

## The Fragility of Meaningful Law Enforcement in Indonesia Viewed from A Progressive Law Perspective

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### Abstract

Through a holistic approach to the conceptualization of progressive law, this research aims to analyze and provide a comprehensive view of the fragile meaning of law in Indonesia after the MKMK decision Number 2/MKMK/L/11/2023 as viewed from progressive law. This research is normative or dogmatic legal research which refers to two data sources: primary and secondary. The primary source refers to MKMK Decision Number 2/MKMK/L/11/2023. Furthermore, secondary sources include law books, law research results, and the views of experts, especially the Progressive Law paradigm by Prof. Satjipto Rahardjo. The research results show that MKMK Decision Number 02/MKMK/L/11/2023 marks the point of fragility of the meaning of law in Indonesia based on violations of the Constitutional Court Judge's Code of Ethics and Behavior by Anwar Usman as Chief Judge of the Constitutional Court at the time of ratification of Constitutional Court Decision Number 90/PUU -XXI/2023 which is full of personal interests. The "nemo judex in causa sua" principle in law indicates that a judge cannot handle cases involving his interest. That is important to revitalize the meaning of law by promoting progressive law that prioritizes morality to minimize ethical defects in the rule of law in the future.

**Keywords:** Ethical violations; Justice; Principles of justice; Progressive law

### 1. Introduction

*Equum et bonum est lex legum* (everything that is just and good is the real law). *Lex rejicitsuperflua, pugnancia, incongrua* (nonconformity and impropriety are rejected by law). Indeed, law realization always proceeds in a never-ending dynamic [1]. It is manifested in progressive law, which in its implementation requires the courage of legal actors to find the deepest substance of the law to civilize the nation [2]. Progressive law does not absolute the law in a final way but is very much determined by the spirit of the law to serve humans [3]. Satjipto Rahardjo's idea in his writing that implementing the law is not just about the rigidity of the rules "according to the letter," [4] but must strive for law enforcement with spiritual intelligence; filled with strong determination, a deep sense of empathy, sincere dedication, commitment to eliminating people's suffering, and the courage to seek unconventional law solutions.

As a country that has declared itself a law state, Indonesia has significant responsibilities, as reflected in the preamble of the 1945 Constitution of the Republic of Indonesia, which emphasizes "advancing general welfare and making the nation's life more intelligent" [5]. The rule of law carries the burden of guiding the nation toward real happiness in life [6]. In this context, the Indonesian state administration includes a

crucial institution, the Constitutional Court (MK), which holds responsibility for upholding constitutional principles [7]. As the guardian of the constitution [8], the MK plays a central role in the democratization process in Indonesia [9]. This role is further reinforced by its authority as the highest interpreter of the constitution, particularly in reviewing the constitutionality of laws concerning the 1945 Constitution of the Republic of Indonesia [10], [11]. The Constitutional Court is recognized as “the sole and the highest interpreter of the constitution,” ensuring that laws align with constitutional principles [12].

In implementing these responsibilities, constitutional judges with skills in the context of state administration are certainly needed by focusing on strengthening national values so that they are always at the level of the constitution [13]. An assessment of the judiciary’s image can be seen through the decisions issued by the judiciary which is considered the last line in maintaining law compliance and justice. The main thing is that judge’s ethics in deciding on a case must reflect integrity, competence and conformity of behavior with the rules established following law procedures [14]. Referring to The Bangalore Principles of Judicial Conduct 2002 concerning the Code of Ethics and Behavior of Constitutional Judges, it must be under the Indonesian judicial legal system and the ethics of national life as stated in MPR Decree Number VI/MPR/2001. Specifically, constitutional judge’s behavior, known as (*Sapta Karsa Hutama*), is enshrined in the Constitutional Court Regulation of the Republic of Indonesia Number 09/PMK/2006 [14].

However, since modern law accommodates the role of administration in law, the search for justice has become increasingly complicated [8]. Furthermore, in looking at Indonesia today as a country based on law, it is at the nadir of a crisis experiencing law decline. Of course, the damage and decline experienced boils down to procedural games determining “is the court a place to seek victory or justice?” Cotterell said in [15] that law brings justice, benefit, and certainty. However, what happens is that the law does not reflect its basic function in jurisprudential analysis and only looks rigidly at legal proceduralism [16]. For example, it can be seen in the Constitutional Court decision: 90/PUU-XXI/2023 which caused turbulence in legal dynamics and was considered full of family interests [28]. In line with this, based on the Decision of the Honorary Council of the Constitutional Court (MKMK) Number 2/MKMK/L/11/2023, it was confirmed that Anwar Usman, Chairman of the Constitutional Court, was firmly proven to have violated fundamental principles in judicial ethics, including impartiality, integrity, competence and thoroughness, independence, as well as appropriateness and politeness. As a result of this violation, Anwar Usman was punished by dismissal from his position as Chief Justice of the Constitutional Court (MK) [17], [18].

Concerns about law enforcement have led law observers to express various views, which analyzed violations of the code of ethics by Anwar Usman as Chairman of the Constitutional Court of the Republic of Indonesia in decisions regarding the age limit for Presidential Candidates and Vice-presidential Candidates of Indonesia 2024 [3]. Furthermore, violations of the code of ethics by Anwar Usman as Chief Justice of the Constitutional Court and the event of Gibran's nomination as Candidate for Vice President of the Republic of Indonesia 2024 accompanying Prabowo Subianto created

conditions for desacralization in democratic life and damaged the political climate in Indonesia [19]. Then, the violations of the Code of Ethics and Behavior of Constitutional Court Judges by Anwar Usman [20], [14]. All research used as a reference sharply criticizes the integrity, skills, independence and propriety of Constitutional Court Judges as the guardians of the constitution.

Meanwhile, no specific point of study from previous research which examines the MKMK decision Number 2/MKMK/L/11/2023 as a sign of the fragile meaning of law in Indonesia from a Progressive Law Perspective. Therefore, this is the basis of the author's interest and a strong reason for the importance of conducting this research. The problem formulation that is the author's guideline for this research is why the meaning of law is fragile in Indonesia after the promulgation of the MKMK decision Number 2/MKMK/L/11/2023. Then how does the conceptualization of progressive law interpret this, especially regarding the substance of violations of judicial ethics? Through a holistic approach to the conceptualization of progressive law, this research aims to analyze and provide a comprehensive view of the fragile meaning of law in Indonesia after the MKMK decision Number 2/MKMK/L/11/2023 as viewed from progressive law.

## **2. Research Method**

The type of research used was normative law research or dogmatic law research, which refers to sources of law material such as law decisions, law theories, and opinions of scholars [21], [22]. This study adopted a conceptual approach based on various views and doctrines developed in law science, particularly progressive law, allowing for a deeper exploration of law concepts and their evolution in law discourse [23]. In this context, the research relies on a primary source, the decision of the Honorary Council of the Constitutional Court Number 2/MKMK/L/11/2023, which serves as a crucial reference in analyzing the application of Progressive Law principles within the judicial framework [24], [25]. Apart from referring to this decision, this research also examined other law documents related to the ethical standards of constitutional judges, including The Bangalore Principles of Judicial Conduct 2002. Then, this research also examined various reports from civil society organizations and opinions of law experts regarding the implications of this decision for the legal system in Indonesia. Thus, the analysis results in this research rely not only on theoretical assumptions but also on an in-depth study of various relevant law sources. The object of this research is the MKMK decision Number 2/MKMK/L/11/2023, several law documents, and Progressive Law theory by Prof. Satjipto Rahardjo. Data collection techniques were carried out using library research. Furthermore, in data processing techniques, on the law and tertiary materials that have been collected, inventory, identification, grouping and systematization activities will be carried out for further study using a conceptual approach. Data analysis is carried out using a qualitative approach, which involves interpreting or interpreting findings from available references, or in other words, has a prescriptive nature, assessing right and wrong or what should be according to the law [26]. After the entire series of activities such as data collection, data processing and data analysis has been carried out, the final step in this research is concluded.

### 3. Results and Discussion

#### 3.1. The Constitutional Court is Like a “Tiger Losing Its Fangs” After the Decision of the Honorary Council of the Constitutional Court Number 2/MKMK/L/11/2023

Complying with the code of ethics and principles of integrity law enforcement agencies decision-making is crucial in maintaining public trust in the country's law system. At the Constitutional Court, a code of ethics is considered the main foundation in maintaining the principles of constitutionality and as a moral compass for judges in carrying out their duties [3]. MKMK Decision Number 02/MKMK/L/11/2023 explicitly highlights the serious ethical violations committed by the constitutional Court Chief Justice at that time, Anwar Usman, in making decisions regarding the age limit for presidential and vice-presidential candidates [27]. This decision based the findings of violations on five fundamental principles that constitutional judges must uphold, namely: (1) violation of the principle of independence due to a clear conflict of interest in Constitutional Court Decision Number 90/PUU-XXI/2023 [20], [27], (2) violation of the principle of impartiality due to kinship relationships that influence the decision [14], [19], (3) violation of the principle of integrity due to failure to maintain the propriety and honor of the position [28], (4) violation of the principle of professionalism that reflects a lack of competency standards as a constitutional judge [14], and (5) violation of the principle of propriety and politeness that damages the dignity and honor of the Constitutional Court [18], [22].

As a consequence of this violation, the MKMK imposed sanctions by dismissing Anwar Usman from his position as Chief Justice of the Constitutional Court [27]. However, the decision impact was limited to individual sanctions and sparked controversy among academics, law practitioners, and civil society. Many parties, including Denny Indrayana, PEREKAT Nusantara, and the Indonesian Law Care Advocacy Team, actively reported the violation to the MKMK, emphasizing that the Constitutional Court's decision Number 90/PUU-XXI/2023 was considered to be full of family interests, especially in accommodating the nomination of Gibran Rakabuming Raka—Anwar Usman's nephew—as a vice-presidential candidate in the 2024 Indonesian Presidential Election [19].

If looked more deeply, the conflict of interest of Anwar Usman as the former Chief Justice of the Constitutional Court, contrary to judicial ethics, clearly illustrates the defects of this institution. Especially if you look at The Bangalore Principles of Judicial Conduct 2002, which is a reference norm to provide direction to judges and summarize the framework for the justice system in regulating the behavior of judges [29], [30]. The document lists six guiding principles of judicial conduct: independence, impartiality, integrity, ethics, equality, competence and diligence. These principles are the starting point for judges' ethics and behavior. This document is the main reference in developing a Code of Ethics and Behavior for Constitutional Judges adapted to the Indonesian judiciary's legal structure, customs, and national values regulated in MPR Decree Number: VI/MPR/2001 concerning Ethics in National Life [31]. Regulations regarding the code of ethics and behavior of judges at the Constitutional Court are explained in the Regulation of the Constitutional Court of the Republic of Indonesia Number:

09/PMK/2006 concerning the Implementation of the Declaration of the Code of Ethics and Behavior of Constitutional Judges (hereinafter referred to as *Sapta Karsa Utama*).

The Constitutional Court's Code of Ethics emphasizes the principles essential in maintaining this institution's integrity and dignity. As explained in Samad [32], *first*, the principle of independence emphasizes that judges must remain neutral and not be influenced in the examination and decision-making process; *Second*, the principle of impartiality guarantees that judges must act impartially and carry out the legal process fairly; *Third*, the principle of integrity requires that judges must carry out their duties with complete integrity and equanimity; *Fourth*, the principle of propriety and decency emphasizes the importance of judges' behavior that reflects professionalism and earns the respect and trust of the community; *Fifth*, the principle of equality guarantees equal treatment of all individuals, following the Pancasila values of just and civilized humanity. *Sixth*, competence and thoroughness emphasize that the professional skills of judges must be reflected in the implementation of their duties; *Seventh*, the principle of wisdom and discretion requires judges to act according to legal norms and societal norms.

Based on the importance of strengthening the implementation of the code of ethics for constitutional judges, the MKMK decision Number 02/MKMK/L/11/2023 states explicitly that the spectrum of problems that occur is the denial of the law adage which states "judicial disqualification" or "recusal", which in other terms is known as the principle of "*nemo iudex in causa sua*," indicating that a judge is not allowed to handle cases involving his interests [27]. These inappropriate actions of course require accelerated corrective steps. There is a lot of discussion that Anwar Usman should not only be dismissed as Chief Judge of the Constitutional Court, but also dishonorably dismissed as a MK judge [20]. Strengthening the role of internal and external institutions as controllers also colors the various views of experts to reorganize the sanctity of the Constitutional Court as the guardian of the constitution, the final arbiter in interpreting the constitution, as well as the protector of human rights, citizens' constitutional rights and democracy [13]. This seriousness is encouraged to eliminate conditions of public distrust in this institution.

### **3.2. The Fragility of Legal Meaning in Indonesia Viewed from the Perspective of Progressive Law**

Every decision issued in the judicial system of the Constitutional Court is the result of deliberation by nine constitutional judges who act collectively and collegially [17]. Article 28 of Law Number 24 of 2003 concerning the Constitutional Court states that the Constitutional Court's decision must be taken in a deliberative session of judges using the principle of deliberation and consensus or, if this is not achieved, by voting by majority [33]. Thus, in the Constitutional Court Decision Number 90/PUU-XXI/2023, not only was the Chief Justice of the Constitutional Court Anwar Usman responsible, but also eight other judges who made the decision. However, in this case, Anwar Usman's ethical violations were in the spotlight because he did not resign despite a clear conflict of interest. The collective system in making MK decisions still has gaps for violations of the code of ethics, which the MKMK finally highlighted in its decision.



The violation of the judicial code of ethics by Anwar Usman, expressed in the MKMK decision Number 02/MKMK/L/11/2023 [27], was like strong turbulence that impacted the fragile legal meaning in Indonesia [34], even though judge's position is considered a noble duty (*officium nobile*) [35]. "*Fiat justitia ruat coelum*," which means that justice must continue to be upheld even if the sky falls, is a principle that must be adhered to as the nature of law enforcement by judges from the moment they take their professional oath. In carrying out their duties, judges, with decisions as their tool, are expected to inspire the Kartika symbol as a representation that their responsibility is directly to God, the Most Just. In the process of making decisions, judges are required to ensure that their decisions reflect their responsibility to God. Every judge's decision must include the *irah-irah* (head of decision meaning oath) "For the sake of justice based on God, the Almighty One". Without the intended *irah*, the judge's decision has no legal value that can be executed. With this, judges must be able to pay attention to the values of justice desired by society in their decisions. As was done by United States Supreme Court Justice, Oliver Wendel Holmes, who attempted to free the world of justice from the concept of "formalism-positivism" by using a values approach that emerges from society itself in making its decisions [36]. It is not impossible if applied in law enforcement activities, especially in the realm of the Constitutional Court.

Quoting a statement by Paul Scholten in [37] who said, "*het recht ia er, doch het moet worden gevonden*," Law exists but requires in-depth investigation to uncover it. It concludes with the views of Prof. Satjipto Raharjo who revealed a legal study, namely progressive law, as an alternative in legal theory which presents the meaning of law beyond just what is written (according to the letter) and becomes an asset that highlights the spirit of searching for the deepest meaning of legal products (to very meaning). For law enforcers, intelligent intellectual qualities alone are not enough; they must also have determination, empathy for the nation's suffering, commitment and dedication, and the courage to handle law problems outside of common practice [38]. It is in response to the failure of analytical jurisprudence by relying only on the level of rules and logic. So Progressive Law fundamentalism views that humans have good qualities, compassion and concern for others. Law aims to improve human conditions and achieve their welfare and happiness, not just for law itself as emphasized in positive law science. This understanding leads to the idea that law is always developing and in process of meeting the needs of society or in other terms as "law in the making" [2].

In the era of reform, consistent law enforcement and freedom from co-optation of power are crucial aspects in maintaining the supremacy of law. The Progressive Law approach developed by Prof. Satjipto Rahardjo emphasized that law must not simply be understood as rigid normative rules but must reflect the values of justice and morality [8]. In the context of MKMK Decision Number 02/MKMK/L/11/2023, the ethical violation committed by the Chief Justice of the Constitutional Court was not only a violation of written legal norms, but also a betrayal of moral principles that should be upheld by constitutional judges [27].

Progressive Law demands that law enforcement not stop at administrative sanctions alone but also encourage institutional reforms to prevent similar violations in the future. Steps that need to be taken include strengthening the monitoring mechanism

for constitutional judges, increasing transparency in decision-making, and emphasizing that ethical values are the main foundation of the justice system [39]. Law is not just a collection of procedural regulations, but an instrument that must continue to develop to realize substantive justice. In line with Rahardjo's [8] thinking, law is an ongoing process, not a finished institution. Therefore, law reform must be oriented towards upholding justice based on morality, not simply compliance with law texts that can be manipulated for certain interests.

#### 4. Conclusion

Through the MKMK decision Number 02/MKMK/L/11/2023, legal dynamics present a real portrait of ethical violations involving the Chief Justice of the Constitutional Court, Anwar Usman, as a sign of the fragile legal meaning in Indonesia. It is certainly recorded as a dark event in the history of judicial proceedings. The essence of the Constitutional Court seems to be torn apart by this inappropriate behavior. The breaking down of the judicial code of ethics with principles such as integrity, impartiality, competence, equality, independence, as well as the propriety and politeness of judges, truly straddles the law adage *equum et bonum est lex legum* (what is fair and good is the law).

*Lex rejicit superflua, pugnancia, incongrua* (the law of rejecting contradictory and unworthy things). And *nemo iudex in causa sua*, (a judge cannot handle cases involving his interests). However, law is not a finished institution, but something that is continuously realized. In responding to this problem, it is important to relate the presence of progressive law as an offer that must be optimized for complete law enforcement. Progressive law offers a broader approach, beyond just the mechanical application of law, by prioritizing moral values and justice, "rule of moral and justice" in every decision-making. By adopting this approach, law enforcers can ensure that law decisions are based on formal provisions and consider broader social, moral and justice impacts.

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