

## **The Paradox of *Rechtsvinding* in Criminal Law: The Tension Between the Principle of Formal Legality and the Expansion of Progressive Legal Interpretation in Indonesia**

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### **ABSTRACT**

*The practice of judicial law-finding (rechtsvinding) in criminal law has consistently been confronted with a profound doctrinal tension between the demands of legal certainty and the pursuit of substantive justice. This study aims to examine the doctrinal boundaries and practical dynamics of judicial law-finding methods employed by judges in criminal cases in Indonesia following the enactment of the new National Criminal Code. The research adopts a normative juridical methodology utilizing statutory, conceptual, and jurisprudential approaches. The findings reveal that the principle of legality, embodied in the maxim nullum crimen, nulla poena sine praevia lege poenali, imposes strict limitations on judicial discretion by prohibiting the application of analogical reasoning (argumentum per analogiam) in criminal adjudication. Nevertheless, in responding to normative gaps arising from technological advancements and the increasing complexity of contemporary social and criminal phenomena, judges cannot remain passive as mere bouches de la loi (mouthpieces of the law). The paradigm of progressive law provides an avenue for judges to optimize legal interpretation, particularly through teleological (sociological) interpretation and extensive interpretation, without undermining the fundamental rights of defendants. Such interpretative methods enable courts to adapt legal norms to evolving social realities while remaining within the framework of criminal legality. This study concludes that a balance between formal legal certainty and substantive justice may be achieved when criminal law-finding is situated within the framework of protecting legally recognized social interests and guided by the principles of proportionality, objectivity, and rational legal reasoning. Accordingly, the future development of Indonesian criminal jurisprudence should not be directed toward abandoning the legality principle, but rather toward harmonizing legal certainty with the judicial responsibility to ensure that criminal law remains responsive to contemporary societal needs.*

**Keywords: Rechtsvinding; Criminal Law; Principle of Legality; Progressive Law; Extensive Interpretation.**

### **INTRODUCTION**

The existence of criminal law as a branch of public law places the protection of human rights and the limitation of state power at its very foundation. One of the defining characteristics of criminal justice systems in countries adhering to the Civil Law tradition, including Indonesia, is the supremacy of written legislation safeguarded by the principle of strict legality. This classical doctrine affirms that no conduct may be classified as a criminal offense unless it has been explicitly prescribed by law prior to its commission. The coercive nature of criminal sanctions and the deprivation of liberty they entail provide the philosophical justification for strictly limiting the authority of law enforcement officials, particularly judges, to formulate new criminal offenses beyond the legislative framework.

Nevertheless, sociological realities demonstrate that criminal behavior evolves in a dynamic and accelerated manner, often surpassing the capacity of static statutory provisions to capture emerging forms of misconduct. Cybercrime, systemic corruption, corporate crime, and sophisticated financial manipulation have generated new modes of criminal activity that frequently fall outside the scope of traditional criminal legislation. At this point, a profound paradox emerges within criminal law. On the one hand, judges are bound by the prohibition against imposing criminal liability without an explicit legal basis, thereby safeguarding legal certainty and protecting individual rights. On the other hand, judges are simultaneously entrusted with the constitutional duty to uphold law and justice and are prohibited from refusing to adjudicate cases on the ground that the applicable law is absent, incomplete, or unclear.

If judges function merely as mechanical law applicators, criminal law risks losing its social function as an instrument of social defense and may inadvertently permit impunity for novel forms of criminal conduct that cause substantial harm to society. Consequently, judicial law-finding (*rechtsvinding*) within criminal adjudication becomes both indispensable and problematic. Theoretical and practical controversies frequently arise when judges employ interpretative techniques to address normative gaps in criminal law. Advocates of strict legal positivism regard such judicial initiatives as a form of judicial activism that threatens the principle of separation of powers. Conversely, proponents of progressive legal thought view judicial law-finding as a moral and constitutional obligation aimed at realizing substantive justice and ensuring that the law remains responsive to evolving social realities.

Against this background, the debate surrounding the boundaries of *rechtsvinding* in criminal law becomes increasingly significant in contemporary Indonesia. The enactment of the National Criminal Code has intensified discussions regarding the proper balance between legal certainty and judicial creativity. This article therefore examines the doctrinal limits, theoretical foundations, and practical implications of judicial law-finding in Indonesian criminal law, with particular attention to the tension between the principle of formal legality and the growing influence of progressive legal interpretation.

## METHODS

This study employs a normative juridical research method (*doctrinal legal research*), focusing on the analysis of statutory provisions, criminal law doctrines, and judicial precedents. The research is designed to examine the theoretical and normative dimensions of judicial law-finding within criminal law and to assess its compatibility with the principle of legality and contemporary developments in legal interpretation. Three complementary approaches are utilized. First, a statutory approach (*statute approach*) is employed to analyze the normative limitations imposed by the legality principle and the relevant provisions governing judicial authority in criminal adjudication. Second, a conceptual approach (*conceptual approach*) is applied to elaborate theories of judicial law-finding, legal interpretation, legal positivism, and progressive law. Third, a case approach (*case approach*) is undertaken through the examination of judicial decisions that demonstrate the application of *rechtsvinding* in both general and special criminal cases.

The legal materials used in this study consist of primary and secondary sources. Primary legal materials include legislation governing judicial power, the National Criminal Code, and

relevant international human rights instruments. Secondary legal materials comprise criminal law textbooks, legal dictionaries, scholarly commentaries, and peer-reviewed academic journal articles addressing criminal law theory, judicial interpretation, and legal philosophy. The collected legal materials are analyzed qualitatively through a combination of deductive and inductive reasoning. This method facilitates the synthesis of judicial reasoning, statutory provisions, and doctrinal perspectives in order to formulate objective scientific conclusions regarding the permissible scope and limitations of judicial law-finding within Indonesia's criminal justice system.

## RESULT AND DISCUSSION

### The Dogmatic Implications of the Principle of Legality on the Limits of Criminal *Rechtsvinding*

The principle of legality, as embodied in Article 1 Paragraph (1) of the Indonesian Criminal Code, serves as a fundamental safeguard protecting individuals against potential arbitrariness in the exercise of state power. From a doctrinal perspective, this principle imposes four essential requirements on the creation and application of criminal law: *lex scripta* (criminal law must be written), *lex certa* (criminal provisions must be clear and unambiguous), *lex praevia* (criminal law must not be applied retroactively), and *lex stricta* (criminal law must be interpreted strictly). The most far-reaching consequence of the *lex stricta* requirement is the absolute prohibition of analogical reasoning (*argumentum per analogiam*) in criminal adjudication.

Analogy is traditionally regarded as the natural adversary of the legality principle because it operates by extending the scope of a legal norm originally intended to regulate one situation and applying it to another situation not explicitly governed by law, solely on the basis of similarity in characteristics or underlying legal rationale (*ratio legis*). Within the sphere of criminal law, treating an act that has not been criminalized by legislation as a criminal offense through analogy is effectively equivalent to creating new criminal law through judicial action. Such practice is prohibited because it encroaches upon legislative authority and undermines the principle of legal certainty, which protects individuals from unforeseeable criminal liability.

Nevertheless, the prohibition of analogy creates significant challenges when judges encounter vague norms or ambiguous statutory language. It is precisely at this point that the distinction between prohibited analogy and legitimate legal interpretation becomes both delicate and fundamentally important. Criminal judges are not prohibited from engaging in judicial law-finding; rather, they are constrained regarding the methods through which such law-finding may be undertaken. Judges retain the authority to discover and develop legal meaning, provided that they operate within the framework of legal interpretation rather than legal construction through analogy. The fundamental distinction lies in the starting point of legal reasoning: interpretation seeks to uncover the meaning embedded within existing statutory language, whereas analogy extends legal consequences beyond the text to conduct that has not been regulated at all.

#### 1. Epistemological Foundations: Legal Hermeneutics in Criminal *Rechtsvinding*

From an epistemological perspective, the effectiveness of judicial interpretation and legal construction depends largely upon the interpretative paradigm adopted by the judge. In contemporary legal theory, legal hermeneutics has emerged as a significant analytical framework capable of overcoming the limitations of conventional textual interpretation.

Hermeneutics proceeds from the premise that legal texts never exist in isolation. Rather, they are inseparably connected to the political and historical context in which they were enacted as well as the social realities within which they are applied.

Accordingly, through a hermeneutic approach, criminal *rechtsvinding* is not merely a mechanical process of subsuming facts under statutory provisions (*subsumptie*). Instead, it constitutes a dynamic and dialogical process involving interaction among the judge as interpreter, the statutory text as the object of interpretation, and the factual circumstances of the case as the sociological reality requiring legal resolution. This approach enables judges to preserve fidelity to statutory law while ensuring that legal norms remain responsive to evolving social conditions.

Within this framework, teleological and purposive interpretation assume particular significance. Judges are encouraged to identify not only the literal meaning of legal provisions but also the objectives, values, and legal interests that the legislature intended to protect. Such interpretative methods allow criminal law to maintain relevance in addressing contemporary forms of misconduct without violating the fundamental constraints imposed by the legality principle.

## 2. The Construction of Islamic Legal Reasoning Within Indonesia's Legal Pluralism

Beyond Western legal hermeneutics, Indonesia's pluralistic legal system also provides space for the utilization of Islamic legal reasoning (*ijtihad*) as a source of legal methodology, particularly in regions enjoying special autonomy such as Aceh through the implementation of the *Qanun Jinayat*. The methodology of Islamic legal reasoning, especially when grounded in the doctrine of *Maqāṣid al-Sharī'ah* (the objectives of Islamic law), exhibits notable philosophical similarities to teleological interpretation. Under this perspective, criminal law-finding should not be confined to formal justice alone but should be directed toward safeguarding the five fundamental interests (*al-ḍarūriyyāt al-khamsah*): the protection of life (*ḥifẓ al-nafs*), intellect (*ḥifẓ al-'aql*), lineage and dignity (*ḥifẓ al-nasl*), property (*ḥifẓ al-māl*), and religion (*ḥifẓ al-dīn*). These objectives provide a substantive framework for evaluating legal problems in situations where positive law offers limited guidance.

When judges confront modern criminal cases characterized by genuine normative gaps, Islamic legal methodology offers additional analytical tools, including *Maṣlaḥah Mursalah* (public welfare not expressly regulated by sacred texts or statutory law) and *Sadd al-Dharā'ī'* (preventive measures designed to block pathways leading to social harm). These doctrines allow legal reasoning to focus on the broader consequences of judicial decisions while maintaining fidelity to overarching legal values. The integration of legal hermeneutics and principles of substantive public welfare offers a promising methodological framework for contemporary criminal adjudication. Through such synchronization, judges may formulate legal reasoning that possesses both doctrinal legitimacy and practical relevance. The resulting process of judicial law-finding does not undermine the legality principle because legal development remains anchored in the interpretation of existing norms and directed toward the ultimate objectives of law: the protection of public welfare, the preservation of human dignity, and the realization of substantive justice.

Consequently, the challenge facing contemporary criminal jurisprudence is not whether judges should engage in *rechtsvinding*, but rather how such judicial law-finding can be conducted within principled methodological boundaries. A carefully balanced approach enables judges to respond to evolving social realities without transforming judicial interpretation into unauthorized judicial legislation, thereby preserving both legal certainty and the pursuit of justice within the criminal law system.

**The Formulation of Progressive Legal Interpretation in Modern Criminal Adjudication**

To prevent criminal law from becoming stagnant in responding to the challenges of modern crime, criminal law-finding (*rechtsvinding*) must evolve toward a progressive legal paradigm. Progressive law emphasizes the fundamental proposition that “law exists for human beings, not human beings for the law.” Within the judicial context, this paradigm requires criminal judges to possess the moral and intellectual courage to move beyond rigid textualism when necessary to preserve the substance of justice. Where statutory provisions are characterized by ambiguity or indeterminacy, criminal judges may employ several valid and adaptive methods of legal interpretation to ensure that legal norms remain responsive to social realities while remaining faithful to the principle of legality.

**Table 1. Typology of Permissible Methods of Criminal Law Interpretation**

Type of Interpretation	Operational Characteristics	Limitations and Protection of Defendants’ Rights
<b>Interpretasi Gramatikal</b>	Interprets legal terms according to their ordinary meaning, linguistic usage, and prevailing legal terminology at the time of application.	Must not alter, create, or insert new elements into the essential components of a criminal offense ( <i>bestanddeel delict</i> ).
<b>Systematic Interpretation</b>	Examines a criminal provision in relation to other provisions within the Criminal Code and relevant sectoral legislation.	Ensures logical consistency within the legal system and prevents normative conflicts ( <i>antinomies</i> ).
<b>Teleological Interpretation</b>	Identifies the social purpose and public interest objectives underlying the enactment of a criminal provision.	Must be directed toward victim restoration, social welfare, and public interest protection rather than retributive objectives.
<b>Extensive Interpretation</b>	Broadens the meaning of statutory language to accommodate contemporary factual developments and emerging social phenomena.	The expanded meaning must maintain a logical and linguistic connection to the original wording of the statutory provision and must not constitute analogy..

One of the most significant manifestations of extensive and teleological interpretation in the history of Indonesian criminal adjudication concerns the expansion of the meaning of the term “property” (*barang*) under Article 362 of the Criminal Code governing theft offenses. In cases involving the unlawful appropriation of electricity, courts progressively interpreted the term “property” as encompassing not only tangible objects capable of physical possession but also electrical energy possessing economic value. Such judicial law-finding was not classified as

prohibited analogy; rather, it constituted a legitimate extension of the semantic scope of the term “property” in response to evolving social and economic realities.

Similarly, within the context of cybercrime and digital modernization, extensive interpretation has frequently been employed to broaden the traditional understanding of terms such as “document” and “letter” so as to include electronic data and digital information as admissible forms of evidence in criminal proceedings. The critical limitation that progressive judges must observe to prevent judicial law-finding from degenerating into arbitrariness is the prohibition against artificially expanding the unlawfulness of conduct without a compelling and objectively demonstrable *ratio legis*. Progressive criminal law-finding must therefore be grounded in transparent, accountable, and methodologically sound legal reasoning aimed exclusively at realizing substantive justice while ensuring balanced protection of the rights of victims, defendants, and society as a whole.

### **Contemporary Contextualization of *Rechtsvinding*: Living Law under the National Criminal Code and the Challenges of the Artificial Intelligence Era**

The transformation of criminal law-finding in Indonesia has reached a critical stage following the enactment of the National Criminal Code (Law No. 1 of 2023). One of the most significant innovations introduced by this codification reform is the explicit recognition of *living law* customary norms existing within society as a potential basis for criminal liability. Pursuant to Article 2 of the new Criminal Code, the traditional conception of formal legality has undergone a degree of reconceptualization. The application of written law no longer automatically excludes the operation of unwritten norms living within society, provided that such norms are consistent with the values of Pancasila and internationally recognized human rights principles.

The recognition of *living law* substantially expands the judicial mandate in the sphere of criminal *rechtsvinding*. Judges are no longer confined to interpreting statutory norms enacted by the state; they are also required to actively identify, understand, and articulate relevant customary norms and sanctions through an empirically informed and sociologically grounded process of judicial law-finding. This development, however, presents a significant methodological challenge. Judges must reconcile the requirement of *lex certa* which demands legal certainty and precision with customary norms that are often unwritten, localized, and variable across different regions. Consequently, criminal law-finding based on *living law* requires rigorous substantive synchronization to ensure that the incorporation of customary norms into state adjudication does not evolve into a form of judicial arbitrariness that infringes upon the constitutional rights of defendants. The legitimacy of such judicial practices depends upon the existence of clear methodological standards capable of balancing cultural recognition with legal certainty and due process guarantees.

Beyond the accommodation of customary law, judicial discretion in criminal law-finding is increasingly challenged by the rapid expansion of crimes involving Artificial Intelligence (AI). Emerging phenomena such as deepfake manipulation, AI-assisted fraud, synthetic identity fabrication, and autonomous algorithmic decision-making have exposed significant gaps within existing criminal legislation. These technological developments create acute legal lacunae because traditional categories of criminal responsibility, which were

originally designed for natural persons and corporate entities, are being tested by increasingly autonomous digital systems capable of performing functions previously reserved for human actors. Under such circumstances, progressive *rechtsvinding* assumes a decisive role. Judges cannot retreat behind the rigidity of statutory language merely because technological developments outpace legislative responses. Instead, judicial interpretation must serve as an adaptive mechanism capable of preserving the effectiveness of criminal law while respecting the limits imposed by legality.

Through teleological and extensive interpretation, criminal courts may identify appropriate frameworks of liability by contextualizing doctrines such as strict liability and direct liability within contemporary technological environments. Particular attention must be directed toward the assessment of *mens rea* and the attribution of responsibility to human actors who design, deploy, manipulate, or intentionally exploit AI systems for unlawful purposes. In this regard, electronic evidence including digital imagery, algorithmically generated content, and machine-produced data must be interpreted dynamically and progressively, extending beyond conventional evidentiary categories to ensure procedural fairness and legal accountability.

The necessity for adaptive judicial responses demonstrates that Indonesian criminal law cannot remain static in the face of technological disruption. Rather, it must evolve into an effective instrument of social engineering while simultaneously functioning as a mechanism of social defense. The challenge for contemporary criminal jurisprudence is therefore not whether *rechtsvinding* should occur, but how it can be conducted in a manner that preserves legal certainty while enabling the legal system to respond effectively to unprecedented forms of social harm. In the era of artificial intelligence, the future relevance of criminal law will depend significantly upon the judiciary's capacity to harmonize the principle of legality with the demands of technological and societal transformation.

## CONCLUSION

Several important conclusions may be drawn from this study.

1. Judicial law-finding (*rechtsvinding*) in criminal law constitutes an indispensable judicial instrument for maintaining the relevance and effectiveness of legal norms in the face of dynamic social and technological transformations. Nevertheless, the discretion of criminal judges in conducting judicial law-finding remains strictly constrained by the doctrinal boundaries of the principle of formal legality. In particular, the prohibition against analogical reasoning (*argumentum per analogiam*) serves as an absolute limitation designed to safeguard legal certainty and protect individual liberty against the risk of judicial overreach. This restriction remains a fundamental component of the rule of law, ensuring that criminal liability is imposed only on the basis of norms that have been previously established through legitimate legislative processes.
2. The principle of legality should not be interpreted as a justification for judicial passivity in situations involving ambiguity, indeterminacy, or normative gaps within criminal law. From the perspective of progressive law, criminal judges may legitimately employ interpretative methods—particularly teleological and extensive interpretation—to resolve legal uncertainty while remaining within the boundaries of lawful judicial reasoning. An ideal

model of criminal *rechtsvinding* must therefore achieve a balance between textual legal certainty and substantive justice. Any expansion of statutory meaning must remain firmly anchored in the original linguistic and normative framework of the legislation and must be directed toward the protection of victims, the preservation of public interests, and the realization of justice without undermining the fundamental rights of defendants.

Ultimately, the paradox of *rechtsvinding* in criminal law should not be understood as a conflict requiring the dominance of either legality or justice. Rather, it represents an ongoing effort to harmonize both values within a coherent framework of criminal adjudication. The future development of Indonesian criminal jurisprudence will depend upon the judiciary's ability to preserve the constitutional guarantees embodied in the legality principle while simultaneously ensuring that criminal law remains responsive to societal change, technological innovation, and evolving demands for substantive justice.

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