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Revisiting the Indonesian Criminal Procedure Code: Paradigmatic Issues and the Challenges of an Evolving Era

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Abstract

The reform of criminal procedure law in Indonesia has become a necessity, as the Criminal Procedure Code (KUHAP), after more than four decades of implementation, is confronted with the transformations of human civilization that characterize the postmodern era. This study seeks to address two key questions: why the postmodern condition necessitates a response in the renewal of Indonesian criminal procedure law, and how the KUHAP should be reconceptualized. Employing a juridical-normative approach, this research argues that reform cannot be limited to technical procedural adjustments but must extend to a paradigmatic shift. Rooted in modern legal concepts shaped by positivism, the KUHAP must adapt to the challenges of postmodern realities, which are increasingly complex, non-linear, global, segmentary, and multiversal. To bridge this gap, a progressive concept of criminal procedure law is required—one that maintains the principles of lex scripta, lex certa, and lex stricta, while simultaneously allowing space for rationally and morally justifiable legal breakthroughs in extraordinary circumstances.

Keywords: *Legal reform; criminal procedure; progressive law; postmodernism; positivism.*

Introduction

More than four decades ago, the Indonesian Criminal Procedure Code (Law Number 8 of 1981), commonly known as KUHAP (Kitab Undang-Undang Hukum Acara Pidana), was introduced as a national codification envisioned to serve as a means of enforcing justice. However, in practice, KUHAP has often been perceived as contributing to unfair legal processes, particularly for weaker parties.[1] Over time, various problems have emerged in

[1] Aristo Pangaribuan, "Authority, Rights, and Reform: Legislative Struggles over Indonesia's Criminal Procedure Code (1979–1981)," *Asian Journal of Comparative Law*, 2025, 1–20, https://doi.org/10.1017/asjcl.2025.10004; Robert R Strang, "More Adversarial, but Not

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its application within criminal justice, ranging from substantive shortcomings and ambiguities that allow for self-serving interpretations, to regulatory formulations that create space for deviations. These issues have gradually led to growing criticism, even from within law enforcement circles.

The Indonesian Criminal Procedure Code (KUHAP), enacted in 1981, has long been recognized as a landmark reform that replaced colonial procedural law with a national framework. However, scholars have consistently noted its strong positivist orientation, reflecting a modernist legal paradigm that prioritizes written law, rigid procedure, and state authority. This orientation, while initially seen as progressive, has gradually revealed limitations in responding to Indonesia's rapidly changing socio-cultural and technological contexts.

The drafting of KUHAP was deeply shaped by tensions between state-centered authority and rights-based concerns, leading to compromises that still affect its application today. This is inlone with transitional justice written by Wahyuningroem (2018).[2] Similarly, Pompe (2005) highlights that Indonesian procedural law remains embedded in bureaucratic formalism, limiting its ability to accommodate plural legal practices, such as customary dispute resolution. These historical and structural factors explain why KUHAP often clashes with indigenous or restorative mechanisms of justice.[3]

Recent scholarship increasingly critiques the inability of KUHAP to adapt to postmodern challenges, particularly digitalization and globalization. Butt and Lindsey (2018) argue that Indonesian criminal justice institutions struggle to integrate innovations such as electronic evidence and video testimony, which require flexibility beyond the strict text of KUHAP.[4] Luturmas et al. (2024), in a systematic review, note widespread perceptions of obsolescence, observing that KUHAP fails to respond adequately to cybercrime and transnational criminality. This rigidity underscores the gap between a modernist procedural framework and postmodern legal realities characterized by pluralism, technological complexity, and evolving notions of justice.

Completely Adversarial: Reformasi of the Indonesian Criminal Procedure Code," *Fordham Int'l LJ* 32, no. 1 (2008): 188, https://ir.lawnet.fordham.edu/ilj/vol32/iss1/13/.

[2] Sri Lestari Wahyuningroem, "From State to Civil Society: Transitional Justice and Democratization in Indonesia" (2018), https://doi.org/10.25911/5d612148a6df8.

[3] Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Cornell University Press, 2018), https://doi.org/10.7591/9781501718861.

[4] Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford University Press, 2018), https://doi.org/10.1093/oso/9780199677740.001.0001; Simon Butt and Tim Lindsey, "The Criminal Code," in *Crime and Punishment in Indonesia* (Routledge, 2020), 21–43, https://doi.org/10.4324/9780429455247-3; Simon Butt, "Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?," *Griffith Law Review* 32, no. 2 (2023): 190–214, https://doi.org/10.1080/10383441.2023.2243772.

Furthermore, comparative studies suggest that Indonesia lags behind jurisdictions that have embraced restorative justice or procedural innovations. Ferels and Firmansyah (2023), for instance, argue that the absence of provisions for restorative settlements in KUHAP creates a legal void, especially when contrasted with systems in countries like the Netherlands or Japan. These insights underline the urgent need to revisit KUHAP, not only as a technical reform but as a paradigmatic shift from rigid positivism toward a more holistic, adaptive, and culturally responsive criminal procedure.[5]

In the narrow sense, the reform may involve short-term revisions to specific articles to better align with evolving judicial practices. In the broader sense, however, it requires a fundamental and long-term reconstruction of the criminal justice system to achieve its ideal form. From a socio-philosophical perspective, such reform must also account for paradigm shifts in societal development. Rapid advances in science and technology—particularly in communications, media, and informatics—combined with globalization, have ushered in the transition from an industrial to a post-industrial society, or what is often termed the information society. The modern legal system, shaped largely by positivism and designed for the needs of industrial society, is increasingly incompatible with the dynamics of the information age, which is characterized by new realities such as virtuality and hyperreality. This raises two central research questions: (1) Why must the postmodern phenomenon be addressed in reforming Indonesian criminal procedure law? and (2) How can the KUHAP, rooted in modern legal models, be reconceptualized to effectively respond to postmodern challenges?

To address these questions, this research employs a holistic legal study. A juridical-doctrinal approach is combined with a juridical-philosophical perspective, relying primarily on secondary data obtained through literature studies. The data are then analyzed qualitatively to construct a conceptual framework that can provide answers to the identified problems.

Discussion

Understanding the Postmodern Context

There are various perspectives regarding the postmodern phenomenon, often referred to as "postmo." Some scholars view postmo as a new era following modernity, while others regard it as part of an unfinished process within the modern age itself.[6] Despite these differing views, there is a shared

[5] Arnott Ferels and Hery Firmansyah, "Analisis Rechtsvacuum Dalam Hukum Acara Pidana Indonesia: Penerapan Penghentian Penuntutan Berdasarkan Keadilan Restoratif," *Syntax Literate; Jurnal Ilmiah Indonesia* 8, no. 11 (2023): 6215–28, https://doi.org/10.36418/syntax-literate.v8i11.13870.

[6] Hal Foster, "Postmodernism: A Preface," *The Anti-Aesthetic: Essays on Postmodern Culture*, 1985; David Simon, "Rethinking (Post) Modernism, Postcolonialism, and

understanding that postmodernism essentially represents a reaction to, or a critique of, the problems that emerged during the modern era. According to Budi Hardiman, postmodernism can be understood as an epistemological critique of the modern *weltanschauung*—including liberalism, Marxism, scientism, and positivism. The rise of the postmodern phenomenon is closely linked to changing social dynamics driven by the development of information technology, globalization, shifting lifestyles, social fragmentation, the crisis of the nation-state, and the revitalization of tradition.[7]

A central difficulty in understanding postmodernism lies in its plural and heterogeneous nature. Unlike modernism, which generally moved in a relatively unified direction, postmodernism manifests as a constellation of diverse and fragmented ideas. For instance, in politics, grand narratives are losing their credibility (as noted by Lyotard). In lifestyle and culture, the "surface" or "skin" is often valued more than substance, reflecting a culture of superficiality and image. In literature, narratives increasingly adopt fragmentary forms, avoiding totality or resolution. Perhaps most visibly, in architecture, postmodernism has expressed itself through stylistic eclecticism and a rejection of uniform modernist design.[8]

More broadly, the transition from modernism to postmodernism is characterized by contrasting principles and realities. While modernism emphasizes coherence, rationality, and universality, postmodernism privileges diversity, complexity, and particularity. These fundamental tensions provide the framework for understanding the epistemological and cultural shifts that define the postmodern condition.[9]

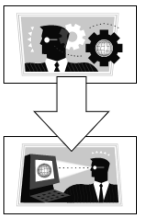
Posttraditionalism: South—North Perspectives," *Environment and Planning D: Society and Space* 16, no. 2 (1998): 219–45, https://doi.org/10.1068/d160219.

[7] Compare with: Steven Best and Douglas Kellner, *Postmodern Theory: Critical Interrogations* (Bloomsbury Publishing, 1991); Abdolmajid Arfaei Moghaddam and A Rahman, "Three of Concepts: Modernism, Postmodernism and Globalization," *Elixir Social Sciences* 43 (2012): 6643–49.

[8] Jean-François Lyotard and Niels Brügger, "What about the Postmodern? The Concept of the Postmodern in the Work of Lyotard," *Yale French Studies*, no. 99 (2001): 77–92, https://doi.org/10.2307/2903244; Bradley G Bowden, "Empiricism, Epistemology and Modern Postmodernism: A Critique," *Qualitative Research in Organizations and Management: An International Journal* 14, no. 4 (2019): 481–97, https://doi.org/10.1108/QROM-02-2019-1726.

[9] See Dragan Milovanovic, "Dueling Paradigms: Modernist versus Postmodernist Thought," *Humanity & Society* 19, no. 1 (1995): 19–44, https://doi.org/10.1177/016059769501900103.

Figure 1. Shift between modernism and postmodernism



	MODERNISM	POSTMODERNISM
ERA	Industrialisasi	Informasi
SYMBOL	Factory	Computer
MODEL	Central	Network, heterotopy
UNDERSTANDING	Universe	Multiverse
PRODUCTION	Mass, standard	Segmentary, multivalence
DECISION	Hierarchical	Consensus
AWARENESS	National	Global

Source: processed by the author

The figure 1 illustrates the fundamental differences between modernism and postmodernism across several dimensions of thought and social organization. Modernism is rooted in the era of industrialization, symbolized by the factory, and structured around centralization. Its worldview is shaped by the idea of a singular universe, with production processes focused on mass standardization and uniformity. Decision-making within the modernist paradigm tends to be hierarchical, reflecting authority concentrated at the top, while social and cultural awareness is largely confined within national boundaries. In contrast, postmodernism is associated with the information age, symbolized by the computer, and characterized by networks and heterotopic structures rather than centralized systems. Postmodern thought embraces the notion of the multiverse, reflecting pluralism, diversity, and complexity. Production in this paradigm is segmentary and multivalent, allowing for flexibility and contextual adaptation. Decision-making shifts from hierarchical control to consensus-based approaches, emphasizing collective participation. Finally, awareness extends beyond national frameworks toward a global orientation, reflecting the interconnectedness and interdependence of contemporary societies.

From a philosophical perspective, the "polar" differences between modernism and postmodernism are shaped by paradigm shifts in the history of thought. The Cartesian paradigm of rationalism, combined with the Baconian method of empiricism, reached its zenith in physics with Newtonian mechanics during the modern era. This paradigm emphasized atomistic thinking—rational, logical, reductionist, mathematical, mechanical, deterministic, and linear. However, it has since been challenged by new paradigms, such as chaos theory, which in physics culminated in groundbreaking developments like quantum theory and Einstein's theory of relativity. These shifts represent a transition from atomistic to holistic modes

of thought, characterized by responsiveness, critical reflection, and openness to complexity, including aspects of morality, feeling, and spirituality.[10]

In the realm of legal science, postmodernism has had a profound impact by challenging the dominance of modernist, dogmatic, and positivist approaches. As a critique of modernity, postmodernism has inspired the emergence of diverse schools of thought such as legal realism,[11] critical legal studies,[12] responsive law,[13] feminist legal theory,[14] freie rechtslehre, and progressive legal thought.[15] These approaches, though varied, share a common skepticism toward rigid legal formalism and an emphasis on contextual, human-centered, and justice-oriented interpretations of law. Together, they may be considered features of what can be described as "postmodern law."

The influence of postmodernism on legal thought also lies in its rejection of grand narratives and universal claims of legal certainty. Modern legal positivism, grounded in the ideal of predictable and uniform application of codified rules, often neglects the complexity of human experience and social dynamics. Postmodern legal theories respond to this limitation by highlighting the contingency of law, the plurality of legal sources, and the importance of social, cultural, and political contexts in shaping legal outcomes. In this sense, law is no longer understood as an autonomous and closed system but as a discursive practice embedded in broader power relations.

Furthermore, postmodernism challenges legal scholars and practitioners to rethink the very foundations of justice and legitimacy. By embracing diversity, multiplicity, and the recognition of marginalized voices, postmodern

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[10]Stephen Priest, *The British Empiricists* (Routledge, 2007), https://doi.org/10.4324/9780203003107; David R Keller, "From Empiricism and Rationalism to Kant and Nietzsche," in *Ecology and Justice—Citizenship in Biotic Communities* (Springer, 2019), 133–60, https://doi.org/10.1007/978-3-030-11636-1_7.

[11] Brian Leiter, "American Legal Realism," *A Companion to Philosophy of Law and Legal Theory*, 2010, 249–66, https://doi.org/10.2139/ssrn.339562; John Mikhail, "Holmes, Legal Realism, and Experimental Jurisprudence," *The Cambridge Handbook of Experimental Jurisprudence (Forthcoming)*, 2024, https://ssrn.com/abstract=4759443.

[12] Roberto Mangabeira Unger, "The Critical Legal Studies Movement," *Harvard Law Review*, 1983, 561–675, https://doi.org/10.2307/1341032.

[13] Philippe Nonet, Philip Selznick, and Robert A Kagan, *Law and Society in Transition: Toward Responsive Law* (Routledge, 2017), https://doi.org/10.4324/9780203787540; Philippe Nonet, "What Is Positive Law?," *The Yale Law Journal* 100, no. 3 (1990): 667–99, https://doi.org/10.2307/796665.

[14] Cynthia Grant Bowman and Elizabeth M Schneider, "Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession," *Fordham L. Rev.* 67 (1998): 249, https://ssrn.com/abstract=2122566; Nicola Lacey, "Feminist Legal Theory," *Oxford J. Legal Stud.* 9 (1989): 383, https://www.jstor.org/stable/764424.

[15] See Adriaan Bedner and Jacqueline Vel, "Legal Education in Indonesia," *The Indonesian Journal of Socio-Legal Studies* 1, no. 1 (2021): 6, https://doi.org/10.54828/ijsls.2021v1n1.6.

legal theories open pathways for more inclusive approaches to legal reform. This is particularly relevant in societies experiencing rapid technological and cultural transformations, where rigid legal structures may fail to accommodate new realities. Thus, postmodernism does not merely critique modern legal paradigms but also provides an intellectual space for imagining progressive, responsive, and transformative legal frameworks capable of addressing the complexities of contemporary life.[16]

Characteristics od Criminal Procedure Law and Paradigmatic Issues and the Challenges of Postmodernism

One of the fundamental principles in criminal law is the principle of legality[17] (*legaliteitsbeginsel*), originally formulated by Anselm von Feuerbach in the maxim: *"nullum delictum, nulla poena sine praevia lege poenali."* This expression literally means that there can be no crime and no punishment without prior criminal law. In essence, no individual may be subjected to criminal sanctions unless their conduct is explicitly prescribed by law. The principle serves as a safeguard against arbitrary state power and functions as an instrument to limit the authority of state apparatus in exercising their powers.[18] In accordance with this function, criminal procedural law must be codified (*lex scripta*) to provide a formal and legitimate foundation regarding what powers law enforcement officials may exercise in the examination of criminal cases, and in what manner such powers are to be carried out. Furthermore, criminal procedural law must also contain clear provisions (*lex certa*) and be subject to strict interpretation (*lex stricta*), thereby ensuring the protection of due process rights within the criminal justice system.[19]

The principle of legality—expressed through written, clear, and strict provisions—constitutes the basis of legal policy in the Indonesian Criminal Procedure Code (*Kitab Undang-Undang Hukum Acara Pidana*, KUHAP). In the current KUHAP (Law No. 8 of 1981), this principle is codified in Article 3, which states: *"Trials shall be conducted in accordance with the procedures stipulated in this law."* In the draft of the revised Criminal Procedure Code, the principle is articulated more explicitly in Article 2 of the 2025 Criminal Procedure Code

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[16] Maxine Eichner, "On Postmodern Feminist Legal Theory," *Harv. CR-CLL Rev.* 36 (2001): 1, https://ssrn.com/abstract=2129746; Tim Murphy, "Postmodernism: Legal Theory, Legal Education and the Future," *International Journal of the Legal Profession* 7, no. 3 (2000): 357–79, https://doi.org/10.1080/09695950750143188.

[17] Bostjan M Zupancic, "On Legal Formalism: The Principle of Legality in Criminal Law," *Loy. L. Rev.* 27 (1981): 369.

[18] Herbert Packer, *The Limits of the Criminal Sanction* (Stanford university press, 1968).

[19] Naveen Kanalu, "The Pure Reason of Lex Scripta: Jurisprudential Philology and the Domain of Instituted Laws," *Empire and Legal Thought: Ideas and Institutions from Antiquity to Modernity* 41 (2020): 462; Sajad Fatahi Zafarqandi and Majid Vaziri, "Comparative Analysis between Traditional and Modern Criminal Procedure Code," *J. Pol. & L.* 9 (2016): 97.

Bill (*RUU KUHAP 2025*): *"Criminal procedures are carried out only on the basis of procedures regulated by law."* Based on these provisions, any action taken by the State, through its law enforcement officials, that does not conform to the legally prescribed procedures is invalid and may render the judicial process null and void. As a consequence of this legality principle, the procedural rules governing the examination of criminal cases must be regulated as comprehensively, precisely, and unambiguously as possible. Interpretations are permitted only through formal mechanisms, such as Supreme Court Circulars (*SEMA*), Supreme Court Regulations (*Perma*), Technical Guidelines (*Juknis*), or other official instruments issued by judicial authorities. This requirement reflects the rigid and mechanistic character of the KUHAP as a codified body of procedural law.

The detailed regulation of criminal procedure reflects adherence to the Due Process Model, which emphasizes the protection of the rights of suspects and defendants. This orientation is reinforced in the 2025 KUHAP Bill, which maintains the pretrial institution while expanding its authority. Such provisions, however, tend to produce a more procedural and formalistic trial process, sometimes at the expense of efficiency. Although Herbert L. Packer has argued that the due process model represents an improvement over the earlier crime control model, both remain adversarial in nature.[20] Griffiths describes this as the "battle model,"[21] while Packer refers to it as the "adversary model." The 2025 KUHAP Bill further underscores this orientation by explicitly adopting an adversarial system, as stated in Article 4 of the Bill and its accompanying explanation.

From a historical perspective, the adversary model originates in the modern Western legal tradition, particularly within the common law system shaped by liberal thought. Chronologically, the due process model emerged in the nineteenth century under the influence of positivist legal paradigms. Accordingly, Indonesian criminal procedural law, as derived from the KUHAP, may be characterized as a modern legal construct that adheres to the principles of legal positivism.

Changes across different eras have not only transformed civilization from pre-modern to modern society and beyond but have also been accompanied by the evolution of paradigms of thought, including legal

[20] Herbert L Packer, "The Courts, the Police, and the Rest of Us," *The Journal of Criminal Law, Criminology, and Police Science* 57, no. 3 (1966): 238–43; Herbert L Packer, "The Aims of the Criminal Law Revisited: A Plea for a New Look at Substantive Due Process," *S. Cal. L. Rev.* 44 (1970): 490; Packer, *The Limits of the Criminal Sanction*; Herbert L Packer, "Making the Punishment Fit the Crime," *Harv. L. Rev.* 77 (1963): 1071.

[21] Katherine Catton, "Models of Procedure and the Juvenile Courts," *Crim. LQ* 18 (1975): 181; John Griffiths, "Ideology in Criminal Procedure or a Third Model of the Criminal Process," *Yale LJ* 79, no. 3 (1969): 359, https://doi.org/10.2307/795141.

reasoning concerning the concept of justice. The positivistic orientation of the Criminal Procedure Code, as previously discussed, must now confront the realities of an increasingly complex era. Indonesia's transitional phase has given rise to diverse societal forms and socio-cultural issues. From the traditional "pre-modern" era to the global "postmodern" era, which together constitute the lived reality of Indonesia, each stage of development embodies its own concept of justice and unique approaches to conflict resolution, including criminal matters.

The Criminal Procedure Code, grounded in a modern legal paradigm and an understanding of facts based on "hard reality," often encounters difficulties when applied to criminal acts occurring in indigenous or traditional communities that continue to rely on pre-modern modes of thought and a "soft reality" shaped by religious-magical perspectives. For instance, when a criminal case is resolved harmoniously through customary mechanisms within a traditional community, problems still arise because the Code, adhering to strict positivistic principles, requires that once a judicial process has commenced, it must proceed until a formal verdict is delivered. In other words, customary or extra-judicial settlements cannot automatically terminate judicial proceedings mandated by the Criminal Procedure Code.[22]

Conversely, the Code also reveals limitations in addressing the emergence of new types of criminal acts within a globalized community operating within the realm of "virtual reality." The judicial system often struggles when confronted with technological interventions, such as demands for the use of teleconference or videoconference platforms in trial processes. Likewise, the authority of investigators to conduct lawful interceptions and the recognition of electronic or digital evidence remain contentious issues in the ongoing renewal of the Code. These challenges are further compounded when the modernist foundation of the Code encounters the shifting paradigms of thought that characterize the postmodern era.

The tension between these paradigms highlights the urgent need for a more adaptive and pluralistic approach to criminal procedure. A rigid adherence to positivistic legality risks rendering the Code outdated in the face of societal plurality and rapid technological change. Future reform must not only refine technical provisions but also open normative spaces that can reconcile the diverse realities of Indonesian society—whether traditional, modern, or postmodern. In this sense, the Criminal Procedure Code should evolve into a legal instrument that balances certainty with flexibility, thereby

[22] Compare to Faisal et al., "Genuine Paradigm of Criminal Justice: Rethinking Penal Reform within Indonesia New Criminal Code," *Cogent Social Sciences* 10, no. 1 (2024): 2301634, https://doi.org/10.1080/23311886.2023.2301634.

safeguarding due process while accommodating indigenous justice mechanisms, global demands, and postmodern conceptions of justice.

The Idea of Progressive Law as a Type of Postmodern Law

In the previous sub-chapter, it was explained that one of the legal reasoning models that is in line with the postmodern "era" is progressive law which critically views the existence of legal reasoning that is a "product" of the previous era, namely positivistic-analytical reasoning. The concept of "Progressive Law" is closely associated with its founder, Professor Satjipto Rahardjo. This is not an exaggeration, as in reality, Professor Tjip was not only an early initiator but also a "champion" and "developer" of progressive law.[23]

Therefore what is written in this section is nothing more than a flashback of his ideas.[24] The idea of progressive law emerged as a reaction to concern about the state of law in Indonesia which was such (especially regarding the reality of the chaotic law enforcement through the courts in many cases) that opinions emerged from international observers and the general public that the Indonesian legal system was the worst in the world. The undeniable fact is that Indonesian law is becoming increasingly powerless in its efforts to realize justice and prosperity for the Indonesian people.

The main principle underlying progressive law is: "Law is for humans," not the other way around. Therefore, humans are the ones who determine, and it is understood that humans are inherently good. This principle seeks to shift the theoretical foundation from legal factors to human factors. Consequently, law is not absolute and final but is always "in the process of becoming" (law as process, law in the making), that is, moving toward perfection, meaning becoming just law, law capable of realizing prosperity, or law that cares for the people. From a theoretical perspective, progressive law leaves behind the tradition of analytical jurisprudence (*rechtsdogmatiek*) and moves towards the tradition of sociological jurisprudence. So, in fact, the concept of progressive law is very close/shares/is related to several legal schools that have existed

[23] M Sudikno Mertokusumo and Adriaan Pitlo, *Bab-Bab Tentang Penemuan Hukum* (Citra Aditya Bakti, 1993).

[24] Satjipto Rahardjo and Hukum Progresif, "Penjelajahan Suatu Gagasan," *Majalah Newsletter, Kajian Hukum Ekonomi Dan Bisnis*, 2004; Satjipto Raharjo, *Hukum Progresif, Sebuah Sintesa Hukum Indonesia*, *Yogyakarta: Genta Publishing* (Yogyakarta: Genta Publishing, 2009); Satjipto Rahardjo and Biarkan Hukum Mengalir, "Hukum Progresif Sebagai Dasar Pembangunan Ilmu Hukum Indonesia," in *Makalah Yang Disampaikan Pada Seminar Nasional Menggagas Ilmu Hukum Progresif Di Indonesia, Di Semarang*, 2004.

previously, including:[25] historical school by Von Savigny),[26] legal realism by Holmes,[27] *freierechtslehre* by Ehrlich,[28] sociological jurisprudence by Pound,[29] *interessenjurisprudenz* by von Jhering,[30] critical legal studies by Unger,[31] responsive law by Nonet & Selznick.[32]

The closeness of progressive legal thinking to several of the legal schools of thought mentioned above lies in the nature of progressive law which frees itself from the domination of liberal legal types which are not always suitable for application in countries which already have a social system different from the social system from which modern law originated (in this case Europe). The closeness of progressive law to several legal schools of thought does not necessarily place progressive law as a "legal theory", especially when linked to the figure of progressive law as "law in process" or "law on going process". Rahardjo himself, as the initial initiator of progressive law, did not clearly position his thinking. In numerous writings and forums, Rahardjo has also given progressive law several "labels," such as: "intellectual movement"; "paradigm"; "concept"; or "idea," and "legal science". Tanya et al., in their book "Teori Hukum" have boldly and concisely positioned progressive law as a legal theory. It seems that Rahardjo has no objection to the classification of

[25] Myrna A Safitri, Awaludin Marwan, and Yance Arizona, "Satjipto Rahardjo Dan Hukum Progresif: Urgensi Dan Kritik," *Jakarta: Epistema Institute Dan HuMa*, 2011; Bernard Arief Sidharta, "Posisi Pemikiran Hukum Progresif Dalam Konfigurasi Aliran-Aliran Filsafat Hukum: Sebuah Diagnosis Awal, Dalam Buku Satjipto Raharjo Dan Hukum Progresif Urgensi Dan Kritik," *Jakarta: Epistema Institute*, 2011.

[26] Susan Gaylord Gale, "A Very German Legal Science: Savigny and the Historical School," *Stan. J. Int'l L.* 18 (1982): 123; Robert E Rodes Jr, "On the Historical School of Jurisprudence," *Am. J. Juris.* 49 (2004): 165; Hermann Kantorowicz, "Savigny and the Historical School of Law," *LQ Rev.* 53 (1937): 326.

[27] Neil Duxbury, "The Birth of Legal Realism and the Myth of Justice Holmes," *Anglo-American Law Review* 20, no. 2 (1991): 81–100; Brian Z Tamanaha, "Understanding Legal Realism," *Tex. L. Rev.* 87 (2008): 731.

[28] Brian Z Tamanaha, "A Vision of Social-Legal Change: Rescuing Ehrlich from 'Living Law,'" *Law & Social Inquiry* 36, no. 1 (2011): 297–318, https://doi.org/10.1111/j.1747-4469.2010.01232.x; David Nelken, "Eugen Ehrlich, Living Law, and Plural Legalities," *Theoretical Inquiries in Law* 9, no. 2 (2008): 443–71, https://doi.org/10.2202/1565-3404.1193.

[29] Roscoe Pound, "Sociology of Law and Sociological Jurisprudence," *U. Toronto LJ* 5 (1943): 1; Roscoe Pound, "The Need of a Sociological Jurisprudence," *Annu. Rep. ABA* 30 (1907): 911; Julius Stone, "Roscoe Pound and Sociological Jurisprudence," *Harvard Law Review* 78, no. 8 (1965): 1578–84, https://doi.org/10.2307/1338955.

[30] Iredell Jenkins, "Rudolf von Jhering," *Vand. L. Rev.* 14 (1960): 169; William Seagle, "Rudolf von Jhering: Or Law as a Means to an End," *The University of Chicago Law Review* 13, no. 1 (1945): 71–89, https://doi.org/10.2307/1597562.

[31] Unger, "The Critical Legal Studies Movement."

[32] Nonet, Selznick, and Kagan, *Law and Society in Transition: Toward Responsive Law*; Nonet, "What Is Positive Law?"

progressive law as a theory that is aligned with Nonet and Selznick's thinking on responsive law as a legal theory during the transition period.[33]

The concept of "progressivism" is based on a humanitarian perspective and thus seeks to change unconscionable laws into moral institutions. The paradigm of "law for people" makes him feel free to seek and find the right format, thoughts, principles and actions to realize the goals of law, namely justice, welfare and concern for the people. One thing that must be guarded against is that this free and loose approach should not be misused or diverted for negative purposes. To gain a more concrete understanding in order to implement progressive legal ideas in legal practice, the principles of progressive law can be simply summarized as follows:

a. Not wanting to maintain the status quo (continuously deconstructing and reconstructing);
b. Prioritize human factors and roles over the law;
c. Reading the law means reading its meaning (contextual), not just its words (textual). Therefore, law enforcement should not be "imprisoned" by the words of the law;
d. Freeing human from customs, whether based on laws and regulations or in customary practices;
e. Prioritizing Conscience Capital: Empathy; Compassion; Dedication; Determination; Sincerety; Dare;
f. The law is not a machine that runs mechanically, but rather is the effort of humans with the capital of conscience.[34]

Finally, the problem of interpretation or interpretation becomes very urgent in the empowerment of progressive law in order to overcome legal stagnation and decline. Interpretation in progressive law is not limited to the conventions that have been prioritized so far, such as grammatical, historical, systematic interpretation and so on, but more than that, it is an interpretation that is creative and innovative so that it can make a breakthrough and a "leap" in the meaning of law into an appropriate concept in reaching a law that is moral and humanitarian. Thus, in fact, progressive law enforcement is not only

[33] Bernard L Tanya, Yoan Nursari Simanjuntak, and Markus Y Hage, "Teori Hukum" (Genta publishing, 2013).

[34] These principles serve as a simplification to "ground" the ideas of progressive law in Prof. Satjipto Rahardjo's various writings. This simplification is particularly necessary for progressive law workers in operationalizing these ideas. Read: Ali Wisnubroto, "Kontribusi Hukum Progresif Bagi Pekerja Hukum," *Dalam Myrna A. Savitri, et. Al, Satjipto Rahardjo Dan Hukum Progresif: Urgensi Dan Kritik, EpistemaHuma, Jakarta*, 2011; Al Wisnubroto and G Widiartana, *Menuju Hukum Acara Pidana Baru* (Citra Aditya Bakti, 2021); Safitri, Marwan, and Arizona, "Satjipto Rahardjo Dan Hukum Progresif: Urgensi Dan Kritik."

limited to the application of the law but should be supported by the formulation of the law.

Reconceptualization of the Criminal Procedure Code towards a Progressive Criminal Justice System

As a modern legal product in the form of codification, the Indonesian Criminal Procedure Code (KUHAP) inevitably reflects the principles of lex scripta, lex certa, and lex stricta. While these principles provide legal certainty, they have also constrained KUHAP's capacity to realize a fair criminal justice system, especially in addressing the complexities of the postmodern era. This paradigmatic limitation calls for a comprehensive reform of the Criminal Procedure Code.

Concrete efforts at reform have already been undertaken through the drafting of a new Criminal Procedure Code Bill intended to replace Law No. 8 of 1981. After more than a decade of preparation, the Draft Criminal Procedure Code (last version: 2012) was submitted by the Government to the Indonesian House of Representatives (DPR RI) on December 9, 2012. Yet, deliberations were halted in 2015 when legislative focus shifted to the Draft Criminal Code, which has since been ratified as Law No. 1 of 2023. With the new Criminal Code set to come into force on January 2, 2026, the urgency of passing a new Criminal Procedure Code has become clear. In early 2025, DPR RI initiated the 2025 Draft Criminal Procedure Code, which is currently under discussion.

The draft is expected not only to correct the limitations of KUHAP in practice but also to respond to broader socio-political and technological changes, as well as to Indonesia's commitments under international conventions such as the ICCPR, the Convention Against Torture, and the UN Convention Against Corruption. However, despite these ambitions, the draft remains firmly rooted in a positivist legal paradigm. Indonesian legal practice continues to rely on detailed and rigid formulations of law, and the draft reflects this tendency. Nevertheless, strict procedural regulations require what might be called "safety valves" that would allow for progressive interpretation when extraordinary circumstances demand it. Current formulations, such as Article 7(1)(j), are narrower than those found in the existing KUHAP, which is in fact more flexible but still provides clear safeguards against arbitrariness by requiring actions to remain lawful, necessary, reasonable, and respectful of human rights.

Another issue concerns the placement of fundamental principles of criminal procedure, which serve as the "soul" of the law. In the draft, these principles appear only in explanatory sections, and in the March 2025 version they were removed entirely. Such an omission risks reducing the Criminal Procedure Code to a set of mechanical provisions without normative depth.

Incorporating these principles directly into binding provisions, as is common in other statutes, would give them stronger legal force and ensure that procedural rules remain connected to broader values of justice.

The draft also attempts to merge elements of the adversarial system with Indonesia's civil law–based system. While this hybridization can be viewed as an innovative and progressive step, it also carries risks of inconsistency if not supported by a thorough and comprehensive study. Alternative models, such as the "family model" or an "integrated model," may better align with Indonesian cultural values and the aspirations of progressive law. Provisions on restorative justice in the draft strengthen the orientation toward victim recovery by introducing penal mediation as an alternative to formal adjudication. Yet, certain weaknesses remain. The terminology used is misleading, as "restorative justice mechanism" is not the proper term; "diversion" would be more accurate. Furthermore, the draft leaves the process largely to party agreement, which risks neglecting the role of the state—through investigators and prosecutors—in safeguarding victims' rights to restoration.

The draft also seeks to address the problem of institutional fragmentation by promoting integrated functions of investigation and prosecution, allowing prosecutors to be involved from the early stages of an investigation. While this integration could support a more coherent criminal justice system, provisions that appear to subordinate investigators to prosecutors risk reigniting tensions between law enforcement agencies if not carefully designed and communicated. In addition, the draft seeks to optimize the principle of speedy, simple, and low-cost justice by imposing strict time limits on arrests, detentions, investigations, and trials. While such measures are intended to prevent delays, they may prove difficult to implement under extraordinary circumstances and could create unintended obstacles to justice.

Taken together, these provisions reveal that the reform of Indonesian criminal procedure law remains heavily shaped by a positivistic spirit, presupposing "normal conditions" where suspects, defendants, and convicts are weaker than state authorities. This assumption, however, is problematic. Victims are often in even weaker positions, while in extraordinary cases perpetrators may in fact be stronger, especially when state institutions are captured by economic or political power. Under such circumstances, rigid prohibitions—such as those limiting prosecutorial review petitions (peninjauan kembali)—may hinder rather than promote justice.

The postmodern condition, characterized by rapid advances in information technology, globalization, lifestyle transformations, fragmentation, and crises of the nation-state, generates social contexts that demand a more holistic and flexible legal paradigm. The idea of Progressive Law offers a promising framework in this regard. It reconceptualizes law not

merely as a technical instrument but as a moral institution guided by humanity, conscience, and justice. Importantly, legal progressivity should not be confined to the stage of law enforcement but must begin at the stage of lawmaking.

Accordingly, the Criminal Procedure Code must be reconstructed not only as a collection of rigid procedural rules but also as a framework that embeds fundamental principles, objectives, and ethical standards. These provisions could be placed at the beginning of the Code, followed by detailed technical regulations. Such an arrangement would provide both the normative foundation and the procedural mechanisms necessary for a dignified and just system of criminal justice. While technical rules must remain precise and enforceable, they should be complemented by exceptions that serve as "safety valves" for progressive interpretation in extraordinary cases. Through this construction, the future KUHAP can evolve into a progressive system of criminal procedure that balances legal certainty with substantive justice, grounding legality in conscience and ensuring that the law remains responsive to the challenges of the postmodern era.

Conclusion

Reforming the Criminal Procedure Code (KUHAP) is an urgent necessity to ensure that procedural law in the administration of criminal justice remains relevant within an increasingly complex society. Such reform should not be limited to revising technical procedural rules governing the examination of criminal cases, but must also address the broader challenges posed by paradigmatic shifts in the contemporary era, particularly the emergence of postmodernism. The analysis of these issues leads to two main conclusions. First, the renewal of the Criminal Procedure Code must be responsive to postmodern phenomena, as this era has brought about a fundamental paradigm shift from positivism toward more holistic, critical, responsive, and progressive schools of thought. The KUHAP, which was originally shaped by the logic of modern law, must therefore be reconceptualized to respond effectively to the characteristics of postmodern society, which is increasingly complex, non-linear, segmented, and multiversal.

Second, in order to confront the challenges of the postmodern era, the KUHAP requires reconceptualization into a progressive model of criminal procedure law. While it remains bound to its nature as procedural or formal law, the KUHAP must continue to uphold the fundamental legality principles of the modern legal system. At the same time, excessive discretionary rules inspired by postmodernist ideals—which often stand in opposition to modernism—could undermine the stability of the system. For this reason, the notion of legal progressiveness is best incorporated through carefully designed provisions that serve as a "safety valve." Such rules would allow legal

breakthroughs in extraordinary circumstances, particularly when the codified legality of the KUHAP leads to a deadlock in achieving substantive justice.

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