

## PROGRESSIVE LAW FUNCTIONS IN REALIZING JUSTICE IN INDONESIA

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**Abstrak:** Persoalan hukum yang terjadi di Indonesia seakan menjadi tanda tanya besar karena Indonesia merupakan Negara Hukum yang seharusnya dapat menjaga stabilitas, keamanan dan kesejahteraan masyarakat. Keadilan menjadi salah satu tuntutan dalam penegakan hukum di Indonesia sehingga menimbulkan pertanyaan dimana letak persoalan ketidakadilan tersebut apakah pada substansi, strukture atau kulturenya ?. penegakan hukum seperti sebila pisau yang tumpul ke atas dan tajam ke bawah, persoalan ketidakadilan inilah yang menjadi dasar dalam penelitian ini sehingga dapat dirumuskan persoalan sebagai berikut, yaitu: **(1)** Bagaimanakah fungsi hukum progresif sebagai upaya menemukan keadilan?. **(2)** Bagaimanakah perwujudan Hukum Progresif dalam Hukum di Indonesia ?. penelitian ini bertujuan untuk memberikan sumbangsi pemikiran agar teori hukum progresif dapat dijadikan sebagai salah satu solusi dalam penegakan hukum di Indonesia. Metode penelitian menggunakan penelitian normatif dengan melakukan deskripsi terhadap aturan-aturan, putusan-putusan hakim dan tindakan aparat penegak hukum yang bersifat progresif. Penelitian ini menggunakan 2 sumber hukum yakni bahan hukum primer: Pancasila, Norma atau kaidah-kaidah (UUD NRI 1945 dan UU No 48 Tahun 2009) dan bahan sekunder: literatur-literatur, hasil penelitian ilmiah, makalah dan seminar, artikel, jurnal, buku dan berita. Analisis terhadap permasalahan dalam penelitian dapat disimpulkan: **(1)** bahwa hukum yang dianggap tidak adil dapat diabaikan demi menumkan keadilan dengan menggunakan pendekatan hukum progresif karena teori ini bisa dipahami sebagai sosiologis normatif sehingga bisa diterapkan dalam tiga komponen hukum yakni substansi, structure, dan kulture. **(2)** Perwujudan hukum progresif dapat diupayakan dengan beberapa gagasanyaknimempgunakanperan moral danetika, melakukanpenafsiran yang progresif, pendidikandimulaipadafakultashukumdanmengangkat orang-orang baik. Perwujudan hukum progresif di Indonesia dapat direlevansikan dengan pembangunan hukum nasional di Indonesia dengan upaya pemeliharaan, pembaharuan dan penciptaan seperti hukum progresif yang merobohkan dan membangun hukum.

**Kata Kunci:** Negara Hukum, Keadilan, Hukum Progresif

**Abstract:** Legal issues in Indonesia seem to be a big question mark because Indonesia is the State of Law that should be able to maintain the stability, security, and welfare of the community. Justice becomes one of the demands in law enforcement in Indonesia that raises the question where the problem of injustice was whether, on substance, structure or culture ?. law enforcement such as blunt knife is blunt upward and sharp downward. the problem of injustice was the basis of this research formulated as follows: (1) How is the function of progressive law as an effort to find justice ?. (2) How is the embodiment of Progressive Law in Indonesian Law ?. This study was aimed to provide a contribution to the idea that progressive legal theory can be used as one of the solutions in law enforcement in Indonesia. The research method was normative research with the description of rules, judges' decisions and progressive actions of law enforcement officers. The researcher used two legal sources: primary law materials: Pancasila, norma or rules (UUD NRI 1945 and UU No 48 the Year 2009) and secondary materials: literature, scientific research results, papers and seminars, articles, journals, books, and news. The analysis of the problems in the research can be concluded as the following as the following: (1) the unfair law can be ignored in order to put forward justice by using progressive law approach because this theory can be understood as

normative sociology so it can be applied in three legal components namely substance, structure, and culture. (2) The embodiment of progressive law can be pursued by several ideas, as such as, the use of moral and ethical roles, doing progressive interpretations, providing education in law faculties and hiring some good people. The implementation of progressive law in Indonesia can be related to the development of national law in Indonesia by maintaining, reforming, and creating like how progressive law breaks down and builds the law.

**Keywords:** State of Law, Justice, Progressive Law

### Preliminary

The history of legal thought can be seen that law is always present in human life. cannot be imagined, how humans live without law. Therefore, an order in the community is inconceivable. In fact, it can be said, order and society are two meanings that may be distinguished, but cannot be separated. Celsius, the Roman philosopher said, "Ubi societas, ibi ius" (where there are people, there is a law).<sup>1</sup> the development of legal complexity in human life has even reached the level that the law is no longer easy to understand. supposedly, the law is present to maintain order (order) in the community.<sup>2</sup>

Ontological development of law, there are 3 legal objectives that we commonly understand namely justice, certainty, and expediency. These legal objectives are a reflection of 3 legal streams that significantly influence the

development of law in the present, namely the flow of natural law that prioritizes justice, legal positivism tends to prioritize legal certainty which leads to legal justice rather than substantive justice and legal realism that emphasizes benefits.

The law understood in the approach of the state of Pancasila law is not only limited to the law with the context of codification but the broad law that is the values that live in Indonesian society which are then used as the basis or foundation in social life.

The principles contained in the Pancasila stem from the culture and experience of the Indonesian nation that developed as a result of the nation's efforts in seeking Indonesia as a country that has a Pancasila philosophy, moving from a community culture consisting of various tribes, religions, races which are then bound in *Bhinneka Tunggal Ika*<sup>3</sup> with different slogans but united. in relation

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<sup>1</sup> Abu Rokhmad, *Hukum Progresif*, Semarang, Pustaka Rizki Putra, 2012, hlm V

<sup>2</sup> Abdul Latif dan Hasbi Ali, *Politik Hukum*, (Bandung: Sinar Grafika, 2010), hlm.14

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<sup>3</sup>*Ibid.*, hlm. 2

to the laws that apply to the nation and state of Indonesia, Pancasila is a legal ideal that controls the basic laws of the State, both basic written laws or unwritten basic laws.

In accordance with the philosophy of the Indonesian nation, namely Pancasila, According to Satjipto Rahardjo, Progressive law enforcement is to carry out the law not only black-and-white words from the rules (according to the letter), but according to the spirit and meaning more (to very meaning) from laws or laws based on the Pancasila so that law enforcement is not only intellectual intelligence but with a conscious approach. In other words, law enforcement is carried out with determination, empathy, dedication, commitment to the suffering of the nation and accompanied by the courage to find a way other than what is usually done.<sup>4</sup> so that all legal instruments must place humanity as the center of orientation so that humanitarian law enforcement.

But at the same time when it was echoed by the enforcement of the rule of law, it turned out that legal life in

Indonesia still caused concern and disappointment by the people. In three legal objectives namely justice, certainty and expediency. The law is unable to bring justice to all, even these three legal objectives are very difficult to go hand in hand. Law enforcement is like a kitchen knife, sharply down blunt up. The law is repressive when dealing with small people who have no possession. On the other hand, those with legal money are protective and impartial. Siding law will not be able to realize justice in society. The legal principle that everyone is equal before the law, is changed by society to "remain not before the law".

The image of Indonesia as a legal state contained in the constitutional mandate of article 3 paragraph (1) of the 1945 Constitution of the Republic of Indonesia<sup>5</sup>Indonesia is a rule of law" and in Law No. 48 of 2009 concerning judicial power in article 2 paragraph (1) said that justice is carried out for justice the Almighty God and verse (2) that, state justice applies and enforces law and justice based on Pancasila.<sup>6</sup>

So the law should be a means to realize justice in the midst of society to

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<sup>4</sup>Satjipto Rahardjo, *Penegakan Hukum Suatu Tinjauan Sosiologis*, Genta Publishing, Yogyakarta, 2009, hlm. xiii

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<sup>5</sup>*Undang-Undang Dasar 1945*, Bab I, Pasal 1, Ayat 3.

<sup>6</sup> Undang-Undang No 48 tahun 2009 tentang Kekuasaan Kehakiman, Bab II, Pasal 2 ayat I-2.

bring happiness and prosperity to the community. But the law enforcement structure seems to be blind to it, the law seems to be seen for itself without seeing a broader aspect, namely the community, so Sapiro Rahrjo said that law must use a spiritual approach, as in law with a conscience, then it is appropriate not only pay attention to the text but must pay attention to the context of the community but deeper than that is the situation and condition of the community's feelings.

However, the facts of law that occur in society cannot be denied, many have caused anxiety such as the recent facts of the Gayus H. Tambunan case. A staff member at the Ministry of Finance's Directorate General of Taxes succeeded in bribing lawyers, investigators, prosecutors, judges so that the case that was wrapped up in him was lightly sentenced. Even when detained at the Jakarta Mobile Brigade Detention Center for tax cases, Gayus was able to travel to Bali and even abroad (Malaysia, Singapore, and China). Apparently, the detention officer was bought by Gayus. The case of Gaius is one illustration of the breakdown of law in this country.<sup>7</sup>

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<sup>7</sup> Abu Rokhmad, *Hukum Progresif*, Semarang: 2012, hlm 4

As a comparison, the legal case that touches conscience is the Case of Grandma Minah with the theft of 3 cocoa fruits. Minah with a background in livelihoods as a removable farmer. Minah picking 3 cocoa from PT Rumpun Sari Antan (PT RSA), interviewed by grandmother Minah did not intend to hide and did not intend to take the cocoa away either. The 3 cocoa fruits were to be used as seeds but he still asked for approval from the foreman of the plantation. Finally, I became a defendant in theft with article 362 of the Criminal Code and was sentenced to one month and 15 days with a three-month trial period due to various considerations.<sup>8</sup>

Comparative studies of the two cases have increasingly demonstrated the complexity of legal issues in Indonesia. in terms of work strata and social status, Gayus H. Tambunan can play the law with his freedom to go abroad while in the case of Grandma Minah with the status of the economy below as if the law is so strict and repressive. Then the question arises where is justice?

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<sup>8</sup> Widodo Dwi Putro, *Kritik terhadap Paradigma Positivisme Hukum*, Genta Publishing, Yogyakarta: 2011, hlm 163-181

In Islamic law as well as applicable law in Indonesia, there is a principle agreement that all humans are equal. They are not discriminated because of their nationality, because of their descent, because of wealth or because of grandeur. Nothing in Islamic law is a ruler who is free from the law if they do wrong. All humans before God are the same and God is the Just Judge. As in the letter, Anisa verse 58 has been ordered to do justice to anyone regardless of any strata.

An-Nisa (4.58)

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا  
حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا  
يُعْظَمُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا (٥٨)

Meaning: Verily Allah commands (orders) you to carry out (deliver/deliver) the mandate to those who have the right to receive it, and (tell you) when setting a law among men so that you determine fairly.

Verily Allah gives the best (most valuable) teaching to you. Lo! Allah is Hearing, Seeing. (An-Nisa 4.58)<sup>9</sup>

Moving on from the legal polemic that occurred in Indonesia, justice seemed to be a delusion of legal

objectives, the judge seemed to be a mouthpiece and formal procedural rules that hurt the feelings of the people who were fighting for their rights in the legal table, the authors formulated the following problems: First: How the function of progressive law in an effort to find justice? Second: What is the realization of the progressive Law in Law in Indonesia?

The theory that the author uses in this writing is the theory of justice, the writer can use the theory of justice. Aristotle's theory of justice, Jhown Rawls's theory of justice, and Islamic justice theory are formulated by the author to provide an overview of understanding justice in progressive legal theory. In addition, the author also uses progressive legal theory, progressive legal theory is one tool that can be used to improve laws that do not provide substantial justice to the public. When the law does not provide justice, the law must be overhauled and repaired because what is aspired to in the progressive law is to realize substantive justice.

The theory of legal systems according to Lawrance M Friedman consists of 3 components, namely: legal substance, legal structure, and legal

<sup>9</sup> Agus Abdurahim Dahlan , *Al-Qur'an dan Terjemahannya*, Al-Jumanatul Hadi,Bandung, 2006, hlm 67

culture. This legal system theory is used by the author to conform to the Indonesian legal system which consists of various components as elements in realizing substantive justice according to progressive legal theory. These 3 components are very influential in realizing the idea of progressive law.

### **Method**

This study, the authors use Normative research methods,<sup>10</sup> namely research on legal principles, research on legal synchronization, historical research, research on schools of law and comparative legal research. This type of normative research specifically conducts an analysis of regulations containing progressive legal values. Besides doing comparative studies with the schools of law that affect progressive law, such as the flow of natural law, sociological jurisprudence, legal realism, critical legal studies, responsive law. Analysis of progressive judgments. So that we can analyze the position of progressive law in Indonesian law especially in the law which is very strong in continental European law.

This study uses two sources of law, namely the first primary legal material, namely Pancasila, the norms or basic rules, namely the 1945 Constitution of the Republic of Indonesia and the Law No. 48 of 2009 and other regulations relating to the role of progressive law on the Indonesian legal system. Both secondary legal materials, namely legal material that does not include legislation, but can provide an explanation of primary legal material consisting of literature, the results of scientific research, papers and seminars, articles, scientific journals, textbooks, newspapers, internet news and various other writings relating to the subject matter in this study.

Analysis of the data used in this study is the analysis of normative qualitative data, namely data obtained after systematically arranged, to then be analyzed qualitatively normatively in the form of description, so that conclusions can be drawn to be able to achieve clarity about the problems to be studied. The results of the library research will be used to analyze the data, then the data is analyzed qualitatively normatively to answer the problems in this study.

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<sup>10</sup> Soerjono Soekonto, 2007, *Pengantar Penelitian Hukum*, UI-Press, Jakarta, hlm. 153.

### **Result and Discussion**

## **1. Progressive Legal Function in Realizing Justice**

In realizing justice, the discussion about justice in a progressive legal perspective is what Satjipto Rahardjo always hears. Law for humans, not humans for a law. Law is only a tool for humans to give grace to the world and humanity. The law does not exist for itself, but for something wider and bigger. So whenever there are problems in law, laws that are reviewed and corrected, not humans who are forced to enter into legal schemes, this is one point that confirms the enforcement of substantive justice that the law can be violated if the law does not humanize humans. In the sense that the law does not bring justice so that the lawmaker must enforce a law that exceeds the written rules or is called discretion.

The fundamental thing of injustice towards progressive law is that the law must be pro-people. Justice must be occupied above the rules, law enforcement officials must progress by trying to get out of the mainstream legal rigidity (legal mobilization) if the law is not pro-people as a justice postulate aspired by progressive law. Expectations to be achieved by humans are prosperity and happiness so that the law should be

an infrastructure capable of realizing this.

So that the pattern of a law that is understood to make this happen is to see the law. especially progressive law is always in the process of becoming, a law is not a final institution, but is determined by its ability to serve humans. He constantly builds and transforms himself towards a better level of perfection. Every stage in the course of the law is decisions that are made in order to achieve the legal ideal, both those carried out by the legislature, the judiciary, and the executive. Every decision is terminal to the next, better decision. The law can never completely eliminate the autonomous forces of society to regulate their own order. These forces will always be there, even in a hidden form. At certain times he will emerge and take over work that cannot be resolved properly by state law.<sup>11</sup>

Article 5 paragraph (1) Law No. 48 of 2009 concerning Judicial Power, changes to Law No. 4 of 2004 affirms that Judges and Constitutional Justices are obliged to explore, follow, and understand the law and justice that live

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<sup>11</sup>Sidharta, 2010, *Posisi pemikiran hukum progresif dalam konfigurasi aliran-aliran filsafat hukum*, internet, hlm. 4.

in society. Judges are encouraged to explore and realize substantive justice in society rather than being shackled by procedural justice. This requirement to seek substantive justice besides being justified by the 1945 Constitution is also contained in various laws that are directly related to law enforcement.

So in article 2 paragraph (1) of Law No. 48 of 2009 stated that the Judiciary was carried out "For Justice Based on the Supreme Godhead" and Not For Legal Certainty-Based on the Act became the basis that allowed judges to make decisions to enforce justice even though forced to violate formal provisions the law that inhibits the upholding of justice in order to achieve substantive justice as stated by Satjipto Rahardjo that laws that are characterized by humans are building law (breaking the law) that every decision can go beyond a written rule if the rules it hurts people's justice.

Laws that apply in Indonesia, through several legal foundations prove that the spirit and values of progressive law have existed even as long as Indonesia. These values have been implemented until the situation of Indonesian legal plurality has been applied. Because basically, progressive

law enters every applicable law in Indonesia.

In addition, more flexible legal efforts can also be made with mediation efforts with the aim of providing convenience for litigant communities. Supreme Court Regulation No. 1 of 2008 concerning the Mediation Process in the Court of the Supreme Court of the Republic of Indonesia, in its stated consideration that Mediation is one of the faster and cheaper dispute resolution processes, and can provide parties with greater access to find solutions that satisfy and fulfill a sense of justice. The presence of the Perma made it easier for parties who litigated to resolve cases without having to be confined to solving cases through lane or court. In the mediation regulations made by the Dutch known the term settlement of disputes through judges of village peace (article 3a RO / *Rechtelijke organization*).<sup>12</sup>

In the Supreme Court Regulation No. 2 of 2012 concerning the adjustment of minor criminal violations provides fresh air for law enforcement in

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<sup>12</sup>Didit Pambudi Widodo, *Efektifitas Perma No. 1 Tahun 2008 tentang, Prosedur Mediasi terhadap Perkara Perdata Gugatan di Pengadilan Negeri Maros*. Universitas Muslim Indonesia, Makassar, Hlm. 48.



Indonesia. Cases that afflict the people, especially the small people, have adjusted to the legal process. The Supreme Court hopes that the court will bring down crimes that are truly comparable to the severity and nature of criminal offenses and do not impose crime in society. Minor theft crimes of less than Rp250 are now converted to Rp2. 500,000, - where the value is doubled to 10,000 times.

## **2. An Embodiment of Progressive Law**

### **A. Efforts to realize progressive law**

#### **1. Moral or Ethical Role**

Progressive law positions law as a human moral institution that can give mercy to the world, a law is not a king but law is a means to humanize humans, not a law as innocent technology.

Ethics or morals will speak right and wrong or good and bad that exist in humans even though actually crime does not have its own existence but we will refer to its actions. This is very closely related to mental and physical development, because progressive law is the central point of humanitarian problems, so various ethical or moral developments are needed. It is :

- a. Renewal, refreshment, or change in mindset.
- b. Improvement, guidance or direction in the way humans work.
- c. Improvement, stabilization, or presentation and discovery of initiatives and so on.<sup>13</sup>

Ethics has a measuring tool that can be used to assess, determine, or decide actions that are moral and which are immoral or immoral. Assessment tools are conscience or mental awareness. The contents of the attitude of the soul, among others:

- a.Awareness (ability and lack of self).
- b.Consideration of taste (a reflection of a sense of justice, humanity and health of mind).
- c.Maturity (experience, maturity considerations, and caution).<sup>14</sup>

#### **2. Making progressive legal interpretations**

Interpretation is not merely reading the rules using the logic of regulation, but also reading the facts or what happens in society. The two

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<sup>13</sup>Joni Emirzon, *Urgensi Etika (Moral) dalam pembangunan Hukum Progresif di Masa Depan*, dalam Satjipto Rahardjo, *Membedah Hukum Progresif*, Ed, I Gede A.B Wiranata Emirzon, dan Firman Muntaqo, (Jakarta: Penerbit Buku Kompas, cet 2:2007), hlm. 229.

<sup>14</sup>*Ibid*, hlm. 232.

readings were put together and then led to creativity, innovation, and progression.

Since the adoption of the regulations, there are timebound and space bound. Since the regulations have been made, they will be bound to both, at any time the regulation will be redefined to serve the "here and now" situation. Paul Scholten said as follows, "Het Recht is er, doch het moet worden gevonden" (the law exists, but still has to be found). Therefore, it is said, that law enforcement is not merely national, automatic and linear work, but full of creativity. Job finding is creative work and that's where interpretation is.<sup>15</sup>

### **3. Starting from Education at the Law Faculty**

Changes in the role expected of a number of law graduates can be clearly read in the formulation of the general objective of legal education held by the Faculty of Law, Airlangga University, namely: "Trying to produce legal scholars who are able to create the desired community through legal means, and are able to solve legal problems in social context.

In 1975 a seminar was held "Bachelor of Law and Development" by the Faculty of Law, Diponegoro University. One of the decisions regarding the type of legal reformer is those who see the legal order that applies as an ingredient to be tested for its use in the present society and express alternative alternatives.<sup>16</sup>

Law graduates not only have to think about how to apply the current law, but also about the possibility of overhauling it as part of the ongoing changes in society. Law graduates are told not only to maintain the status quo but also as skilled people to contribute to shaping society through legal means.

### **4. Lifting Good People**

According to Satjipto Rahardjo, the most interesting thing is that progressive legal actors are only found a little at the national level, but more at the local level, among people and small actors, progressive judges, such as Amiruddin Zakaria, Teguh Prasetyo, and Benjamin Mangkudilaga (when participating in canceling the revocation of Tempo SIUPP), it was not a "big judge". Unfortunately, they are

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<sup>15</sup>*Ibid*, hlm. 172.

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<sup>16</sup>Satjipto Rahardjo, 2009, *Hukum dan Perubahan Sosial*, Yogyakarta: Genta Publishing, 2009, hlm. 228.

marginalized and increasingly marginalized if they are not united and united.<sup>17</sup> If people like this are appointed and not marginalized, then the idea of progressive law that liberates and makes people happy will be realized.

### 5. Progressive Law in Indonesia

According to Lawrence M. Friedman, 3 components of law must be the basis of a better legal change in Indonesia because it will affect the dimensions of change or renewal of national law. Ismail Saleh stated that within the framework of renewing and developing national law, there are three main dimensions. Namely: first: dimensions of maintenance by maintaining order by relying on changing situations or conditions so as to give birth to an understanding and application of a holistic and substantial law, both increasing and enhancing the development of national law by establishing new regulations and adjusting to legal, three-dimensional contexts and requirements the creation and renewal of regulations in laws that are adjusted to the development of the dynamics of society so that progressive

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<sup>17</sup>Abdul Khoiruddin, *Relevansi Hukum Progressif terhadap Hukum Islam (Studi Analisis Pemikiran Prof. Satjipto Rahardjo tentang Hukum Progressif di Indonesia)*, *Op. cit.* Hlm. 73-74.

law enforcement can be applied to the fullest.

### 6. Case Review

A. Sex change by Agus Widyo in provision No.19 / Pdt / 2009 / PN.Btg.<sup>18</sup>

b. Customary rights in the decision of the Constitutional Court No. 35 / PUU-X / 2012.<sup>19</sup>

### Conclusion

Progressive law which departs on the basis that the law for humans makes man the main goal of law enforcement. Legal certainty that is considered unfair, in certain contexts, can be ignored if it can find justice by using another approach. Progressive law plays an important role in efforts to present justice because progressive sociological legal attitudes that can enter into every legal element, especially in the realization of justice, are not only in court and are fixed on written law. The characteristics

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<sup>18</sup>Widodo Dwi Putro, *Kritik terhadap Paradigma Positivisme Hukum*, *Op. Cit.* hlm. 216.

<sup>19</sup>Mahkamah Konstitusi (Faiq Tobroni), *Jurnal Konstitusi (Menguat Hak Masyarakat Adat atas Hutan Adat suatu Studi Putusan MK Nomor 35/PUU-X/2012)*, X, (September 2013), hlm. 462.

of progressive law, namely law for humans and refusing to maintain the status quo can be used as a basis to bring justice to society.

The realization of progressive law can be pursued with several ideas, namely using moral and ethical roles, making progressive interpretations, education starting in law schools and raising good people. When these ideas can be fulfilled, the desired law enforcement can be realized as a legal progressive legal mission for humans. To realize progressive law in Indonesia, of course, it has relevance to the development of national law which can be pursued by several efforts, namely: undertaking maintenance efforts, renewal, and creation such as progressive law which destroys and builds law.

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