on Stipulation of Government Regulation in Lieu of Law Number 1 of 2014 on Elections of Governor, Regent, and Mayor to Become Law	9/7/2015
24	79/PUU-XII/2014	Law Number 17 of 2014 on MPR, DPR, DPD, and DPRD	22/9/2015

No.	Decision	Law(s) Reviewed	Date
25	95/PUU-XII/2014	Law Number 18 of 2013 on Prevention and Eradication of Forest Destruction dan Law Number 41 of 1999 on Forestry	10/12/2015
26	107/PUU-XIII/2015	Law Number 5 of 2010 on Amendment to Law Number 22 of 2002 on Clemency	15/6/2016
27	32/PUU-XIV/2016	Law Number 5 of 2010 on Amendment to Law Number 22 of 2002 on Clemency	21/6/2016
28	29/PUU-XIV/2016	Law Number 16 of 2004 on Public Prosecution Service	11/1/2017
29	108/PUU-XIV/2016	Law Number 14 of 1985 on Supreme Court and Law Number 48 of 2009 on Judicial Power	26/7/2017
30	85/PUU-XIV/2016	Law Number 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition	20/9/2017
31	6/PUU-XV/2017	Law Number 35 of 2014 on Child Protection and Law Number 14 of 2005 on Teacher and Lecturer	28/3/2018
32	58/PUU-XVI/2018	Law Number 7 of 2017 on General Elections	25/10/2018
33	91/PUU-XVI/2018	Law Number 5 of 2014 on State Civil Apparatus	25/4/2019
34	74/PUU-XVI/2018	Law Number 8 of 2010 on Prevention and Eradication of Money Laundering Crime	21/5/2019
35	83/PUU-XVII/2019	Law Number 18 of 2017 on the Protection of Indonesian Migrant Workers	25/11/2020
36	39/PUU-XVIII/2020	Law Number 32 of 2002 on Broadcasting	14/1/2021
37	29/PUU-XIX/2021	Law Number 31 of 1999 on Eradication of Corruption Crime as Amended by Law Number 20 of 2001 on Amendment to Law Number 31 of 1999 on Eradication of Corruption Crime	29/9/2021
38	60/PUU-XVIII/2020	Law Number 3 of 2020 on Amendment to Law Number 4 of 2009 on Mineral and Coal Mining	27/10/2021
39	91/PUU-XVIII/2020	Law Number 11 of 2020 on Job Creation	25/11/2021
40	4/PUU-XIX/2021	Law Number 11 of 2020 on Job Creation	25/11/2021

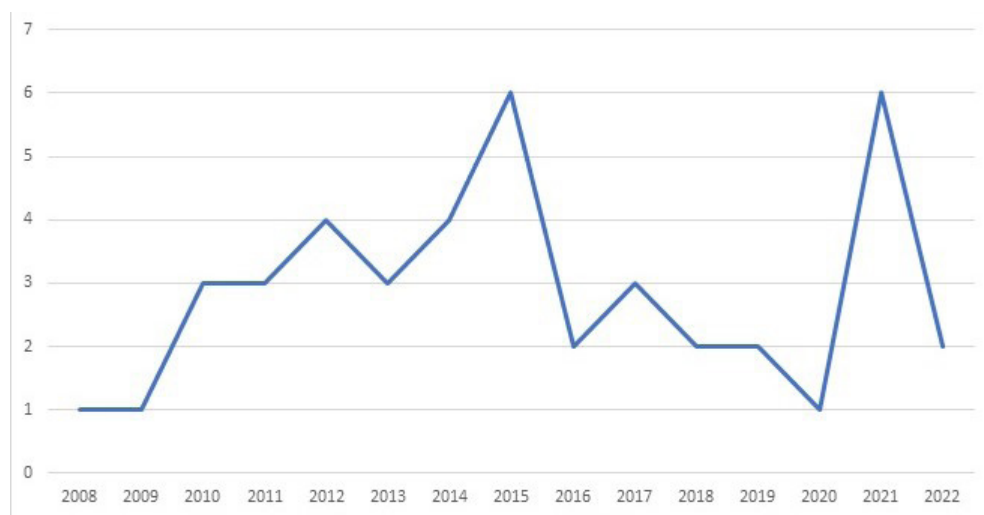
No.	Decision	Law(s) Reviewed	Date
41	105/PUU-XVIII/2020	Law Number 11 of 2020 on Job Creation	25/11/2021
42	36/PUU-XX/2022	Law Number 11 of 2008 on Electronic Information and Transaction as Amended by Law Number 19 of 2016 on Amendment to Law Number 11 of 2008 on Electronic Information and Transaction	20/7/2022
43	27/PUU-XIX/2021	Law Number 23 of 2019 on Management of National Resources for National Defense	31/10/2022

Source: processed by the Authors from <https://search.mkri.id>.

According to the data in Table 1, the phrase progressive law has appeared in Constitutional Court decisions in judicial review cases since 2008. This number has continued to rise in subsequent years, with the highest being six (in 2015 and 2021) and the lowest being one (in 2008, 2009, and 2020). Graph 1 depicts the number of movements per year from 2008 to 2022 (early November 2022).

Graph 1.

Number of Constitutional Court Decisions Containing the Phrase “Progressive Law”



Source: processed by the Authors.

Second, regarding the frequency of and subject using progressive legal phrases. The phrase progressive law is used by various parties involved in 43 judicial review decisions, as shown in Table 2. The petitioner, the petitioner’s expert, the government’s expert, the DPR, related parties, experts from interested parties, and justices have all used the phrase.

Most of these parties' usage does not coincide with a single decision, but it has also been discovered that more than one party used this phrase in a single decision.⁴² As a result, despite appearing in 43 decisions, this phrase is used on 48 occasions.⁴³

Table 2.
Use of Progressive Law Phrase in Constitutional Court Decisions

Subject	Frequency
Petitioner	21
Petitioner's Expert	14
Government	2
Government's Expert	2
DPR	2
Related Parties	2
Related Parties' Expert	2
Justice	3
Sum	48

Source: processed by the Authors.

According to the data in Table 2, the petitioner and petitioner's expert are the parties who use this phrase the most, with 21 and 14, respectively. The judge, who hears and decides cases, has also used this phrase three times, once by a panel of judges.⁴⁴ Saldi Isra, among others, used progressive law the most, namely three times as the petitioner's expert.⁴⁵ Interestingly, since joining the Constitutional Court on April 11, 2017, Saldi has never used this phrase in a decision.⁴⁶

Third, in the context of using the "progressive law" phrase in Constitutional Court decisions. It is necessary to research this topic because progressive law has a broad scope and dimension. The previous sub-chapter description indicates whether it includes, among other things, the law's purpose, the law's nature or character, the law, the formation of the

⁴² This was found in Case 4 Decision (by the Petitioner's expert, Mudzakkir, and Justice Achmad Sodiki) and Case 20 Decision (by the President's expert, Yunus Husein, and the testimony of the KPK as a related party). This phrase was used by both of the applicant's experts in the Case 24 Decision (Saldi Isra and Refly Harun).

⁴³ This research will count as one if it has ever been used by a party in a decision, even if the party mentions 'progressive law' more than once. Thus, if it is discovered in one decision that this phrase is used by two parties, for example, the applicant's expert and the judge, it means that it will be counted as two; and so on.

⁴⁴ Case 9 Decision.

⁴⁵ Cases 8, 13, and 24 Decisions.

⁴⁶ However, this could also be due to the court decision model in Indonesia, include by Constitutional Court, which does not express the opinion of each judge (and the possibility of debate) in deciding a case, except for a dissenting opinion. Therefore, it is non known exactly what legal ideas and theories have been used by judges, if any, in strengthening their opinions and decisions.

law, how the law is practiced, and law enforcement. With such a broad scope, this article divides the context into four categories: legal purposes, legal method or legal approach, legal nature or character, and legal interpretation. The phrase ‘purpose of law’ refers to the context in which the law exists in human life. The term ‘legal method or legal approach’ refers to descriptions of how to practice law in accordance with progressive law. The phrase ‘the nature or character of the law’ is used here to refer to all instances in which speakers refer to the nature or character of progressive law. The term ‘legal interpretation’ refers to narratives that state the interpretation and meaning of law according to progressive law.

Table 3.
The Context of Progressive Law Phrase Use in Constitutional Court Decisions

Context of its Use	Frequency
Legal purpose	4
Legal method or legal approach	14
Nature character of the law	24
Legal interpretation	11

Source: processed by the Authors.

According to the data in Table 3, most of the use of progressive law in Constitutional Court decisions is related to the ‘nature or character of law’ and ‘legal method or legal approach.’ Among the characteristics or characteristics of progressive law that are frequently mentioned are: ‘the law is dynamic,’⁴⁷ ‘the law must be in accordance with the conscience and justice of society,’⁴⁸ ‘the law always strives to be more righteous and just,’⁴⁹ ‘law enforcement that is full of determination, empathy, dedication, and commitment,’⁵⁰ and ‘procedures must not limit efforts to seek justice.’⁵¹ Interestingly, some users associate this progressive phrase

⁴⁷ For example: Case 39 Decision [stated by Justices Arief Hidayat and Anwar Usman, p. 419, that law must be dynamic and progressive, in the sense that it is strongly influenced by developments in people’s lives and must also be capable of regulating societal development].

⁴⁸ For example: Case 22 Decision [As stated by the applicant on p. 28, progressive law views written law as not necessarily being treated rigidly and disregarding conscience in order to fulfill society’s sense of justice]; Case 34 Decision [“... The theory of Progressive Law was introduced by Prof. Dr. Satjipto Rahardjo (1930-2010), who put forward conscience, justice, and the concept of ‘law for humans,’” explained the petitioner’s expert Yunus Husein, p. 52].

⁴⁹ For example: Case 6 Decision [“The connotation of progressive law, namely as a school of legal thought that always strives to be more just and fair,” the applicant stated on p. 13].

⁵⁰ For example: Case 38 Decision [“Law enforcement is carried out with full determination, empathy, dedication, commitment to the suffering of the nation, and accompanied by the courage to find a different way than is usually done,” explained petitioner’s expert Aan Eko Widiarto, p. 65, quoting Satjipto Rahardjo’s book].

⁵¹ For example: Case 17 Decision [“Whereas the prohibition against filing/application for clemency that can be filed no later than 1 (one) year after the decision obtains permanent legal force at least ignores the principles and values of substantive justice, the principle of a rule of law that guarantees citizens’ human rights to fight for justice, and contrary to responsive or progressive law, so that for justice seekers there may be no restrictions,” conveyed the applicant; p. 7]; Case 29 Decision [“Progressive law was developed by Satjipto Rahardjo et. al. as a legal concept to address contemporary legal needs and challenges. So that there should be no restrictions for justice seekers with the classic reason ‘for and on behalf of legal certainty,’” conveyed the applicant, p. 38].

with regressive law, interpreting it as a law that goes backward, even though this mention refers to the opinion of another person not mentioned in the decision.⁵²

Tables 1, 2, and 3, as well as Graph 1, demonstrate that the phrase progressive law has been used by many parties in various decisions and contexts. This phrase appears in 43 decisions, which is not tiny even though it is relatively small compared to the total number of 1590 judicial review decisions issued thus far.⁵³ This fact also indicates that this phrase has been used in Constitutional Court decisions since 2008, when Satjipto Rahardjo, the initiator, had reached an advanced age (78) and was nearing the end of his life (a year later). If the term progressive law is traced back to its first appearance in 2002, it can be said that this legal concept did not take long to influence legal practice at the Constitutional Court six years later. Since then, the phrase has been used in a variety of contexts, including “purpose of the law,” “legal method or legal approach,” “nature or character of law,” and “legal interpretation.”

3. The Assumptions or Pillars of Progressive Legal Thought have been Taken into Account

This sub-chapter will investigate whether the assumptions or pillars underlying progressive legal thought have been considered by various parties who use the phrase progressive law to support their stance in judicial review cases. This examination is necessary to determine whether this phrase is used entirely, proportionally, or partially based on the speakers’ needs or interests. Furthermore, following Satjipto’s departure, this phrase appears too easy and freely used by anyone, particularly in the context of simply deviating from legal texts or rejecting the status quo.⁵⁴

The discussion of whether its users have taken various progressive legal assumptions into account begins with determining whether the name Satjipto Rahardjo is also included when this phrase is used. Because, in the Indonesian context, it appears that this legal concept is originally from Satjipto, or at the very least, there are no works by other writers who use and explain this term with various assumptions in their versions. Even though ‘progressive’ is a general or generic term that anyone can use, when it is associated with law, which means ‘progressive law,’ this term is already exclusive because it is attached or integrated with the name Satjipto Rahardjo. Even if other legal scholars, particularly those from abroad, use this term, the user or speaker should include the scholar’s name. According to academic principles, the absence of mention of the name being referred to would imply that such an explanation is the user’s or speaker’s copyright.

⁵² Case 28 Decision [“Dutch legal experts say, there are criminal law experts in Indonesia advocating a progressive law which is a regressive law (law of decline) returning to the law of the days of Sultan Hasanuddin, Sultan Agung, and Sultan Tirtayasa,” conveyed government expert, Andi Hamzah, p. 70].

⁵³ Data 2003-2022 (29 November). See: <https://www.mkri.id/index.php?page=web.RekapPUU&menu=4>, accessed 29/11/2022.

⁵⁴ Aulia, “Hukum Progresif dari Satjipto Rahardjo,” 181.

Table 4.
The Use of Progressive Law Phrase and the Mention of Satjipto Rahardjo in Constitutional Court Decisions

Subject	Frequency of the Use of Progressive Law Phrase	Mentioned Satjipto Rahardjo
Petitioner	21	8
Petitioner's Expert	14	5
Government	2	-
Government's Expert	2	1
DPR	2	1
Related Parties	2	1
Related Parties' Expert	2	-
Justice	3	1
Sum	48	17

Source: processed by the Authors.

As shown in Table 4, this research demonstrates that Satjipto Rahardjo was only mentioned 17 times out of 48 times the phrase progressive law was used. This means that only less than half of the time, Satjipto Rahardjo's name is mentioned. On the other hand, no names of other figures have been mentioned concerning these legal thoughts or ideas, giving the impression that such terms and explanations came from speakers. Saldi, mentioned in the previous description as the one who used the phrase progressive law the most (three times), apparently did not mention or include the name Satjipto.

A search for the phrase 'progressive law' and 'Satjipto Rahardjo' turned up mentions of Satjipto, but not in conjunction with progressive law phrases. For example, the petitioner has used this phrase to describe the inherent flaws of legal regulation, precisely its formulation.⁵⁵ Maruarar Siahaan, a petitioner's expert and former Constitutional Court justice, also stated, quoting Ronald Dworkin, that it is not enough to read the text to interpret the Constitution but also its morals.⁵⁶ Maruarar also mentioned Satjipto's name once when explaining the interaction of the final Constitutional Court decision with societal forces.⁵⁷ Justice Arief Hidayat also mentioned Satjipto once, though not in conjunction with progressive legal phrases, namely in his dissent, that a series of legal formations, according to Satjipto by quoting Hans Kelsen, ends with the highest basic norm.⁵⁸

⁵⁵ Case 13 Decision [pp. 24, 30-2].

⁵⁶ Case 13 Decision [p. 114].

⁵⁷ Case 24 Decision [p. 102]. In fact, Maruarar stated that his source was doctoral lecture material.

⁵⁸ Case 24 Decision [p. 201]. Arief's statement was put forward in a different opinion on Decision Number 73/PUU-XII/2014, in addition to the decision that is the subject of this research. In its development, the applicant frequently quotes Arief's statement in Decision Number 73, among others in Case 26 Decision (p. 24) and Case 27 Decision (p. 25). In Case 31 Decision (p. 22), with essentially the same statement, the source of the reference is not mentioned.

The finding of the phrase progressive law that is not always followed by the mention of Satjipto Rahardjo's name raises critical questions about whether mentioning a particular legal idea or theory should be followed by mentioning the person who initiated it. This can be answered in terms of copyright law. In copyright law, the person who produces a work, including a specific legal idea or theory, has the exclusive right to use the work. These exclusive rights include both economic and moral rights. In general, economic rights have limitations, whereas moral rights do not. Identification of creation with the creator's name is part of the moral rights in copyright.

Then, what are the ramifications if a particular idea or theory is not accompanied by a source or, at the very least, the name of the person who initiated it? There are two possibilities. The first possibility is that the idea or theory is popular and may even become a generic term, so the mere mention of the idea or theory is considered to be associated with a specific name. For example, it appears that anyone in this world will attribute the theory of gravity to the name of Isaac Newton. In terms of progressive law, there is no consensus that this idea must have originated with Satjipto Rahardjo. However, there also appear to be no names of other figures who originally conveyed this legal thought or idea. Second, readers, listeners, or viewers will perceive the idea or theory as the idea or theory conveyed by the person who mentions it. This means that users or speakers will be thought of as or given the impression of being the *creator*.

An explanation of the mention of a particular idea or theory and the name that initiated it will be easier to understand in the context of academic work. Why does it have to be academic when ideas or theories are essentially the result of academic and scientific activities? Using and borrowing ideas, explanations, or descriptions from others requires users to mention the source or provide information about it in academic works.⁵⁹ If a reference to the source accompanies such use, it will be considered an idea, explanation, or description of the user or speaker. Worse yet, this will be considered plagiarism.

The issue is whether a courtroom trial process could be classified as academic. This subject may require discussion.⁶⁰ However, in a trial involving parties with an academic background, such as experts or judges, it is necessary to follow and uphold academic principles, such as honesty in stating the source or, at the very least, the name of the person whose idea, explanation, or description is borrowed or used to support a statement or claims. As found in some of this research, the absence of mention of the initiating figure's

⁵⁹ According to Edward Shils, this is a derivative obligation, namely recognizing the achievements of colleagues. Edward Shils, *Etika Akademis*, trans. A. Agus Nugroho (Jakarta: Yayasan Obor Indonesia, 1993), 76-7. See also Henry Soelistyo, *Plagiarisme: Pelanggaran Hak Cipta dan Etika* (Yogyakarta: Penerbit Kanisius, 2011), 26; Muhammad Abdan Shadiqi, "Memahami dan Mencegah Perilaku Plagiarisme dalam Menulis Karya Ilmiah," *Buletin Psikologi* 27, no. 1 (2019): 32.

⁶⁰ In this regard, one of the judges in a subordinate judicial body under the Supreme Court, Zulkarnain, writes, "... the act of making decisions can be compared to writing scientific papers that require correct and accurate procedures, data, analysis, and research methods." Zulkarnain, "Manajemen Pembuatan Putusan."

name demonstrates that academic principles do not fully apply in adjudicatory settings. Trials at the Constitutional Court, serving as a platform for unveiling the truth—particularly the constitutional truth—should also give precedence to academic honesty. This entails including sources or, at the very least, the names of individuals who originated specific legal concepts or ideas utilized to bolster an argument or claims. This is critical so that the forum for pursuing substantive and constitutional truths is accompanied by mechanisms that promote honesty, including academic honesty.

After learning that the phrase progressive law is not always followed by the name Satjipto Rahardjo, it is also essential to consider whether its users have considered the assumptions or pillars that underpin progressive legal thought as a whole or proportionately or if they were instead used based on assumptions that only serve their interests. Given that the phrase “progressive law” appears in 43 Constitutional Court decisions, the following section will examine some of them.

First, the judicial review of court decision review provisions is discussed. There are at least five Constitutional Court decisions concerning court decision review provisions (PK), namely Decisions on Cases 6, 16, 17, 18, and 29. Among the petitions submitted are provisions of Article 268, paragraph (3) of Law Number 8 of 1981 on the Criminal Procedure Code (KUHP), which states that “a request for review of a decision can only be submitted once.” The applicant believes that the provisions restricting the submission of PK have resulted in a constitutional disadvantage by impeding efforts to seek the truth and obtain justice if new evidence (*novum*) is discovered after the final decision.

Antasari Azhar and his wife and children stated in the Decision of Case 17 that this PK restriction hampered their efforts to obtain material or substantive justice. Such a legal method, namely imposing procedural constraints to limit the attainment of more substantive justice, is considered incompatible with progressive law.

“Bahwa larangan terhadap peninjauan kembali untuk kedua kalinya setidaknya-tidaknya mengabaikan prinsip dan nilai keadilan materiil/substansial, prinsip negara hukum yang menjamin hak asasi warga negara untuk memperjuangkan keadilan, dan bertolak belakang dengan hukum responsif dan progresif, sehingga untuk pencarian keadilan tidak boleh ada pembatasan.”⁶¹

[“That the prohibition against second review [of court decision] ignores the principles and values of substantive justice, the principle of a rule of law that guarantees citizens’ human rights to fight for justice, and is contrary to responsive and progressive law, so that there should be no restrictions on the search for justice.”]

This quote clarifies that progressive and responsive law both seek material and substantive justice, hence necessitating the avoidance of procedural constraints. This type of narrative can be found in all judicial review cases regarding the provisions of PK’s effort

⁶¹ Case 17 Decision, p. 7.

limits.⁶² Other provisions that limit procedures, such as clemency, which can only be filed once⁶³ and no later than one year after a decision has binding legal force,⁶⁴ have also been recorded as having been reviewed, and their argument also used the phrase progressive law.

This procedural limitation, thought to impede material and substantive justice, intersects with Satjipto Rahardjo's assumptions or pillars of progressive law, namely 'law for humans and not humans for law' and 'practicing law substantially and not artificially.' These assumptions necessitate that law not be treated rigidly, even if it is completed or final but instead must prioritize the interests of humans and humanity.

At this point, 'Procedural provisions that impede material/substantive justice' would appear to contradict some of the assumptions of progressive law at this point. However, this cannot be said to reflect progressive law. First, progressive law focuses on behavior rather than written law, particularly procedural matters. According to Satjipto, written law is 'defective since it was promulgated or born.'⁶⁵ To address these flaws, progressive law promotes progressive interpretation, which includes reading regulations based on their logic and social reality. As a result, progressive law is based more on the behavior of those who enforce the law. Second, claiming such things as progressive can, of course, have disastrous consequences. This is because, because they have the potential to limit efforts to seek substantive justice, all procedural provisions can be easily delegitimized by relying on progressive legal arguments.⁶⁶

Secondly, there are judicial review cases regarding the provision prohibiting resignation as a member of the General Election Commission (KPU). This case pertains to a provision in Law Number 15 of 2011 on General Elections, specifically Article 17, paragraph (3), which effectively prohibits or restricts KPU members from resigning. Those who resign without 'acceptable reasons' or 'disrespectfully discharged' must return twice the amount of the honorarium they received. According to the article's elucidation, "acceptable reasons" are limited to "reasons of health and/or due to physical and/or mental disturbances."

Tugiman, a member of the KPU for Bogor Regency, believes this provision restricts his freedom to choose a job and has petitioned the Constitutional Court to have it reviewed.

⁶² Case 6 Decision, p. 13-4; Case 16 Decision, p. 7; Case 18 Decision, p. 19; Case 29 Decision, p. 38.

⁶³ Case 27 Decision, p. 7.

⁶⁴ Case 26 Decision, p. 6.

⁶⁵ Satjipto Rahardjo, *Biarkan Hukum Mengalir: Catatan Kritis tentang Pergulatan Manusia dan Hukum* (Jakarta: Penerbit Buku Kompas, 2007), 141. Satjipto also alluded to PK on page 142 of this book, which according to the law requires that it be filed by the defendant or his heirs, but the court accepted that it was filed by the prosecutor. It is unclear whether Satjipto agreed. However, this description is given in connection with the fact that "the law has been flawed since it was promulgated or born."

⁶⁶ Satjipto reminded that the journey of law is indeed full of twists and turns which cannot be patterned absolutely and accurately. However, he quickly clarified that this does not imply that the law is a malleable institution that can be bent to suit people's preferences. Through these twists and turns, he simply want to demonstrate that law enforcement is not as simple as the law suggests, but is full of various social, political, and economic interventions, as well as significant behavioral practices from those who run it. Satjipto Rahardjo, *Sisi-sisi Lain dari Hukum di Indonesia* (Jakarta: Penerbit Buku Kompas, 2003), 193.

The Constitutional Court granted this request in its Decision in Case 9. The Constitutional Court stated in its decision that,

“... memperoleh pekerjaan dan penghasilan yang lebih baik adalah untuk lebih mendekati diri ke arah tercapainya kebahagiaan bagi kemanusiaan selain, menurut hukum progresif, merupakan tujuan setiap hukum dan peraturan perundang-undangan terutama juga merupakan hal yang menjadi salah satu kewajiban Pemerintah Negara Indonesia sebagaimana yang tercantum dalam alinea keempat Pembukaan UUD 1945, yakni memajukan kesejahteraan umum.”⁶⁷

[“... obtaining a better job and income is to move closer to achieving happiness for humanity; additionally, according to progressive law, it is the goal of every law and regulation in particular; it is also one of the obligations of the Indonesian State Government as stated in the fourth Preamble of the 1945 Constitution, namely promoting public welfare.”]

The considerations of the Constitutional Court clearly state that the goal of every law and statutory regulation according to progressive law is to achieve happiness for humanity. The legal provisions prohibiting KPU members from resigning are thought to stymie a person's efforts to find another, better job and bring him closer to happiness. This means that progressive law phrases are used in relation to the purpose or orientation of law, that law must lead humans to prosperity and happiness.

Third, a judicial review case is focused on the legislative authority of the Regional Representatives Council (DPD). This case pertains to provisions in Law Number 27 of 2009 on the MPR, DPR, DPD, and DPRD and Law Number 12 of 2011 on the Establishment of Laws and Regulations. These provisions restrict the DPD's legislative authority, encompassing the proposal of drafts, discussions, approvals, the development of legislative programs at the national level, and the consideration of a bill. The leadership of the DPD, namely Irman Gusman, La Ode Ida, and GKR Hemas, believed that these provisions diminished the DPD's legislative authority, prompting them to file a constitutional challenge.

In this case, Saldi Isra, the petitioner's expert, used the phrase progressive law to support his statement. According to Saldi,

“... apabila MK mau memberikan tafsir yang lebih progresif, apabila makna persetujuan dinilai sebagai konsekwensi dari pembahasan bersama, tidak keliru apabila DPD dilibatkan dalam proses pembentukan Undang-Undang sampai pada proses persetujuan bersama.”⁶⁸

[“... if the Constitutional Court wishes to provide a more progressive interpretation, if the meaning of approval is viewed as a consequence of joint discussions, it is not wrong if the DPD participates in the process of forming laws up to the joint approval process.”]

⁶⁷ Case 9 Decision, pp. 31-2.

⁶⁸ Case 13 Decision, p. 107.

This quote demonstrates how progressive law is used in the context of legal interpretation. Regarding the DPD's legislative authority, a progressive legal interpretation allows the DPD to participate in the deliberation of a draft up to the joint approval stage.

Saldi even stated in another section that only the Constitutional Court could give new meaning to the DPD's legislative function. He stated,

"Dalam pandangan ahli, hanya Mahkamah Konstitusi yang dapat memberi pemaknaan baru yang lebih progresif terhadap fungsi legislasi DPD agar kamar kedua ini lebih berfungsi dan bermakna dalam penyelenggaraan negara. ... tanpa tafsir baru yang progresif dari MK, DPD tak ubahnya seperti kerakap tumbuh di batu, hidup segan matipun tidak mau."⁶⁹

["In expert's view, only the Constitutional Court can provide a new, more progressive meaning to the DPD's legislative function, allowing this second chamber to be more functional and meaningful in state administration... Without a progressive new interpretation from the Constitutional Court, the DPD is like a worm growing on a rock, reluctant to live and unwilling to live."]

Saldi does not explicitly state in these two quotations that the interpretation he is referring to is part of progressive law.⁷⁰ He referred to this as a "more progressive interpretation" and "new, more progressive meaning." This appears to be appropriate if it relates to progressive law's assumptions or pillars. According to progressive law, one way to overcome a flaw is by encouraging progressive interpretation. This involves interpreting not only the rules based on their logic but also based on social reality.

Fourthly, there is the judicial review of Job Creation Law cases. While reviewing the Job Creation Law, the Constitutional Court issued three decisions that contained progressive legal phrases, namely Decisions on Cases 39, 40, and 41. This phrase was used by Judge Arief Hidayat and Judge Anwar Usman in Case 39 and the petitioner in Cases 40 and 41.

In Case 39, Arief and Anwar used this phrase in their dissenting opinion. On one occasion, they stated,

*"Pendekatan hukum yang bersifat **positif legalistik dan linier** sangat sulit dan selalu tertinggal untuk menjawab persoalan hukum yang berkembang di dalam masyarakat yang sedang berubah, oleh karena itu pendekatan hukum sebagaimana diuraikan oleh mahaguru, Prof. Dr. Satjipto Rahardjo dengan menggunakan pendekatan baru yang bersifat **out of the box** sangat relevan untuk digunakan dalam rangka mengantisipasi perubahan-perubahan. Pendekatan hukum progresif mengandung semangat melepaskan dari tradisi berhukum yang konvensional."⁷¹*

*["Legal approaches that are **positivistic, legalistic, and linear** are difficult and always fall behind in addressing legal issues that arise in a changing society; therefore, the*

⁶⁹ Case 13 Decision, pp. 108-9.

⁷⁰ These two statements are identical to those used by Saldi in his expert statement in Case 24 Decision, pp. 74-5.

⁷¹ Case 39 Decision, p. 419.

*legal approach described by the professor, Prof. Dr. Satjipto Rahardjo, by using an **out-of-the-box** approach is very relevant to be used in order to anticipate changes. The spirit of breaking away from traditional legal traditions pervades the progressive legal approach.”]*

Here, progressive law is the antithesis of a positivistic, legalistic, and linear approach or law method. Such a way of practicing law is called conventional. In this case, progressive law is different because it encourages an out-of-the-box way of practicing law. On another occasion, Arief and Anwar also used progressive law to state,

*“... **dalam konteks hukum progresif**, metode pembentukan undang-undang melalui metode omnibus law tidak mempermasalahkan nilai baik atau pun buruk. Karena ia adalah suatu metode yang bebas nilai. Oleh karena itu metode pembentukan undang-undang dengan metode omnibus law dapat diadopsi dan cocok diterapkan dalam konsepsi negara hukum Pancasila sepanjang omnibus law itu dibuat sesuai dan tidak bertentangan dengan nilai-nilai Pancasila dan prinsip-prinsip yang termuat dalam UUD 1945. Lagipula Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan juncto Undang-Undang 15 Tahun 2019 tentang Perubahan Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan (selanjutnya disebut UU 12/2011) tidak secara eksplisit menentukan keharusan menggunakan metode apa dalam pembentukan suatu undang-undang sehingga praktik pembentukan undang-undang dengan menggunakan metode omnibus law dapat dilakukan.”⁷²*

*[“... **in the context of progressive law**, it makes no difference whether the method of forming laws through the omnibus law method is good or bad.” Because it is a method with no inherent value. As a result, the omnibus law method of forming laws can be adopted and applied in the conception of a Pancasila legal state as long as the omnibus law is made in accordance with and does not contradict Pancasila values and principles contained in the 1945 Constitution. Furthermore, Law Number 12 of 2011 on Establishment of Laws and Regulations, in conjunction with Law 15 of 2019 on Amendments to Law Number 12 of 2011 on Establishment of Laws and Regulations (hereinafter referred to as Law 12/2011), does not explicitly stipulate the necessity to use what method is used in forming a law so that the practice of forming a law using the omnibus law method can be carried out.”]*

This time, the two justices used the phrase progressive law in reference to the omnibus law method of forming laws. According to them, the omnibus law method can be adopted and applied in Indonesia as long as it is made in accordance with and does not contradict Pancasila values and principles contained in the Constitution. The lack of explicit mention of this omnibus law method in Law Number 12 of 2011 does not preclude its adoption. This is very possible from a progressive legal thought standpoint.

Both used this explanation to argue that a formal review of the Job Creation Law should be rejected. They stated, “... meskipun UU Ciptaker memiliki banyak kelemahan dari sisi legal drafting, namun UU ini sangat dibutuhkan saat ini sehingga menurut kami, seharusnya

⁷² Case 39 Decision, pp. 422-3.

permohonan pengujian formil UU Ciptaker harus dinyatakan ditolak” [...although the Job Creation Law has many weaknesses from a legislative drafting perspective, this law is urgently needed at this time, so in our opinion, the petition for a formal review of the Job Creation Law should be rejected”].⁷³ This statement is quite interesting because while the two judges acknowledged that the formation of the Job Creation Law had many flaws, they were unwilling to challenge it for reasons of urgency, including if it was deemed not in accordance with the provisions of Law Number 12 of 2011.

In terms of progressive law, Satjipto frequently mentions practicing law outside the box, and thus it is permissible to include it as one of the assumptions of progressive law. In this case, the method of forming laws using omnibus law is seen as an unconventional or outside-the-box method, and in progressive law, it is possible to apply it for other, larger goals, namely seeking and bringing happiness closer. Progressive law, on the other hand, is built on the assumption that law must be responsive and encourage public participation. It is difficult to call a law progressive when it and how it is implemented ignore responsive efforts and public participation. Various studies have even considered the Job Creation Law not participatory and open.

Idul Rishan’s research, for example, which evaluated the formation of the Job Creation Law using legisprudence approach, shows that the formation of the Job Creation Law was not participatory and open. None of the six legisprudence indicators, namely legality, validity, participation, openness, prudence, and acceptability, were met in formulating the Job Creation Law. This is demonstrated, among other things, by the implementation of legislation that has no legal basis in the use of the omnibus law technique, is not participatory and democratic, is not accountable, changes in content that occurred outside of the approval stage, and the presence of unclear and out of sync formulations.⁷⁴ As a result, it is challenging to accept labeling the creation of the Job Creation Law as a reflection of a progressive law simply because it did not use conventional methods while abandoning more substantial ones.

The various case examples presented in this study demonstrate that the use of the phrase progressive law in Constitutional Court decisions has considered the assumptions or pillars of progressive law. However, the assumptions or pillars used are limited to those that meet the needs and interests of its users. Among the frequently used assumptions,

⁷³ Case 39 Decision, p. 431.

⁷⁴ Idul Rishan, “Evaluasi Performa Legislasi dalam Pembentukan Omnibus Law Cipta Kerja: Kajian Legisprudensi,” *Undang: Jurnal Hukum* 5, no. 1 (2022): 43-67. In fact, public participation in the legislative process is critical to ensuring that the laws or regulations enacted reflect the aspirations of the people while also being oriented toward their welfare. Joko Riskiyono, “Partisipasi Masyarakat dalam Pembentukan Perundang-undangan untuk Mewujudkan Kesejahteraan Masyarakat,” *Aspirasi: Jurnal Masalah-Masalah Sosial* 6, no. 2 (2015), 119; Sandy Gustiawan Ruhayat, Imamulhadi, and Yulinda Adharani, “Kewenangan Daerah dalam Perlindungan dan Pengelolaan Lingkungan Hidup Pasca Berlakunya Undang-Undang Cipta Kerja,” *Jurnal Bina Hukum Lingkungan* 7, no. 1 (2022), 42-54; Bayu Dwi Anggono, “Omnibus Law sebagai Teknik Pembentukan Undang-Undang: Peluang Adopsi dan Tantangannya dalam Sistem Perundang-Undang Indonesia,” *Jurnal RechtsVinding* 9, no. 1 (2020): 33-34.

though not explicitly stated, are 'law for humans and non-humans for law' and 'practicing law substantially and not artificially.' These assumptions are used to reject a rigid way of practicing law based solely on positivistic legal texts, such as provisions for procedural restrictions or procedures for establishing laws and regulations. Such use confirms the research's initial suspicion that the mention of progressive law today (after Satjipto's death) is frequently used arbitrarily to identify the law or the workings of laws not bound by legal texts.

Thus, various assumptions that form or underpin progressive legal thought have been sorted and employed in accordance with their users' needs and interests. Such use in a Constitutional Court trial process is done to provide more argumentative reasons for the claim or legal considerations of the parties who use it. However, such use can become biased when the context of the use and its assumptions are compared and studied in a more comprehensive manner based on other assumptions or pillars. If this is the case, then the law would not be *progressive* but *destructive*.

C. CONCLUSIONS

The phrase "progressive law" has appeared in numerous Constitutional Court decisions (43), used by the petitioner, the government, the DPR, related parties, experts, and even the justices. This phrase has also been used to refer to the purpose of law, the legal method or approach, the nature or character of law, and the interpretation of law. The phrase progressive law, particularly the one that includes Satjipto Rahardjo, appears to have considered some of the assumptions or pillars of progressive law in the Constitutional Court's decision. However, the assumptions or pillars used are generally limited to those that suit the needs or interests of its users and thus can have bias implications when compared and studied more thoroughly based on other assumptions or pillars.

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