

*Research Article***Progressive Legal Approaches of the Constitutional Justice Reasoning on Judicial Review Cases: Challenges or Opportunities?**

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**ABSTRACT**

The Constitutional Court often uses a positive legal approach, and some of the decisions it produces do not contain substantive justice. In its development, the Constitutional Court began to face a new paradigm as an institution for interpreting the constitution and began to use a progressive legal approach. This study aims to examine the application of a positivist legal approach and the urgency of using the progressive legal approach in the law review process. This research is normative legal research. Based on the results of this research, the Indonesian legal system is designed to accommodate human interests and needs through progressive legislation. The Constitutional Court, through a progressive legal approach, can issue decisions that fulfill substantive justice. This research is used in several cases, such as the heart article decision, ultra petite, and open legal policy. It can be concluded that through a progressive legal approach, it is a challenge for judges to guard the constitution through judicial review and an opportunity to prove that the Constitutional Court is an institution that prioritizes the constitutional rights of the people. In addition, the Constitutional Court can restore its spirit as the guardian of the constitution and democracy.

**Keywords:** Constitutional Court; Judicial Review; Positivism Legal Approaches; Progressive Legal Approaches.

**A. INTRODUCTION**

Indonesia is a country founded on the principle of equality (Mukhlis et al., 2024). The Indonesian legal system often measures justice through the application of laws and regulations (Latifiani et al., 2022). Judicial authority in Indonesia is vested in the Supreme Court and the Constitutional Court (Buana, 2020), with decisions of the Constitutional Court being final and binding (Abadi, 2016). Judges in Indonesia have long adopted the positivist approach established by Hans Kelsen. This legalistic mindset, rooted in

legal positivism, leads judges to interpret laws in a rigid and formalistic manner. The law is often viewed solely as what is written in statutes (das Sollen) (Asmarudin, 2022).

The application of law to patterns of human behavior and social events is intended to create security, maintain order, and achieve justice within society, the nation, and the state. In Indonesia, law enforcement must reflect the principles of justice as grounded in Pancasila (Wijaya, Kusnadi, & Hadi, 2024). However, the realization of justice in society cannot be

separated from the prevailing legal philosophies and the institutions authorized to enforce the law. Law enforcement must safeguard the interests of all citizens (Aswandi & Roisah, 2019). In practice, however, the law in Indonesia is often applied with limited or narrow objectives. The law traditionally pursues three fundamental goals: justice, utility, and legal certainty. Among these, scholars frequently emphasize justice as the core focus. This emphasis includes exploring the concept of justice, how and where it is manifested, and the ongoing debates surrounding its application. In light of these challenges, reform of the judicial system particularly with regard to judicial review has become increasingly necessary in Indonesia.

Judicial power holds a significant position in the development of the legal system (Winarto, 2024). The Constitutional Court, established during the reform era, is expected to play a vital role in advancing legal reform. In adjudicating cases particularly those concerning judicial review constitutional judges must interpret laws not merely as texts, but within their broader social and constitutional contexts. As such, the Constitutional Court is empowered to provide binding and irrevocable interpretations of the law (Setiawan et al., 2024). Two primary factors contributed to the establishment of the Constitutional Court in Indonesia: internal factors, such as the impeachment of President Abdurrahman Wahid, and external influences, including the formation of constitutional courts in several other Asian countries (Hendrianto, 2018).

The Constitutional Court of Indonesia is vested with four key competencies: reviewing laws against the Constitution (judicial review), resolving disputes over the authority of state institutions whose powers are derived from the Constitution, deciding on the dissolution of political parties, and ruling on disputes concerning the results of general elections (Indonesian Constitutions, 1945).

The Constitutional Court holds several important authorities, with judicial review being one of the most impactful, as its decisions affect the broader public. Philosophically, the legal reasoning behind the Court's decisions forms the foundation for adjudicating judicial review cases. In exercising its authority, the Constitutional Court cannot disregard the political, legal, moral, social, and cultural dimensions of the nation. As a judicial institution, it must consistently act as a *guardian of balance* between the Constitution and the diverse interests of society. The public inevitably associates the Court's rulings with both the Constitution and the pursuit of justice, as the Court is responsible for safeguarding constitutional rights and interpreting justice in that context (Marwiyah et al., 2023). The decisions rendered by the Court are therefore expected to be fair and just in fulfilling the ideals of national life and governance. A responsible state is a universal necessity.

To achieve this, a paradigm shift among judges is essential. This transformation should not solely focus on regulatory reform but should emphasize the creativity and responsiveness of

legal actors in implementing the law within appropriate contexts and timelines. Legal actors can make innovative interpretations of existing laws without waiting for legislative revisions. Unjust laws should not prevent legal actors from delivering justice to the public; rather, they should interpret these laws in ways that better serve justice. The Constitutional Court's decisions are final and binding with *erga omnes* effect, meaning they apply universally not just to the parties involved in the case. Therefore, every decision must be deeply rooted in philosophical values and carry the binding force of legal certainty, founded on principles of justice.

The emergence of many laws that deviate from constitutional ideals and disadvantage the people has contributed to the development of judicial review in Indonesia (Lailam & Andrianti, 2023). This concept arose from a need to protect citizens from the misuse of governmental power. Judicial review is anchored in the principles of the rule of law, the separation of powers, and the ongoing struggle for human rights. It serves as a critical mechanism in meeting the demands of a modern and democratic state.

Judicial review can be categorized into centralized and decentralized systems. Hans Kelsen defines centralized judicial review as a system for reviewing legislation that does not directly determine the validity of laws based on specific or concrete facts. In contrast, decentralized judicial review allows multiple courts to interpret the Constitution, not limiting that authority to a single institution. However, the

concepts of centralization and decentralization are challenging to apply within the Indonesian context (Omara, 2017). Judicial review is fundamentally rooted in the principles of constitutional supremacy and constitutionalism (Salman et al., 2018). Despite this, many decisions by the Constitutional Court of Indonesia tend to reflect a positivist legal approach, even though a progressive legal framework is occasionally adopted to achieve substantive justice.

The Constitutional Court of Indonesia primarily reviews abstract legal norms and has yet to accommodate the examination of concrete norms (Lailam & Chakim, 2023). Moreover, the Court often relies on a positivist approach, which is evident in several of its rulings. This method emphasizes the strict application of written laws and legal reasoning to resolve disputes (Tushnet & Arcila, 2020). The aim of such an approach is to ensure legal compliance and uphold justice. Based on this categorization, the Constitutional Court of Indonesia tends to adopt a purely law-based or positivist framework.

In a positivist approach, the Court focuses exclusively on written legal norms. This is illustrated in the Constitutional Court Decision No. 46/PUU-XIV/2016, where the Court confined its considerations to technical aspects and adopted a narrow interpretation of its role as a constitutional examiner under the 1945 Constitution. In doing so, the Court failed to introduce reforms or offer breakthroughs addressing real societal issues. This reflects a broader trend in Indonesia's

judicial system, where justice is often equated with the strict application of laws and regulations. Consequently, judges who rule strictly based on written laws are perceived as fair. However, the Constitutional Court should go beyond mere constitutional review and interpret the law in a way that reflects societal realities and needs. This approach is essential to achieving justice for the people. Ultimately, the purpose of applying the law is not only to ensure security and order but also to uphold justice for all.

Satjipto Rahardjo developed the paradigm of progressive law in response to the bleak state of the legal system in Indonesia (Aulia, 2018). He expressed concern that if the law failed to bring happiness and justice to society, those responsible for enforcing it would be morally troubled (Khalimy et al., 2023). Progressive law is founded on the belief that law should serve as a tool to create justice, prosperity, and human well-being (Wiguna, 2021). It can be said that progressive law aims to provide individuals with the freedom to think critically and act upon the law, allowing it to function more dynamically in serving humanity (Trisusilowaty, Lumbanraja, & Suteki, 2019).

The Constitutional Court has applied the principles of progressive law in several judicial review decisions, including rulings on open legal policy, *ultra petita*, "heart articles," constitutional interpretations, and conditionally unconstitutional provisions. However, in practice, the Court has not consistently adhered to this approach. This

inconsistency is evident in cases involving similar issues that resulted in differing verdicts.

One example of this inconsistency can be seen in Constitutional Court Decision No. 26/PUU-XXII/2024, which addressed the term of office of the Chairperson of a state auxiliary body, the Broadcasting Commission. In this case, the Court rejected the extension of the Chairperson's term. However, in a similar case concerning the head of another state auxiliary body, the Corruption Eradication Commission, the Constitutional Court ruled differently. In Decision No. 112/PUU-XX/2022, the Court granted the extension of the official's term of office. These conflicting decisions indicate that the Constitutional Court does not consistently apply a progressive legal approach, which may undermine efforts to achieve substantive justice.

Based on these facts, research examining the implementation of a progressive legal approach by the Constitutional Court in judicial review decisions is urgently needed. This study aims to identify the challenges and opportunities faced by the Constitutional Court in applying a progressive legal approach. The results are expected to clarify the reasons behind the Court's inconsistency in utilizing this approach.

Several studies have addressed the application of progressive law. One such study is by Martitah, titled *Progressiveness of Constitutional Judges in Making Decisions (Analysis of the Existence of Constitutional Court Decisions of a Positive Legislature Nature)*. Her research found that the Constitutional Court, in

several decisions, has not only exercised negative legislative powers but also implemented positive legislation. These rulings were grounded in legal, philosophical, and sociological considerations that go beyond literal legal interpretation. The law was viewed not solely as a textual norm, but as a means to promote societal welfare in its contextual application. In this sense, law enforcement by the Constitutional Court can be categorized as progressive. What distinguishes the present article is its focus on the "heart" articles and *ultra petita* rulings (Martitah, 2012).

Another relevant study was conducted by Deni Nuryadi, titled *Progressive Legal Theory and Its Implementation in Indonesia*. He concluded that law and legislation do not exist in isolation, nor do they possess absolute authority. If a nation's legal life is assessed solely through the lens of statutory law, the resulting analysis will be incomplete. A true picture of legal reality requires observing everyday legal behavior. Progressive law addresses this shortcoming by encouraging legal practitioners to interpret legal provisions in a way that serves the public interest and national values. Law is created not only to provide certainty but also to ensure human happiness. Therefore, progressive law must engage with other disciplines such as sociology and anthropology. It should not remain detached in an "ivory tower" but must interact with society to solve complex legal problems. Unlike Nuryadi's research, this article highlights specific Constitutional Court decisions, especially those

involving "heart" and *ultra petita* articles, rather than merely advocating for the general application of progressive law in judicial decisions (Nuryadi, 2016).

Further research by Emy Hajar Abra and Rofi Wahanisa investigated the Constitutional Court's *ultra petita* decisions, focusing on rulings concerning water resources and the Electricity Law. Their findings emphasized the need for the Court to adopt a more progressive and responsive stance in addressing community issues, particularly those related to basic economic needs (Abra & Wahanisa, 2020). Similarly, Mahrus Ali argued that progressive legal interpretation requires judges to move beyond textualism and instead prioritize the substance of justice (Ali, 2010). Sasmito (2011) also analyzed the application of a progressive legal approach by the Constitutional Court in issuing *ultra petita* decisions.

What sets this study apart from previous ones is its broader scope. It does not solely examine *ultra petita* rulings but also explores both the strengths and weaknesses of the progressive legal approach in comparison to the positivist legal model. Furthermore, this study analyzes Constitutional Court decisions that follow both progressive and positivist legal approaches. As a result, the findings will highlight the Constitutional Court's urgent need to consistently apply a progressive legal approach in order to promote substantive justice.

## B. RESEARCH METHODS

This research is a normative legal study employing statutory, conceptual, and case approaches. The statutory approach involves analyzing various legal provisions related to constitutional judicial practices. The study relies on secondary data obtained through library research. The secondary data includes legislation, Constitutional Court decisions, and legal doctrines found in scholarly articles relevant to the research topic. The data is analyzed qualitatively and presented in a narrative form.

## C. RESULTS AND DISCUSSION

### 1. Progressive vs. Positive Legal Approaches

Judges, as enforcers of justice, are required to decide cases fairly. Tracey E. George and Lee Epstein present two decision-making models used by courts: the legal model and the extra-legal model. The legal model posits that judges base their decisions on established legal rules and doctrines. Within this model, judges are seen as constrained decision-makers whose rulings must adhere to legal doctrine and prior judicial precedents (jurisprudence). This systematic decision-making process is often referred to as the positivist model or mechanical jurisprudence (Omara, 2017).

Empirically, legal positivism is associated with the idea that law is a matter of social fact (Priel, 2024). From the positivist perspective, law is understood as an autonomous, rational, consistent, and coherent system of norms. The primary source of law is legislation enacted through legally established procedures (Tuori,

2016). Hart further asserts that legal positivism draws a clear distinction between law and morality (Plunkett & Wodak, 2022).

Hans Kelsen viewed law as a hierarchical system of norms. A norm, in this context, is a prescriptive statement that mandates behavior. Legal interpretation, according to Kelsen, deals with non-empirical norms, which have a structured hierarchy that constrains legal understanding. A defining characteristic of Kelsen's theory is the element of coercion. Moreover, his theory proposes a structured normative system in which norms are arranged in a hierarchy, culminating in the *Grundnorm* or basic norm at the apex (Romlah, Zavira, & Muafa, 2020).

The existence of positive law can experience setbacks as society and the times evolve. These setbacks may result from shifts in societal values or from the lack of optimal philosophical reflection by those who draft legal norms (Romlah, Zavira, & Muafa, 2020). Moreover, an exclusively positivist legal approach can isolate law from interdisciplinary perspectives, thereby limiting its responsiveness to broader societal needs (Postema, 2021). Such isolation hinders the progressive interpretation of legal principles embedded in the ideology of Pancasila and the constitutional values of Indonesia (Arizona, 2019).

Progressive law aims to fulfill a singular yet profound objective: to serve human interests and needs. It presents a noble vision that positions law as an instrument to realize justice and

societal welfare. Accordingly, it is essential that judges are not confined strictly to the textual interpretation of legal provisions. Instead, they must exercise judicial discretion guided by the broader interests and well-being of the community.

The progressive legal approach, as formulated in the progressive legal theory pioneered by Satjipto Rahardjo, emerged in response to the perceived failure of legal reform in Indonesia (Aulia et al., 2023). This theory views law not as an autonomous or supreme institution but as a means to serve humanity. The focus shifts from the institutional function of law to its societal relevance and impact (Khalimy et al., 2023). Legal interpretation, therefore, should not rely solely on doctrinal reasoning but must also incorporate an understanding of social realities (Aulia et al., 2023). Progressive legal theory underscores the continuous pursuit of truth and the strengthening of law in service to humanity (Tan & Sudirman, 2020).

According to Satjipto Rahardjo's theory, justice cannot be achieved merely through formal logical processes. Progressive law posits that law does not exist for its own sake but must serve objectives beyond itself (Rodiyah, 2017). There are two key dimensions of progressive law enforcement: (1) the human dimension, emphasizing the role of individuals as progressive agents in the legal system, and (2) the intellectual revival among scholars, academics, and legal theorists in Indonesia to support transformative legal thinking (Rodiyah, 2017).

Progressive law, which shares a similar logic with Legal Realism, views and evaluates the law based on the social goals it aims to achieve and the consequences it produces. From an ethical perspective, this aligns with teleological ethics, which emphasizes outcomes rather than rigid adherence to rules. In this teleological framework, legal rules are important, but they are not the ultimate benchmark—goals and consequences take precedence. The central question in teleological ethics is whether an action stems from a good purpose and whether it produces positive outcomes.

From the perspective of progressive law, legal actors must be responsive to fundamental issues in human relationships, including forms of oppression rooted in political, economic, and socio-cultural structures. In this context, progressive law must serve as an emancipatory institution, liberating individuals from systemic injustices.

The characteristics of progressive law can be identified as follows: 1. Law exists for humans, not the other way around; 2. It rejects preserving the status quo within the legal system; 3. It anticipates and addresses obstacles in applying written law; 4. It places significant emphasis on human behavior in legal processes (Ali, 2010).

The scope of progressivism in legal thought can be outlined in several key aspects: First, progressive law must encourage the development of human potential, based on the belief that human beings inherently possess various positive qualities.

Second, progressive law is a legal concept grounded in high moral standards, aiming to realize justice, prosperity, and human happiness. Its moral foundation makes it sensitive to societal changes and the real-life implications of law. When harmful conditions arise, progressive law must boldly intervene to liberate people from those conditions, while also providing protection and ensuring that the state adheres to legal standards. Third, when the status quo fosters decay, corruption, or harms the public interest, progressive law must oppose it. It must embody boldness and innovation in seeking the right strategies, ideas, principles, and actions to bring about meaningful change.

## **2. Why Do Constitutional Court Judges Need a Progressive Legal Approach When Making Decisions?**

A strong and independent judiciary is essential to uphold and ensure the proper implementation of the rule of law as envisioned in a state governed by law. Therefore, in establishing the rule of law, judges must be independent and free from any interference, whether internal or external. This independence enables judges to render fair and impartial decisions while being responsive to societal developments and adopting a progressive paradigm to discover laws that can generate new values in people's lives.

Some examples of Constitutional Court decisions that implicitly apply a positivist approach include Decision Number 46/PUU-XIV/2016. In this case, the Constitutional Court

rejected the reform proposal submitted by the petitioner concerning Article 284 paragraphs (1), (2), (3), (4), and (5), as well as Articles 285 and 292 of the Criminal Code (Indonesian Constitutional Court, 2016). The Court deliberately refrained from acting as a positive legislator by expanding the scope of criminal acts. However, it also failed to consider the issue from other perspectives, such as religious and social norms that prevail in society. As a result, the Court interpreted the law strictly based on legal texts and doctrines, without incorporating the broader societal norms that evolve and exist within the community.

The Constitutional Court's reliance on a positivist approach is also evident in Decision Number 26/PUU-XXII/2024. In this case, the Court rejected the judicial review of Article 9 paragraph (3) of Law Number 32 of 2002 concerning Broadcasting. This article regulates the term of office of the Chairperson, Vice Chairperson, and members of both the Central and Regional Broadcasting Commissions. The Court reasoned that determining the term of office for state institutions falls within the authority of the legislature. Furthermore, the Court held that differences in the term of office of the Broadcasting Commission compared to other state institutions do not constitute a constitutional issue (Indonesian Constitutional Court, 2024).

In this decision, the Constitutional Court focused solely on the constitutionality of the norm, without considering broader contextual factors. Ideally, the Court should have examined the



institutional design of the Broadcasting Commission as a state auxiliary body equivalent to other institutions such as the Corruption Eradication Commission, the Indonesian Child Protection Commission, and other similar bodies. Given this equivalence, the terms of office for the Chairperson, Vice Chairperson, and members of the Broadcasting Commission should be aligned with the principle of justice. The disparity in terms of office among these institutions undermines principles of justice, rationality, and non-discrimination. However, the Court confined its analysis to a narrow textual interpretation, disregarding these broader justice-based considerations.

This ruling exemplifies a decision grounded in the legal positivist approach, particularly through the application of the "open legal policy" doctrine. The Court granted the legislature the discretion to regulate the matter through statutory provisions (Al-Fatih, 2021). In Decision Number 26/PUU-XXII/2024, the Constitutional Court affirmed that determining the term of office for the leadership of the Broadcasting Commission falls within the legislative domain, thus categorizing it as a matter of open legal policy. By strictly adhering to the textual provisions of the law, the Court adopted a positivist legal approach. Consequently, the ruling resulted in unequal treatment among state institutions, raising concerns about fairness and consistency.

Indonesia distinguishes between constitutional state organs and state auxiliary organs (Iswandi & Prasetyoningsih, 2020a).

Constitutional state organs are institutions established directly by the 1945 Constitution, whereas state auxiliary organs are institutions established under statutory law or regulatory instruments (Iswandi & Prasetyoningsih, 2020b). State auxiliary organs are further classified into those formed through statutes and those established through regulations subordinate to statutes (Iswandi & Prasetyoningsih, 2020a). The Indonesian Broadcasting Commission is categorized as a state auxiliary organ and is equivalent in status to other institutions such as the Corruption Eradication Commission, the National Human Rights Commission, the Witness and Victim Protection Agency, and the Business Competition Supervisory Commission (Indonesian Constitutional Court, 2024; Iswandi & Prasetyoningsih, 2020a). All of these institutions are established by law and hold constitutional significance (Indonesian Constitutional Court, 2024).

Although the Broadcasting Commission is an institution equivalent to the Corruption Eradication Commission, the Constitutional Court has treated the terms of office of their respective leaders differently. The Court rejected the extension of the Chairperson of the Broadcasting Commission's term from three years to five years (Indonesian Constitutional Court, 2024). In contrast, in Decision Number 112/PUU-XX/2022, the Constitutional Court accepted the extension of the Corruption Eradication Commission Chairperson's term from four years to five years (Indonesian Constitutional Court, 2022). The

Court reasoned that the Corruption Eradication Commission, as a state auxiliary organ of constitutional significance, deserves parity with other institutions governed by similar provisions (Indonesian Constitutional Court, 2022).

These two Constitutional Court decisions addressed similar issues but applied different approaches, resulting in inconsistent outcomes. This discrepancy highlights that the Court's reliance on a positivist legal approach does not always deliver justice. In contrast, Constitutional Court decisions based on progressive legal approaches tend to provide a more equitable outcome for state auxiliary organs.

As previously discussed, the Indonesian Constitutional Court's positivist rulings have contributed to public dissatisfaction in the pursuit of justice. By relying solely on a positivist framework, the Court fails to account for other critical dimensions of societal life. Ideally, the Court should employ both positivist and progressive legal approaches, as both serve as foundational methods for analyzing and deciding judicial review cases (Andriawan, 2022). Positive laws are products of their time and may not always reflect contemporary social needs (Romlah, Zavira, & Muafa, 2020).

Therefore, judges must interpret and apply the law in a way that internalizes the values embedded within legal texts and upholds justice (Satriawan et al., 2022). In Indonesia, the progressive legal approach, pioneered by Satjipto Rahardjo, has been incorporated into several Constitutional Court decisions. However, not all

decisions have embraced this approach, underscoring the need for greater consistency in adopting progressive legal reasoning.

The progressive paradigm is a groundbreaking concept in law enforcement, particularly for judges, encouraging them not to be constrained by legal positivism—which has often resulted in injustice for those seeking fairness in the legal system. Law enforcement is not merely a mechanical process but a series of actions aimed at realizing the abstract values, ideas, and principles that constitute the objectives of the law.

Satjipto Rahardjo further emphasized that the law and the judiciary should not be perceived as machines or robots, but as institutions that guide and serve society creatively. This function can be fulfilled only if the law allows room for interpretation. Interpretation, in this context, is not limited to reading the law through the lens of legal logic, but also includes reading and understanding the societal realities. The convergence of these two readings—text and context—gives rise to creativity, innovation, and progressivism. Hence, legal discovery is inherently a creative endeavor, and it is within this interpretive space that progressive thought emerges.

There are at least two essential and fundamental elements in the rules of progressive legal discovery: the formulation of new legal norms in response to legal gaps, and the incorporation of a vision for legal reform in judicial decisions. Judges must have the courage to

search for, identify, and even create new legal norms when existing laws are inadequate or entirely absent. Moreover, the new legal norms developed should not only address the immediate case at hand but also offer constructive recommendations for future legal reforms (*ius constituendum*).

In addressing cases involving open legal policy, the Constitutional Court has demonstrated a progressive legal approach by stepping beyond its traditional role as a negative legislator (Satriawan & Lailam, 2019). This is evident in Constitutional Court Decisions Number 90/PUU-XXI/2023 and Number 121/PUU-XX/2022. Decision Number 90/PUU-XXI/2023 involved a judicial review of Article 169 letter (q) of Law Number 7 of 2017 on General Elections (Indonesian Constitutional Court, 2023), which sets the minimum age requirement for presidential and vice-presidential candidates. The petitioner requested a revision of the article's wording to: "at least 40 years old or experienced as a Regional Head."

Although the issue falls under the domain of legislative authority, the Constitutional Court declared itself competent and proceeded to rule on the matter. The Court argued that it must address the legal needs of society by continuously interpreting the Constitution in light of evolving societal contexts. The high number of judicial review petitions related to Law Number 7 of 2017 served as a signal for legislators to reconsider the content of the law. Despite the issue being an open legal policy matter, the

Constitutional Court stepped beyond its negative legislator role and granted the petition. As a result, individuals under the age of 40 who have served as regional heads are now eligible to run for president or vice president. This decision reflects the Court's progressive approach, which aligns with justice and societal needs.

Another example of the Court's progressive stance can be found in Decision Number 60/PUU-XXII/2024. This ruling permits political parties without seats in the Regional House of Representatives (DPRD) to nominate candidate pairs for regional elections. The decision underscores the importance of democracy by enhancing public participation in political decision-making. The judges adopted a progressive legal approach to broaden opportunities for public engagement in shaping local leadership. Additionally, the decision altered the threshold for nominating regional heads, deviating from Article 40 of Law Number 10 of 2016 on Regional Elections. The new provision bases the nomination threshold on the population size rather than the previously fixed requirement of 20% of DPRD seats or 25% of votes nationally. This progressive ruling marks a significant reform, especially as Indonesia prepares for its first simultaneous regional and national elections in 2024.

The Constitutional Court has also applied progressive legal approaches in *ultra petita* rulings and in reviewing central provisions ("heart articles") of legislation. An *ultra petita* decision is one that grants more than what is requested by

the petitioner (Ahmad, Wantu, & Ismail, 2023). Such decisions have significantly influenced legal reform in Indonesia (Armia, 2015). The Court has issued *ultra petita* rulings in several landmark cases, including Decision Numbers 001-021-022/PUU-I/2003, 007/PUU-III/2005, 003/PUU-IV/2006, 005/PUU-IV/2006, 006/PUU-IV/2006, 012-016-019/PUU-IV/2006, and 121/PUU-XX/2022. These rulings reflect the Court's growing willingness to take a more active, responsive, and progressive role in addressing legal challenges within society (Abra & Wahanisa, 2020).

Each of the aforementioned *ultra petita* decisions will be explained in turn. Decision No. 001-021-022/PUU-I/2003 involved a judicial review of Law No. 20 of 2002 concerning Electricity. This decision is considered *ultra petita* because the Constitutional Court granted more than what was requested by the applicant. In its ruling, the Court annulled the entirety of Law No. 20 of 2002, even though the applicant had only requested the review of Article 16, Article 17 paragraph (3), and Article 68 of the law (Indonesian Constitutional Court, 2003). In its legal reasoning, the Court stated that the provisions challenged by the applicant constituted the "core" or "essential" articles of the law. Therefore, if those core articles were found to be inconsistent with the 1945 Constitution of the Republic of Indonesia, the entire statute would lose its legal force.

The next *ultra petita* decision is Constitutional Court Decision Number 007/PUU-

III/2005. This case involved a judicial review of Article 5 paragraph (1), Article 5 paragraph (3), Article 5 paragraph (4), and Article 52 of Law Number 40 of 2004 concerning the National Social Security System. The Constitutional Court rejected the petition for the review of Article 5 paragraph (1) and Article 52 of the law *in question* (Indonesian Constitutional Court, 2005). However, the Court also ruled that Article 5 paragraph (2) of the same law was inconsistent with the 1945 Constitution of the Republic of Indonesia and declared that it had no binding legal force, even though this provision was not explicitly requested for review by the petitioners. In its legal reasoning, the Court stated that, although not formally challenged, Article 5 paragraph (2) formed an inseparable unit with Article 5 paragraph (3). Therefore, if it were left intact, it could result in multiple interpretations and lead to legal uncertainty.

Furthermore, Decision Number 003/PUU-IV/2006 also constitutes an *ultra petita* ruling. In this case, the applicant submitted a request for a judicial review of the words "can" and "probation" in Article 2 paragraph (1) of Law Number 31 of 1999 concerning the Eradication of Corruption. Although the Constitutional Court rejected the main petition, it nonetheless declared that the Explanation of Article 2 paragraph (1) of the law was inconsistent with Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. This part of the decision went beyond the scope of the petitioner's request. The Court reasoned that the explanatory section of a statute

should not introduce new legal norms, as it is intended solely to clarify the provisions set forth in the main body of the law. However, the Court did not provide a detailed justification for why it issued an *ultra petita* decision in this case.

The Constitutional Court's Decision No. 005/PUU-IV/2006 is categorized as an *ultra petita* ruling. The case involved the judicial review of Law Number 22 of 2004 concerning the Judicial Commission and Law Number 4 of 2004 concerning Judicial Power. The main issue raised in the petition was the lack of clarity regarding the mechanism for supervising judges as stipulated in Law Number 22. However, in its ruling, the Constitutional Court went beyond the petitioners' claims by declaring that all provisions related to the Judicial Commission's authority to supervise Constitutional Court justices were in contradiction with the 1945 Constitution of the Republic of Indonesia, thereby significantly affecting the Commission's authority.

Similarly, the Constitutional Court's Decision No. 006/PUU-IV/2006 annulled Law Number 27 of 2004 concerning the Truth and Reconciliation Commission. In their petition, the applicants requested a judicial review of only Article 1 point 9, Article 27, and Article 44 of the law. The Court ruled that Article 27 was unconstitutional. However, it reasoned that this article was central to the law's overall implementation. Consequently, the Court concluded that the unconstitutionality of Article 27 rendered the entire law unenforceable, and

therefore declared that Law Number 27 of 2004 no longer had binding legal force.

The next *ultra petita* decision is Decision Number 012-016-019/PUU-IV/2006, which involved the judicial review of Law Number 30 of 2002 concerning the Corruption Eradication Commission. In this case, the Constitutional Court ruled that Article 53 of the *a quo* law was inconsistent with the 1945 Constitution of the Republic of Indonesia. However, the Court granted a period of up to three years for the implementation of its decision.

Another *ultra petita* decision is Decision Number 121/PUU-XX/2022, which involved the judicial review of Law Number 7 of 2020, the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court. In addition to ruling on the retirement age of Constitutional Court clerks, as requested by the petitioner, the Court also addressed the institutional status of the Expert Assistants to Constitutional Justices. The Constitutional Court reasoned that the matter was closely related to the petition and, therefore, provided legal certainty by affirming the institutionalization of Expert Assistants. These examples of *ultra petita* decisions reflect the Constitutional Court's adoption of a progressive legal approach. The Court made a legal breakthrough by delivering substantive justice to citizens affected by oppressive legislation, demonstrating its commitment not only to the letter of the law but also to the broader needs of society.

Secondly, with regard to “heart article” decisions, the Constitutional Court may annul an entire law if the articles being reviewed form the core of the legislation. This, too, exemplifies a progressive legal approach. For instance, in Decision Number 001-021-022/PUU-I/2003, the Court ruled that Article 16, Article 17 paragraph (3), and Article 68 of Law Number 20 of 2002 concerning unbundling and competition in the electricity sector were unconstitutional (Indonesian Constitutional Court, 2003). Since these provisions formed the essential core or “heart” of the law, their invalidation resulted in the entire law losing legal force.

The Constitutional Court’s Decision No. 006/PUU-IV/2006 is also based on the concept of a *heart article*. Article 27 of Law Number 27 of 2004 concerning the Truth and Reconciliation Commission was deemed by the Court to be central to the operationalization of the law. The Court declared that the article was inconsistent with the 1945 Constitution of the Republic of Indonesia, thereby rendering the entire Law Number 27 of 2004 invalid and without binding legal force.

Another decision involving a *heart article* is the Constitutional Court’s Decision No. 85/PUU-XI/2013, which reviewed Law Number 7 of 2004 concerning Water Resources. The petitioners challenged several provisions, including Articles 6, 7, 8, 9, 10, 26, 29(2), 29(5), 45, 46, 48(1), 49(1), 80, 91, 92(1), 92(2), and 92(3). The Constitutional Court determined that these articles formed the core of Law Number 7 of 2004. As a

result, the Court ruled that the law was incompatible with the 1945 Constitution, and therefore, null and void. To prevent a legal vacuum, the Court reinstated Law Number 11 of 1974 concerning Irrigation.

Some decisions that incorporate *ultra petita* elements and address *heart articles* demonstrate that the Constitutional Court applies a progressive legal approach, one that upholds legal certainty, utility, and justice. This stands in contrast to decisions that do not employ a progressive approach, in which the Court adheres strictly to textual interpretations of the law without considering the deeper normative values embedded within legal provisions. As a result, such formalist or positivist rulings often fail to deliver justice, utility, and certainty outcomes that are typically present when a progressive legal approach is applied (Trihastuti, Putri, & Widjanarko, 2020).

Verdicts grounded in progressive legal reasoning reflect the statesmanship and wisdom of constitutional judges. Legal reform is achieved when each decision embodies the values of justice and usefulness, while simultaneously striving to ensure legal certainty. Therefore, it is imperative for constitutional judges to adopt a progressive legal approach in order to fulfill their constitutional mandate to serve justice, promote the public good, and uphold the rule of law.

### **3. Progressive Legal Approaches: Problems, Challenges, or Opportunities?**

As a state organ within the realm of judicial power, the Constitutional Court must consistently

function as the “*guardian of the constitution*”, balancing various constitutional interests to ensure that its decisions are fair, just, and uphold the integrity of the nation and state. In the process of judicial review, a paradigm shift is required among judges. The emphasis should no longer rest solely on statutory regulations; instead, it should focus on the capacity of legal actors to actualize the law in accordance with the context, time, and societal needs. Legal actors are not merely passive interpreters of static norms—they have the ability to reinterpret existing laws, thereby transforming their meaning and application without waiting for formal legislative amendments.

A strong and independent judiciary is essential to uphold and guarantee the implementation of the rule of law. Therefore, in establishing a true rule-of-law system, judges must operate independently and free from any external influence, enabling them to render fair and progressive judgments that align with societal development. By adopting a progressive legal paradigm, judges can contribute to the creation of laws that reflect evolving social values and meet the needs of the people.

To achieve this, judges must not only be well-versed in existing legal norms but must also actively engage with the dynamics of societal change, while remaining anchored to foundational legal values. In such a context, legal institutions—particularly the panel of judges as representatives of judicial authority—play a crucial role in driving meaningful social transformation in the country.

The foundation of progressive law lies in a shift from a purely formalistic system to one that is more humane. As such, the judicial process should not become burdensome or devoid of meaningful purpose. Instead, a judge's expertise, knowledge, insight, and logic should form the foundation of adjudication. Judges must refrain from relying solely on legal texts when deciding cases. The interests and needs of the community should be their highest priority, especially when exercising judicial independence. Progressive legal findings made by judges demonstrate a departure from the confines of legal positivism and break away from the long-standing paradigm in Indonesia that views judges merely as the “mouthpiece of the law.” This progressive legal innovation empowers judges to go beyond the text of the law and make substantive legal breakthroughs, even when existing laws may appear unjust. As a result, judges can deliver not only procedural justice, but also substantial justice.

Progressive legal theory evaluates law based on its social purposes and the consequences of its application. From an ethical perspective, this aligns with *teleological ethics*, which prioritizes goals and outcomes over strict adherence to rules, while still recognizing the importance of those rules. According to this view, law enforcement must be responsive to key issues in human relationships, particularly the suffering caused by oppressive structures—whether political, economic, or socio-cultural. In such contexts, progressive law functions as an

emancipatory or liberating force. The progressive paradigm is a transformative concept intended to support legal practitioners, especially judges, in freeing themselves from the constraints of rigid legal positivism.

Within the framework of progressive law, courts and legal institutions should be seen as creative forces capable of leading and supporting society. To fulfill this role, the law must be allowed interpretive flexibility. One key task in guiding and serving the public is interpretation, which involves understanding both the logical framework of legal rules and the lived realities of society. Creativity, innovation, and progress arise from this intersection. Hence, legal interpretation becomes a process of discovery—defined as a creative endeavor.

There are at least two essential principles underlying progressive legal discovery: (1) the creation of new legal norms to address legal gaps and (2) the formulation of legal reform goals as suggested through judicial decisions. Judges, upon recognizing the insufficiency or absence of applicable law, must be courageous in formulating new legal principles. These new norms should not only resolve the specific case at hand but also offer forward-looking recommendations for legal reform (*ius constituendum*). Constitutional judges in Indonesia have demonstrated such courage by going beyond statutory limitations to address injustices—particularly for justice seekers and marginalized populations—thus fulfilling the ideal of delivering justice for all (Marilang, 2017). Such

rulings are now recognized as manifestations of progressive law.

Judges in Indonesia are encouraged to embrace a progressive legal approach. In other countries, such as the United States, legal thought has evolved from classical doctrines toward progressive interpretations (Hovenkamp, 2015). There, the term "progressive" is often used in contrast to conservatism and supports ideals such as social democracy, the welfare state, and affirmative action for minority groups (Sultany, 2012). Nonetheless, implementing progressive law is not an immediate process (Gitiri, 2020). Every case must still be resolved through applicable procedural laws and grounded in rational judicial reasoning using established methods of constitutional interpretation. To ensure constitutional justice, the Constitutional Court frequently uses conditional constitutional and conditionally unconstitutional rulings. A provision may be deemed conditionally constitutional if its application fails to guarantee constitutional rights. Constitutional judicial review ultimately hinges on whether a legal norm is in conflict with the Constitution. Furthermore, the Court acknowledges that ultra-petita rulings and decisions based on *heart articles* are occasionally necessary to achieve true constitutional justice.

The use of a progressive approach by the Constitutional Court in adjudicating judicial review cases can indeed be seen as an opportunity to restore its role and dignity as the guardian of the Constitution and democracy. The growing number of decisions issued through a purely positivist



approach has often failed to deliver substantive justice to the people. Therefore, a progressive legal approach should serve as a momentum for constitutional judges to maintain consistency and provide justice by issuing rulings that genuinely uphold democratic values and the spirit of the Constitution.

"The people" are sovereign—this is the foundational principle embraced by most modern constitutions worldwide. The sovereignty of the people, as enshrined in the 1945 Constitution, must be protected by the Constitutional Court through its judicial review decisions. Thus, in issuing such rulings, the Court must go beyond a purely textual interpretation and instead adopt a contextual approach. This represents an ongoing challenge for constitutional judges in their efforts to actualize the principle of popular sovereignty.

#### D. CONCLUSION

The Indonesian Constitutional Court, in interpreting the Constitution, often relies on a positivist legal approach. As a result, the public does not always experience the benefits of substantive justice. Therefore, a progressive legal approach is necessary. Progressive law exists within Indonesia's legal system to serve human interests and needs. It offers a noble vision of using the law as a tool to build a fair and just society.

The progressive legal approach views law not merely as a set of texts but as part of a broader context, with the aim of achieving substantive justice. The Constitutional Court has

implemented this approach in several of its decisions, particularly in cases involving *ultra petita* rulings and "heart article" annulments. In addition, the progressive approach has also been applied in decisions related to open legal policy.

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