

## PHILOSOPHY OF PROGRESSIVE LAW ON ESTABLISHMENT OF LAWS AND REGULATIONS IN THE CONTEXT OF SUBSTANTIVE JUSTICE: AN INDONESIAN EXPERIENCE

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### ABSTRACT

*Progressive law in Indonesian legal practices recognized as one of an alternative law enforcement. Progressive law endorsed by Satjipto Rahardjo, one of Indonesian scholars, which emphasized that progressive law as how to see law not only textually but also contextually. Progressive law provides justice not only in what laws and regulations stated (law in book) but also what the people need by law (law in action). Establishment of laws and regulations should provide not only fairness and justice, but also legal certainty and legal benefit. Law establishment as well as legal drafting philosophically should in line with the common need of people, and progressive law strengthen the basic needs of people. Progressive law claimed can provide a substantive justice, and also welfare for people. Satisfaction of people to law enforcement it self always related to substantive justice and in what why people protected by laws. The paper would examine two main issues concerning to progressive law, first how is philosophical ground of progressive law, and the second how progressive law provide a substantive justice and welfare for the people. This paper emphasized that, progressive law basically can be used as an alternative in law enforcement, and establishment of law should in line with this thinking.*

**Keywords:** progressive law, substantive justice, law establishment

### A. INTRODUCTION

Evolution of science increase rapidly including the existence of legal science. In Indonesia, there are so-called the Progressive Law in the beginning of 2002. The progressive law exist because during the teaching of science of positive law (*analytical jurisprudence*) practiced in empirical reality in Indonesia is not satisfactory enough. The idea of Progressive Law arises because of concerns about the quality of law enforcement in Indonesia especially since the reformation in mid of 1997. If the function of law is meant to participate in solving the social problems ideally, then what is happening and happening in Indonesia today is very contrary to the ideal goals. The progressive law has basic assumptions relationship between human and law as a solution of the failure of the application of analytical jurisprudence. *Progressivism* departed from the view of humanity, that man is basically good, have the properties of compassion and concern for others. That is the basic assumption progressive law starts from the basic nature of the "law is for humans". The law does not exist for itself as initiated by positive law science but for humans in order to achieve human well-being and happiness. Such a position emphasized that the law is always on the status of "law in the making".

Such a notion is clearly different from the flow of positive law by means of *analytical jurisprudence* which is based on the premise rules and logic. For positive legal science (*dogmatic*), the truth lies in the body of rules. This is criticized by the progressive law, for seeing the laws that are only chapters, obviously cannot describe the truth of a very complex law. Science cannot explain the complex truth of reality-empirical obviously very doubtful position as an actual science of law as a science (*genuine science*).

Progressive law consciously places its presence in close relationships with people and society. This position puts progressive laws relating to developmental models of Nonet and Selznick Law. Progressive law also shared understood by *Legal Realism* and *Freirechtslehre*. Progressive Law has responsive type that is always associated to the objectives beyond the textual narrative of the law itself while trying to overcome insularity (*prokialisme*) in public morality and promote problem-oriented approach that is socially integrated.

This context is the focus of writing that the philosophy of progressive law becomes the basis of the formation of legislation in Indonesia and at the same time become the basis in the implementation of enforcement. This condition will enable the realization of legal Justice which is the substance of prosperity based on Belief in the One Supreme (*Ketuhanan Yang Maha Esa*).<sup>2</sup>

### B. PHILOSOPHY OF PROGRESSIVE LAW IN THE ESTABLISHMENT OF LAWS IN INDONESIA

The law was qualified as a science in constant formation in which that *legal science is always in the making*. Progressive law is a liberating movement because it is fluid and constantly agitated conduct a search of the truth to the next truth. Progressive Law

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<sup>2</sup> This principle reflects on *Pancasila* (The Five Norms of Indonesia), in the first norm: Belief in the One Supreme (Ketuhanan Yang Maha Esa)

evolved somewhat since Satjipto Rahardjo explained. The idea was first based on concerns about the low contribution of jurisprudence in Indonesia to enlighten the nation out of the crisis, including the crisis in the field of law.

Progressive Law theory by Professor Satjipto Rahardjo confirms that the law is for man, and not the other way around. “*The law is not just building regulations, but also building ideas, culture, and goals*”, further said that the law needs to be re-thought in the philosophical essences, that is the law of man. With this philosophy, then the human becomes the determinant and the point of legal orientation. The law is in charge of serving people, not the other way around. Therefore, the law is not an institution independent of human interests. The quality of the law is determined by its ability to serve human well-being. It causes progressive laws embrace the *ideology*: the Pro-Justice Law and Pro-People Law. According to this theory, justice cannot be directly identified through a process of formal logic. Justice is acquired through institutions, therefore, formal logical arguments “sought” after justice are found to frame the juridical-formal decisions that are believed to be just. Therefore the concept of progressive law, law does not serve for itself, but for purposes that are outside of that self.

Two types of progressive law enforcement: (1) dimensions and human factors progressive actors in law enforcement. Ideally, they consist of a new generation of legal professionals who have a vision and philosophy underlying the progressive law enforcement; (2) the need for some kind of revival among academics, intellectuals and scientists and theoreticians Indonesian law.

Related to *Legal Realism* and *Freirechtslehre*, progressive law to see the law not from the perspective of the law itself, but rather look at it from wanting to accomplish social goals as well as the consequences that arise from the workings of the law. Therefore the legal presence is associated with social objectives, then the progressive law also close to *Sociological Jurisprudence* from Roscoe Pound, who refused to study law as a study of the regulations.<sup>3</sup> Thus, in exercise science, Progressive Law and the regulations beyond the positivistic legal documents. Progressive Law also close to the theories of Natural Law, which is the concern for the things by Hans Kelsen called *meta-judicial*. Thus, the Progressive Law put the interests of a greater man than interpreting the law in terms of the ‘logic and rules’. Progressive law does not stop only on criticism of the liberal legal system. Explores progressive law understand that the law is not absolutely driven by positive law or statutory law, but he also moved in the direction of non-formal. Therefore progressive law assumes that the legal basis was there and present to humans.

Reform and negative criticisms against Indonesian law enforcement systems and provides an opportunity to think about what we will do to get out of a bad situation. But, after the fall atmosphere still leaves a blessing, which gives an opportunity to think about change is directly and seriously at the root of his philosophy.<sup>4</sup> Basically, the law contains ideas or concepts that can be classified as something abstract. When the law is loaded with values or ideas to be realized, then the law is closely related to the various factors that affect the environment such as political, social, economic and cultural. In law enforcement process requires an organization that can apply or concrete law into society like police, court and others. Because basically the law cannot be executed without the existence of an organization that serves to create or realizing law in society. Law enforcement contains supremacy of substantial value that is justice. However, since the use of modern law, the court is no longer a place to seek justice (*searching of justice*) but the Court then shifted into an institution that deals with the rules and procedures, in other words, the court only as a regulatory application of laws and procedures only.

Progressive law enforcement is not only applied law as in the text—black and white text—of the regulation (*according to the letter*), but also according to the spirit and deeper meaning (*to the very meaning*) of the statute or the law.<sup>5</sup> Progressive Law as emphasized by Satjipto Rahardjo also contradicts with the law of two components, namely the rules and behavior.<sup>6</sup> In this context, law enforcement not only an intellectual logic but also have to be based on spiritual intelligence. In other words, law enforcement is done with full determination, empathy, dedications, and commitment to the suffering of the nation and with the courage to find a way other than the usual. The idea of progressive law enforcement was born out of a fairly long intellectual reflection. The discussion above progressive law enforcement is one of the intellectual reflection track records as a starting point why progressive law enforcement serves as a type of alternative law enforcement. It can be highlighted that *the righteousness of the law cannot be construed solely as the truth of the law, but it must be understood as the truth of the principle of justice underlying the law*, because in the perspective of a progressive law theory, the law is not an autonomous institution which is separated from the human interest. Quality of law is determined by its ability to serve human welfare. Laws should provide the happiness for people. This concept led to the legal doctrine of progressive ideology embraced pro-justice law and the Law of the pro-people. Justice provides under the law, and not *vice versa*. If the rule of law does not reveal the breath of justice, then he should be abandoned.<sup>7</sup>

The term progressive law as explained by Satjipto Rahardjo, is based on the basic assumption that law is for man. This is due to the low contribution of law science in enlightening the Indonesian nation, in overcoming the crisis, including the crisis in the field of law itself. The notion of progressive law is to change quickly, make fundamental reversals in theory and legal praxis, as

<sup>3</sup> Suteki, 2015, *Masa Depan Hukum Progresif*, Thafa Media, Yogyakarta, p. 36.

<sup>4</sup> Rodiyah, 2017, “The Policy of Conservation for Justice Values on Law School Curriculum on College Incorporated of UNNES (The Justice Value Based Policy of University’s Tridharma”, *International Journal of Economics and Law*, IJBEL Vol. 12 Issue 4, April, E-ISSN: 2289-1552, p.93-94

<sup>5</sup> Satjipto Rahardjo, 1983, *Aneka Persoalan Hukum dan Masyarakat*, Alumni, Bandung, pp. 56-59

<sup>6</sup> Satjipto Rahardjo, *Menuju Produk Hukum Progresif*, Paper on LGD, Faculty of Law UNDIP, Semarang, 24 June 2004

<sup>7</sup> Hery Abduh Sasmito, “Ultra Petita Decision of Constitutional Court on Judicial Review (The Perspective of Progressive Law)”, *Journal of Indonesian Legal Studies*, JILS Vol. 1 Issue 1, November 2016, p. 53.

well as doing various breakthroughs.<sup>8</sup> Definition as stated by the Satjipto Rahardjo progressive legal means is a series of radical action, by changing the legal system (including changing the legal regulations if necessary) so that the law is more useful, especially in self-esteem and ensure the happiness and well-being. Progressive Law is the law that acquires, either in the way of thinking and acting within the law, so as to allow the law to complete its work flow only serve mankind and humanity. So there is no engineering or alignment in enforcing the law. Therefore, the law aims to create justice and prosperity for all people. The release is based on the principle that the law is for man and not vice versa, and the principle that the law is for man and not vice versa, and the law was not there for himself, but for something broader for human dignity, happiness, prosperity, and human glory. Progressive law is not merely dogmatic. Specifically progressive law can be called a pro-people law and fair law. Therefore, progressive law abandoned the tradition of *analytical jurisprudence* or *rechtsdogmatiek*. The underlying assumption of the progressive law, the *first* is law for humans and not for law itself, and *second* laws are always in the status of *law in the making* and it is not final, the *third* law is as moral institution humanity.

The main points thinking of the progressive law model can be described as follows:

1. Progressive law is aimed at protecting the people towards ideally the law;
2. The law rejects the status quo, and does not want to make law a technology that is not conscience, but a moral institution;
3. Law is an institution aimed at bringing people to a just, prosperous and happy life;
4. Progressive law is, "the law of pro-people and pro-justice";
5. The basic assumption of progressive law is for human beings, not the other way around. in this regard, the law does not exist for itself, but for something greater;
6. The law is always in the process to continue to be the (*law as a process, law in the making*);

### C. LAW ENFORCEMENT SOURCED FROM THE SPIRIT OF PROGRESSIVE LAW

The law enforcement efforts which systematically done by Police should pay attention to these three aspects—law for human, law in the making status, and law as moral humanity institutions—simultaneously, so that the process of law enforcement and justice itself internally can be realized in real terms. However, in addition to the above three factors, complaints regarding the performance of law enforcement by the Police in our country so far, actually also require a more comprehensive analysis again. Law enforcement efforts are only one element of our whole problem as a State of Law that aspires to uphold and realize social justice for all Indonesians. Law may not be straight, if the law itself does not yet reflect the feelings or values of justice in the society. The law is unlikely to guarantee justice if the material is largely a legacy of the past that no longer matches the demands of the times. That is, the issues we face are not only concerned with law enforcement efforts but also legal reforms or the making of new laws. Therefore, there are three important functions in the context of law enforcement that require careful attention, namely:<sup>9</sup>

1. Making the law (*the legislation of law or law and rule making*);
2. Socialization, dissemination and even the law cultivation (*socialization and promulgation of law*); and
3. The enforcement of law itself.

All three require the support of the administration of justice (*the administration of law*) that effectively and efficiently run by the government (*executive*) responsible (*accountable*). The investigation conducted by the Police Investigator, is mainly regulated in the Criminal Procedure Code (KUHAP, *Kitab Undang-Undang Hukum Acara Pidana*), the National Police Law and various Police Regulations as the legal basis for conducting the investigation. In an investigation by the Police Investigator, often there is or there is a gap (discrepancy) between the characteristics of the formation of legislation with the characteristics of legal interpretation. The characteristics of legal interpretation may also differ even from the characteristics of legislation. The research approach is normative juridical about the characteristics of legal interpretation associated with the formation of legislation on investigations by Police Investigators, using legal, case, conceptual and comparative methods of criminal law, with deductive and inductive logic. Associated with the characteristics of legal interpretation by the Police Investigator, Legal Positivism or legalistic flow are the main and dominant characteristics which in practice can lead to injustice. Police investigators also use the characteristics of *Sociological Jurisprudence* or legal interpretation Progressive Law, such as the implementation of an alternative solution of criminal matters or the concept of restorative justice.

The police often perform law enforcement with *legalistic* model of *positivism*. The way of thinking used is spelling laws and abiding procedures by ignoring the value of substantive justice, and the practice of abandoning the language of conscience. They distract that their work requires certainty, so the law is used as a *doctor's stethoscope*. Praxis law becomes busier praxis operate schemes law (*rule and logic*) rather than asking whether the function of law in society are already well underway. When that happens, we are actually trapped into the "human for the law", and if law enforcement officers hold to the belief that humans are for the law, then man will always be cultivated or may be forced to enter into the schemes that have been created by law. So come up the assumption that "*justice above the rules and procedures*".<sup>10</sup>

Instead of law enforcement which brings *compassion* empathy, *determination*, and dedication to the humanitarian conscience called progressive law enforcement. Such law enforcement is to be done, the law serves human or humanity, and in practice is humanist. This understanding is a minority of legal praxis in the Police. Positivists in the Police often forget that they

<sup>8</sup> Suteki, *Op.Cit.* p. 57

<sup>9</sup> Lawrence M Friedman, 1997, *The Legal System: A Social Science Perspective*, Russel Sage Foundation, New York, pp. 112-113.

<sup>10</sup> W Friedmann, 1994, *Teori dan Filsafat Hukum: Idealsme Filosofis dan Problem Keadilan*, Raja Grafindo Persada, Jakarta, pp. 33-34; Friedman L. Wolfgang, 1953, *Legal Theory*, Stevens and Sons Ltd, London, pp. 87-89.

have a discretionary right, which can serve as an entry point for progressive law enforcement praxis. If want to look deeper, how to see the law not only with optical laws, the use of optical “deep ecology”, such as a legal perspective that involves all entities of human life (*holistic*) as an integral part of life, and that too is a source of enlightenment in the lawless progressive, not just spelling out the wording and following the procedure. This study became the basis for the wisdom to think, that the law is not aimed at creating legal certainty alone or justice procedures or “*legal justice*”, but “*substantial justice*”. One thing to be adhered to is that the law should not escape its primary function of serving humanity, and whenever the function is disturbed we need to do something creative to overcome it. Police have the right to conduct police discretion.

For example in the case of police discretion, in which that the Police discretion in Indonesia stipulated in Law Number 2 of 2002, Article 18 that emphasized that “*for the public interest, official Indonesian National Police in carrying out the duties and authority to act according to his own judgment*”, it says something that a policeman who carry out their duties in in the midst of a society alone, must be able to take a decision based on its own judgment if disturbances to public order and security or when there is danger to public order and security. Police Discretion may also be construed as the authority of the Police Officer to choose to act or not to act legally or illegally in the performance of his duties. Another example of discretion is to allow a Police to choose between various roles (maintaining order, enforcing law or protecting the community) tactics (enforcing the Traffic Act by patrolling or guarding somewhere) or purpose (countering offenders or advising him) in the performance of his duties. The use of discretionary powers by the Police has recently been recognized as a natural under the authority of the Police.

Furthermore, law enforcement does not comply with the satisfaction of the procedure with the spirit of winning to lose so the police must always choose the maximum action without looking at the context, and involve empathy and dedication as a conscientious human being. Progressive law enforcement remains within the framework of protecting and uplifting people to enjoy the validity of the law, namely certainty, justice and the benefits of creating security and order. The police should not be enslaved by *legalistic positivism* law enforcement model so that the police will lose the opportunity to contribute to the creation of life and praxis of humanist law.

#### D. THE ESTABLISHMENT OF LAWS AND REGULATIONS BASED ON PHILOSOPHICAL VALUES OF PROGRESSIVE LAW ON PROMOTING SUBTANTIVE JUSTICE IN INDONESIA

Maria Farida Indrati Soeprapto stated that the term legislation (legislation, *wetgeving* or *gesetzgebung*) has two different senses, namely:

1. Legislation is the process of forming / forming process of state regulations, both at the central and regional levels;
2. Legislation shall be all state regulations, which are the result of the establishment of regulatory regulations, both at the central and regional levels.

Definition of legislation itself in Indonesian positive law stipulated in Article 1 (2) of Law No. 12 of 2011, which states that “*laws and regulations are written rules established by state agencies or competent authority and generally binding*”. This Law, at Article 7 (1) emphasized types and the hierarchy of legislation consists of:

1. The Constitution of the Republic of Indonesia of 1945;
2. Decision of the People’s Consultative Assembly;
3. Law/Government Regulation in Lieu of Law;
4. Government regulations;
5. Presidential decree;
6. Provincial Regulations; and
7. Regency/City Regulations.

Article 7, paragraph 2, confirms the power of laws and regulations in accordance with the hierarchy as referred to in paragraph (1) Law No. 12 of 2011. This type of legislation covers the rules established by the People’s Consultative Assembly, the People’s Legislative Assembly, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Supreme Audit Board, the Judicial Commission, Bank Indonesia, the Minister, the same body, institution or commission established by Law or Government on the order of the Act, Provincial People’s Legislative Assembly, Governor, Regency/Municipal House of Representatives, Regent/Mayor, Village Head or equivalent.<sup>11</sup>

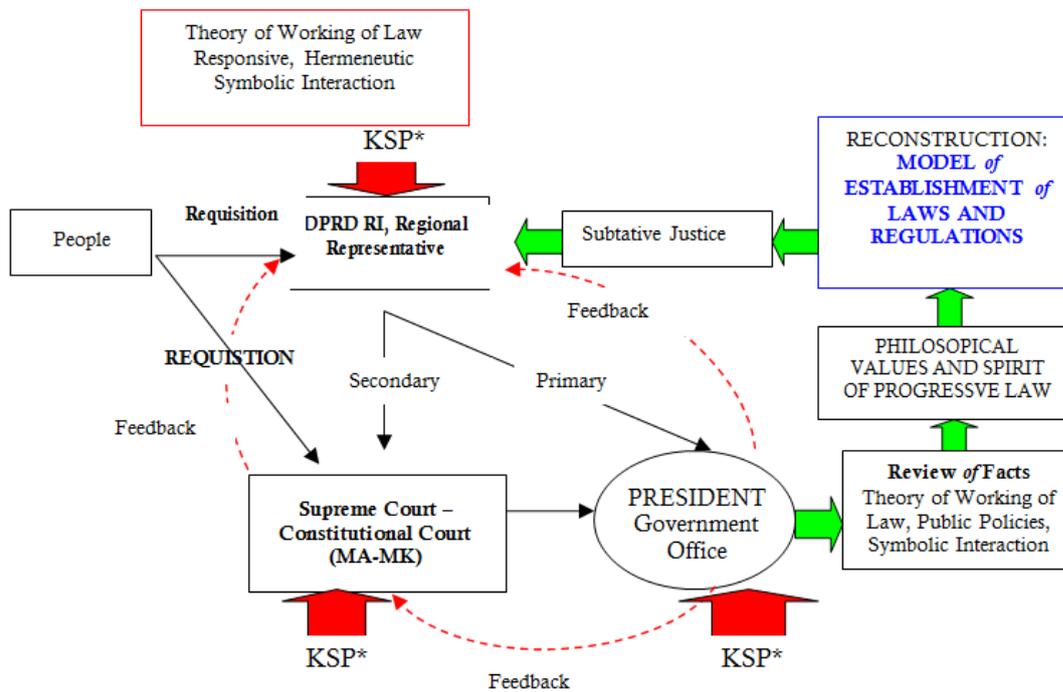
A law allegedly contradictory to the 1945 Constitution of the State of the Republic of Indonesia, the review shall be conducted by the Constitutional Court (MK, *Mahkamah Konstitusi*). Whereas, the legislation under the Act is allegedly contrary to the Act, the review or test are conducted by the Supreme Court (MA, *Mahkamah Agung*).

#### 1. Legislation in the working of Indonesian Law Based Philosophical Value of Progressive Law

Formation of a legislation based on the mechanism of working of law on Chamlis and Seidman’s theory so as to realize prosperity and substantive justice is *the truth justice* (the fair justice, the real justice). The main consideration of substantial justice is no longer searches the formal aspects (*state law*) and *materiil* (*living law*) law but the nature of the legal

<sup>11</sup> Rodiyah, “Aspect Democracy in the Formation of Regional Regulation (Case Study the Formation of Regional Regulation about Education in Perspective Socio-Legal)”, *International Journal of Business, Economics, and Law*, IJBEL Vol. 2 Issue 3, June 2013, ISSN: 2289-1552, pp. 53-54; see also Rodiyah, “Aspek Demokrasi Pembentukan Peraturan Daerah dalam Perspektif Socio-Legal”, *Jurnal Masalah-Masalah Hukum*, Vol. 41 No. 1, January 2012, ISSN: 2086-2695, pp. 67-68; Rodiyah, 2016, *Aspek Demokrasi dalam Pembentukan Peraturan Perundang-Undangan*, BPFH UNNES, Semarang, p. 98.

aspect, namely the exclusion of considerations of **morality, ethics, and, religion**,<sup>12</sup> and Werner F Menski refers to substantive justice as a *perfect justice*.<sup>13</sup> The seeking of welfare by promoting substantive justice in rural communities can only be achieved with the use of *legal pluralism* approach, in which he conceptual framework based on the theory of working of law in society (Chambliss and Seidman) with the following plot:



\*KSP: *Keadilan Substantif Progresif, Progressive Substantial*

## 2. The Principles of Laws and Regulations on Promoting Prospering Substantive Justice Based on Belief in the One Supreme Principle

Regulations recognized as the foundation of the rule of law State, in which the State is subject to the laws. Experts distinguish between the ordinary laws in material sense (*this wet materiele zin*) and legislation in the formal sense (*this wet formele zin*). The meaning of the law in the material sense relates to the law seen in terms of content, matter and substance while the law in the formal sense is seen in terms of form and formation. The distinction both can be seen only in terms of emphasis or angle of vision, that a law can be seen in terms of the material or in terms of its form, which can be seen as two completely separate things.

In general, the contents of Law No. 12 of 2011 can be said to be obligation (*obligatere*) so that all the provisions of this Law should be implemented. If Law Number 12 of 2011 is not implemented then this law can be said not authoritative. Article 5 of Law Number 12 of 2011 states that in establishing laws and regulations should be based on the principles of good legal drafting, which include, clarity of purpose; the appropriate institutional or forming authority; suitability between species, hierarchy, and content material; can be implemented; usefulness and usability; clarity of formulation; and openness.

Article 6 Paragraph (1) of Law Number 12 Year 2011 states that the content of Legislation should reflect the principle of: supervision; humanity; nationalism; kinship; archipelagic insight/*kenusantraan*; unity in diversity; justice; equality of positions in law and government; order and legal certainty; and/or balance, harmony, and harmony. Furthermore, in Article 6 paragraph (2) stated that besides reflect the principle as referred to in paragraph (1), certain laws and regulations may contain principles other corresponding with the legal field of the relevant laws and regulations.

Both Articles contain the formal and material principles that must be implemented in the formation of any laws and regulations in Indonesia. As has been said the contents of Law Number 12 Year 2011 in general can be said to be a necessity so that in every formulation of legislation in Indonesia these principles must be adhered to without any exceptions

Establishing laws and regulations in Indonesia based on Decision of Constitutional Court No. 92/PUU-X/ which stated that several provisions of Law Number 12 of 2011 are contradictory to the Constitution of the Republic of Indonesia of 1945 and has

<sup>12</sup> William J. Chambliss, Robert B. Seidman, 1971, *Law, Order and Power*. Adison-Wesley Publishing Company, Reading, Massachusetts, pp. 103-105; see also Muthiah Alagappa, 1990, *Political Legitimacy in Southeast Asia: The Quest for Moral Authority*, Princeton University Press, Princeton, pp. 76-77

<sup>13</sup> Werner F Menski, 2006, *Comparative Law in the Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, UK, p.245; Rodiyah, 2009, "Model Strategi Kebijakan Otonomi Daerah dalam Percepatan Pengarusutamaan Gender Bidang Pendidikan di Jawa Tengah", *Project Report, DP2M DIKTI*, Jakarta, pp. 86-88.

no binding legal force. This ruling among others, provide a wider opportunity to the Regional Representatives Council (DPD, *Dewan Perwakilan Daerah*) to be involved in the formation of legislation. That is the original formation of the law involves only two state institutions, namely the House of Representatives (DPR, *Dewan Perwakilan Rakyat*) and the President but after the Constitutional Court ruling over the DPD involved as well.

#### E. CONCLUSION

The establishment of laws and regulations that able to respond to the needs of the law of people and substantive justice is in its formative phase based on the philosophical progressive law. Law enforcement by the police should be oriented to the progressive spirit of the law to change the *legalistic positivism oriented*. Even, the Judge not only have an obligation to realize his duty to apply laws and regulations as in the text, but also its application to achieve a justice in society, in the other words, the progressive of Judge will become main point of our law enforcement.

The author suggests some advices that in the context of establishment of laws in Indonesia should be based on progressive law in all steps of its establishment. The law enforcement agencies are encouraged to develop and apply progressive law with the basis of Indonesian societies values, values of Pancasila as a basic norm, and law enforcement applied by Police should be used *sociological jurisprudence* and *progressive law* in legal interpretation.

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