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THE FUNCTION OF LEGAL REASONITY IN COURT JUDGEMENT (MODEL ON FINDING THE LAW REFLECTY PANCASILA VALUE)

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Abstract

Legal research is a process to determine the rule of law, principles of law and legal doctrines in order to address the legal issues at hand. This study using a type of normative juridical (legal research). Rechtvinding understanding in Indonesian as legal discovery (translated literally) could mislead rechtvinding function is to find concrete norm to associate the relevant legal facts. Adhering to the understanding of the rechtvinding the judge in carrying out its functions prosecute a legal case can not be separated from efforts to find concrete norms to be linked to the fact the law. Furthermore, when the facts of law has no grounding norms that govern mutatis mutandis thus not regulated in the rules of positive law and customary law. Scholasticism and dialectic method is used as a support hermeneutic interpretation of legal facts to me recht construction of a new legal norm normative ideas should not be separated from Idee recht itself. Rechvinding model contained in the provisions of the Basic Law of Judicial Authority Article 1 in Conjunction with Article 5, Article 10 in conjunction with Article 50 1 for the model Rechtvinding is the approach taken by norma series is a concept of morals and justice and practices considered society as law and the criminal law model rechtvinding is also banned norma concrete (new), to assess the actions (act) so that an exit permit from the actions that have not been regulated in the act so that such actions are not punished.

Keywords: Law Logic Functions; Verdict; Rechtvinding.

Abstrak

Penelitian hukum adalah suatu proses untuk menentukan aturan hukum, prinsip-prinsip hukum maupun doktrin-doktrin hukum untuk menjawab isu hukum yang dihadapi. Penelitian ini menggunakan tipe penelitian yuridis normatif (legal research). Pemahaman Rechtvinding dalam bahasa Indonesia sebagai penemuan hukum (diterjemahkan secara harfiah) bisa menyesatkan fungsi rechtvinding adalah menemukan norma konkrit untuk dikaitkan pada fakta hukum terkait. Berpegang pada pemahaman rechtvinding tersebut maka hakim dalam menjalankan fungsinya mengadili suatu kasus hukum tidak terlepas dari upaya menemukan norma konkrit untuk dikaitkan pada fakta hukum. Metode skolastik dan dialektika digunakan sebagai penunjang interpretasi hermeneutika fakta-fakta hukum guna me recht kontruksi suatu norma hukum baru yang gagasan normatifnya tidak boleh terlepas dari recht Idee itu sendiri. Model rechvinding terkandung dalam ketentuan-ketentuan Undang-Undang Pokok Kekuasaan Kehakiman Pasal 1 jo Pasal 5, Pasal 10 jis Pasal 50 1 karena dalam model Rechtvinding ini pendekatan yang dilakukan melalui Norma yang merupakan rangkaian konsep mengenai moral dan keadilan serta praktik-praktik yang dianggap masyarakat sebagai hukum dan dalam Hukum Pidana Model Rechtvinding ini pun melarang norma konkrit (baru) untuk menilai tindakan (act) sehingga merupakan exit permit dari perbuatan yang belum diatur dalam ketentuan undang-undang sehingga perbuatan tersebut tidak dipidana.

Kata Kunci: Fungsi Logika Hukum; Putusan Hakim; Penemuan Hukum.

Introduction

The purpose of human thought is essentially trying to obtain the truth. Logic will help human beings to think straight and orderly; with this, human are able to recognize the truth and avoid the error of thinking. Characteristics of legal science can be seen from the statement of Paul Scholten who states “*rechtswetenschap kent niet allen een beschrijvende maar ook voorschrijvende dimensie*” According to Scholten, jurisprudence is different from descriptive science, he proposed the science of law is not to look for historical facts and social relationships as found in social studies . Instead, jurisprudence is dealing with legal prescriptions, judgments of a legal nature and material processed from the customs. Scholten further states that for legislators, jurisprudence is related to the law in abstracto; however, it did not mean that for judges, it will relate to the law in concreto. For judges, the science of law provides guidance in handling cases and establishing vague facts. Arguments presented by Paul Scholten shows clearly that the science of law has a prescriptive character as well as applied science. On the practical side of the law, the function of the judges decision includes the application of law (in concreto) and the formation of law (in abstracto). Therefore in addition to applying the law, the judges decision is one of the sources of law. The judges verdict is an independent element of the law. In the context of judges in which the lawyer (*meester in rechten*), the judges decision can not be separated from the science of law.

Judges decision, in addition to being one of the sources of law, can also be part of the development of legal theory. Even it can be argued that in the development of the dynamics of law within the society, it presents complicated problems. The ratio *decidentie* of judge decisions becomes a new discussion sphere to interpret or reconstruct existing legal theories. Therefore, the most important thing for both legal science and judge decision is the application of legal logic as the “tools of analysis” in solving legal problems. The guidance of the judges decision must be in accordance with the principles contained in Law Number 48 Year 2009 on the Principles of Judicial Power (hereinafter referred as Law No. 48/2009). Article 1 point 1 reads: “Judicial power is the power of an independent state to administer the

judiciary to uphold law and justice pursuant to Pancasila and the Constitution of the State of the Republic of Indonesia Year 1945, for the implementation of the legal state of the Republic of Indonesia”. Article 5 of Law no. 48/2009 reads: “Judges are obliged to explore, follow, and understand the values of law and sense of justice living in society”. Article 10 of Law no. 48/2009 reads: “The court is prohibited from refusing to examine, hear and decide upon a case filed under the pretext that the law is absent or unclear, but obligated to examine and prosecute”. Article 50 paragraph 1 of Law no. 48/2009 reads: “The judgment of a court other than to contain the reasons and grounds of the decision, also contains certain articles of the relevant legislation or source of the unwritten law as the basis for adjudication”.

Based on the principles of the above law, the personification of the judicial authority is actually reduced to the figure of the judge, there is a command (*gebod*) for the judge to establish the judiciary to enforce the law and justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia. Further, the judge shall upheld, follow and understand the legal values and sense of justice that lives in society and the law prohibits (*verbod*) judge to refuse to examine, hear and decide a case filed under the consideration of absence of law. It is mandatory for the judge to examine and adjudicate it through the living law within the society. Therefore, the judge as an expert of law (*Meester in de Rechten*) should be equipped with professional skills, namely mastering legal science and skills (*ars*). *Ars*, is a skills based on knowledge.

Professional ability of judges can not be separated from the logic of the law used in order to quickly and accurately analyze, formulate and prosecute a legal case in *concreto* and in *abstractio*. The decision-making process and the responsibility entitle the decision clearly can not be separated. It is worth noting what Paul Scholten said about open systems *van het recht* that every verdict is an independent element that always find something new. So the legal logic for the judges verdict also serves to strengthen an argument. Model *Rechtvinding* adopted today, as proposed among others by J.J.H Bruggink in his *Op Zoek Naar Het Recht* (*rechtsvinding* in *Rechtstheoretisch Prespectief*) which includes interpretation (*interpretatiemethoden*) and model of reasoning (*redeneerwijzen*) or construction law, which stems from the rule of law. It is not out of the weakness of legal

positivism that sees the law merely as the will of the ruler. Legal positivism view is the understanding that the nature of law should be a study of the laws that actually contained in the legal system, not the law that should exist in the moral rules.

Characteristics of Logic in Normative Legal Studies

Logic as a branch of philosophy that is practical based on reasoning and at the same time as the basis of philosophy and as a form of science with a function as the basis of philosophy. Logic is the “connecting bridge” between philosophy and science.¹ Object of the logic research is the way of thinking, then the function of logic other than the foundation of the birth of science, it also as a practical function to practice law. The terminology of legal study is more precisely called jurisprudence, which is derived from the Latin *iuris* and *prudentia* that translated as the wisdom in the law. The word *iuris* is a plural form of the word *ius* which defined as a series of guidelines to achieve justice.² *Scientia*, on the other side, translated as knowledge. From this, it can be concluded that legal science is a form of suggestion instead of just a mere descriptive statute.³

Philipus M. Hadjon examines the peculiar nature of jurisprudence from its normative character through two approaches to explain the nature of legal scholarship and by itself carries the consequences of his method of study. From the point of philosophy of science, it differentiates science from two perspectives namely positivistic view which gave birth to empirical sciences and normative science view. Legal science has two sides, on the one hand the science of law with the original character is the normative science and the other has an empirical facet. Empirical side is the study of empirical law; such as sociological jurisprudence and socio legal jurisprudence. Therefore, from this point of view the science of law is distinguished over the science of normative law and the science of empirical law. Normative’s legal study use a distinctive method of analysis, while empirical

¹ Noor Muhsin, ‘Logika, Penalaran Dan Analisis Definisi 18-04-2015’ (2008) <<https://massofa.wordpress.com/2008/01/31/logika-penalaran-dan-analisis-definisi/>> accessed 18 April 2015.

² Peter Mahmud Marzuki. *Op. Cit.*[8].

³ Ahmad Ali. *Loc. Cit.*

law can be studied through qualitative or quantitative research, depending on the nature of the data.⁴ According to the standpoint of the legal theory of science, law is divided into three main layers: legal dogmatic, legal theory (in the narrow sense) and legal philosophy.⁵ The three layers end up supporting the practice of law.⁶ Legal practice involves two main aspects: the formation of law and the application of law. The basic foundation is the theory of truth, while the science of empirical law is the attitude of scientists as a spectator who observes the symptoms of the object that can be captured by the five senses. The legal science of normative juris actively analyzes the norm, so the role of the subject is very prominent. The truth of empirical law is the truth of correspondence that means something is true because it is supported by facts (correspond to reality).⁷

The science of empirical law is qualified as a science of minimum value so that empirical jurisprudence only described as a social phenomenon that is not related to norms, in contrast to normative jurisprudence which views social phenomena as a full relationship to values within a frame of norm and needs to be addressed by jurist in forming a legal concept. To form a legal concept, John Austin who has legislative thinking makes a sharp distinction between jurisprudence and the science of ethics, he states that “The science of jurisprudence is concerned with positive law, or with laws strictly se called as considered without regard to their goodness and badness”. Jurist according to Austin is only related to the law as it is. Positive law according to Austin is not related to the ideal law or fair.⁸

This is contrary to what Freeman proposes in his book *Lloyd's Introduction to Jurisprudence* which provides an examination of the science of law as *Jurisprudence involves the study of general theoretical questions about the nature of law and legal systems, about the relationship of law to justice and morality and about the social nature law*.⁹ This means that the legal science covers the discussion of the general

⁴ Philipus M.Hadjon dan Tatiek Sri Djatmiati.[3].

⁵ Noor Muhsin.*Loc.Cit.*

⁶ Philipus M.Hadjon dan Tatiek Sri Djatmiati.[10].

⁷ *ibid.*

⁸ Peter Mahmud Marzuki.*Op.Cit.*[39].

⁹ *ibid.*[6].

law to answer the question of the principle of law and the legal system covers the relationship between law with justice and morality and custom law and practices that have been accepted as law by society. John Austin's view will not be able to create an ideal and fair legal concept when it comes to the meaning of jurisprudence that is value-filled and prescriptive because it relates to morality, justice and practices already accepted as law by society. Furthermore, Austinian views law as the ruler's command.¹⁰ The concept of law is ideal and fair, the science of law has 3 (three) layers of science that one and the other has a very strong attachment to be used in practical law.

Chronology of legal science development begins with the philosophy of law and followed dogmatic law (positive law). The two disciplines have a very extreme difference. The philosophy of law is highly speculative while the law is highly technical, the necessary correlation of middle discipline bridging legal philosophy and positive law. The middle discipline was initially shaped by the general law (*algemene rechtsleer*) which contains common features such as legal principles of various legal systems. This new discipline not only focuses on the same features but also the same problems of the various legal systems. The description of logical characteristics in the study of normative law science, can be proposed normative legal science which is the original character of law science¹¹ *sue generis* (one for himself) using scholastic and dialectic methods to achieve 2 (two) truths as a science that is the truth of coherence and a pragmatic truth that is basically a consensus. Therefore the characteristic of logic in jurisprudence is different from other science characteristics.

Legal Reasoning in Judge Decision

Judges decision is an independent element of the law, the judge is an expert in legal context (*meester in de rechten*), the judges decision is inseparable from the science of law itself. The judges ruling in addition to being a source of law may

¹⁰ Peter Mahmud Marzuki, 'Karakteristik Ilmu Hukum' (2008) 23 Yuridika.[7].

¹¹ *ibid.*[9].

also be part of the development of legal theory. In the *Hoge Raad* Decision dated January 31, 1919, the term *onrechtmatige daad*, interpreted broadly, so that it also includes an act that is contrary to morality or the social life is considered appropriate in the society.¹² Definition of legal violation in Article 1401 B.W. including acts that violate the legal rights of others or in conflict with the legal obligations by the creator or contrary to morality (*geode zeden*) or with a community decision about caring for others (*indruist tegen de zorgvuldigheid welke het maatschappelijk vekeer betaamt ten aanzien van anders person goed*).¹³ The ruling is contrary to a deeply rooted legislative judge at that time as well as the jurists who supported him. However, this decision becomes part *decidentie ratio* further judges in deciding the case because of legal logic applied strong enough to sustain the universal criteria and specific criteria that makes basic juridical rationality in the legal arguments of the judges decision. So as to solve the problems in practical law. Decision of the Hoge Raad dated January 31, 1919 rated also can not be separated from morality, fairness and practices that have been accepted as law by the public in accordance with the characteristics of normative in dogmatic law that the judges decision in accordance with *Recht Idee* / ideals of law which is the basis of all laws .

In the legal discipline, in the common law legal system, jurisprudence (previous judge decision) is seen as a source of law,¹⁴ in particular, this induction method developed into induction syllogism based on reasoning through precedent, based on the doctrine of *stare decides* bound by the judgment of the previous judge in adjudicating a similar case, the preceding facts will be analogous to the facts faced in adjudicating the legal case. So these facts are predictable facts that can be predicted with the facts of the former legal case. Therefore, the previous judges decision remains a hypothesis in the decision of the judge. On the other side, there exists the doctrine of *in percuriam*. It is when the following judge disagrees with the previous judges and then chose not to follow the precedent. 15 In the

¹² R Wirjono Projodikoro, *Perbuatan Melanggar Hukm Dipandang Dari Sudut Pandang Hukum Perdata* (Mandar Maju 2000).[7].

¹³ *ibid.*[8].

¹⁴ Peter Mahmud Marzuki.*Op.Cit.*[250].

¹⁵ *ibid.*[253].

civil law system, legislation is seen as a prime source of law.¹⁶ This method of deduction developed into a deduction syllogism based on reasoning based on rules. The enactment of a rule usually precedes the case, the starting point of rules not the case, through the principle of the legislative supremacy of the judge playing a subordinate role, the judge cannot change the language of the law.¹⁷ The influence of this legal positivism view creates a flow of legism, where judges are viewed as mere trumpets of the law or *as bouche de la loi* only.¹⁸ So the core of this view of the flow of legism is that judges should not do anything other than strictly enforce the law. Legislators of legislation are considered to be complete and clear in arranging all the problems in it.¹⁹

A formulation of positive law is presented by judges then be applied by the legislator or executive solely as a mere hypothesis. So that the societal phenomena which are empirically free from any value (as such is not considered normative behavior) according to *legism*, it must be verified to prove the hypothesis when the judge applies the rule of positive law to concrete cases by using deductive syllogism.

The view of judge with legism belief is based on this method in a narrow sense, which is limited to the rule of positive law called the general rule of conduct, laid down by political superior to a political inferior. Therefore, if the hypothesis proves successful in the sense that the rules of positive law reflect morals and justice, then it would not be a problem if the judge applied the rule of positive law purely. But when it does not reflect morals and justice, then the verdict of the judge will be contrary to his conscience and the judge does not have a clear legal concept of what he decides. *Recht Idee* is the legal ideals hidden behind the rule of law. It is so different when judges have prescriptive thoughts that have their own rationale in relation to various concepts of truth, understanding and meaning and moral values or principles are not merely the soundness of the rules of positive law

¹⁶ *ibid.*[24].

¹⁷ Philipus M.Hadjon dan Tatiek Sri Djatmiati.[36].

¹⁸ *ibid.*[36].

¹⁹ *ibid.*[37].

The judicial power that is reduced in the personification of judges can be accounted for its power and be more extensively in generating a theory and applying the theory in its verdict. The function of legal logic for judges decisions has led judges to find a correct ways of thinking and arguing by applying scholastic and dialectical methods to solve legal cases. The above guidelines are actually coherent with the guidance of achieving justice in realizing Indonesian society with high humanity and civilization as a nation.

Formulation of *Rechvinding* Model that Reflects the Ideal of Pancasila in Judges Decision

The first *Rechvinding* model ever put forward by Montesquieu is that the judge is the mouth of the law; meaning the judge applies the law and implements it literally: “*Les Judge Delanation Ne sont Que Les Bouches qui Prononcent Les Paroles De La Loi Des Etres Inanimés Qiu N en Peuvent Moderer Ni La For Ce Ni riguer*” (each judge must adjudge as how it set forth in the law for all activities in order to not get caught in a chaotic situation) Similar expressions in Dutch language “*Recht Ers Als Spreebuis der wet als wetsvertolkers en als geode mannen oordelend naar bilijkkheid*” (the judge as the mouth of the law and as a translator of the law and as a good person judging from the point of justice). *Dans Let Etats Monarchiques il ya une loi, la ou elle est precise le judge la suit, la ou elle ne l'est pas, il en cherche spirit* (within the monarchy state there is a law that guides the judges. If the guideline does not exist, the law becomes the spirit to look for it). Interpretations according to the spirit (*esprit*) of the law, judges are not just *spreekbuis van de wet* (mouth of the law, but also as *vertolker* (interpreters).²⁰

There is a difference between the duties of lawmakers and the duties of judges. The task of legislators is to formulate only general rules while the task of judges is not only to apply the law but apply it under the base of the principles formulated by the legislators applying to factual acts. Further, it should be noted also Paul Scholten’s open system *van het recht*. He asserted that judge decision as

²⁰ *ibid.*

an independent element always finds something new.²¹

The second *Rechtvinding* model as proposed by J.J.H Brruggink in his book *Op Zoek Naar Het Recht (Rechtvinding in Rechts theoretisch Prespektief)* which includes the interpretation method (*interpretatiemethode*) and the reasoning model (*redeneerwijezzen*) or legal construction.²² The fundamental difference of 2 (two) *rechtvinding* models mentioned above with the *rechtvinding* model presented in this scientific research is the legal logic model using scholastic and dialectic method which is based on logico analysis synthesis process. Therefore, the focus of this *rechtvinding* model analysis is not on the rule of law but on the norm. Furthermore, related legal facts that have been verified are connected to the concrete norms, not just in the given legal facts (given) and predicted (in prediction).

This *Rechtvinding* accommodates *the recht idee*, so that the vacuum of norm is analyzed and produces a concrete (new) norm that can solve cases in the practical law become more dynamic following the development of the dynamics of law within the society.

Application of *Rechtvinding* Model that Reflects the *Recht Idee* of Pancasila in Judges Decision

The settlement of legal cases against the probability of concrete coherent norms with the rule of positive law as well as customary law rules but gives different sanctions. Hence, the settlement by applying sanctions to both rules of law because between these two rules of law has a different purpose, sanctions rule positive law aims to execute the command of the ruler while the rule of habit is to restore cosmic balance. There are several acts which constitute crime, whether by criminal law or by custom. For example murder, wounding people, and offenses against property (*vermogensdelicten*). Throughout the era, people in the villages gradually accept and assume that it is reasonable that the guilty person will be punished by the district court with a penalty determined by the Kitab Undang-

²¹ *ibid.*

²² *ibid.*

Undang Hukum Pidana (Indonesian Penal Code). In addition there are also acts that violate morals (*zendendelicten*) is considered to be severe thus the punishment set in the Criminal Code is deemed to be not enough. Therefore, it is also obligatory to organize customary apology efforts, to give *salamatan* (*pembersih husun*).²³ The dialectic function used by the judge as a balance keeper in its *decidentie ratio* is considered as mitigating reasons, for example in the field of criminal law, when someone is proven guilty from doing larceny, if the victim accept the apology from the perpetrator, then the judges in his *ratio decidentie* can reduce the punishment.

The settlement of a legal case against probability is used when the rule of law is positive as well as coherent custom law with concrete norms but between them there is a contradiction, on the one hand in the rule of positive law it is a prohibited act, but on the other hand, in the rule of custom law it is allowed; then the dialectic function is used by Judges in their *ratio decidentie* are considered as excuses of forgiveness as well as justification reasons and may also remove their unlawful nature. For example, elopement is a criminal act; Sasak tribe in West Nusa Tenggara done eloped as one of their customary tradition. Elope according to the KUHP (Article 330 jo Section 331) is a criminal act, then the judge in his *ratio decidentie* can eliminate his unlawful nature if the young man has kept his promise to marry the woman and the parents finally allow their marriage. Another thing that can be taken into consideration is the criteria of public interest in some judges rulings. The public interest criterion itself is very hard to be defined. One common criterion in terms of legal protection of patents is how the state can guarantee the patent holder and provide protection for other parties. Public interest is translated that IPR protection can guarantee the distribution and utilization of IPR so that the utilization can provide economic benefits for the wider community.²⁴

The settlement of legal cases against the probability of legal facts which are not based on the norms governing them is therefore not *mutatis mutandis* also

²³ Agus Yudha Hernoko, *Hukum Perjanjian : Asas Proposionalitas Dalam Kontrak Komersial* (Prenadamedia Group 2014).[134].

²⁴ Winner Sitorus, 'Kepentingan Umum Dalam Perlindungan Paten' (2014) 29 *Yuridika*. [47-49].

regulated in the rules of positive law and custom law. Then the next step is to use *diontik logic* in doing the construction of norms. The dialectic function is used to solve the void of norms through the logic that allows man find whether the act is morally good by looking for something effective and experimentation in social, philosophical and cultural issues that are worth it solve legal practical problems. Scholastic and dialectic methods are used to support the hermeneutics of legal facts in order to reconstruct the construction of a new legal norm whose normative notion can not be separated from the *recht idee* itself. The stages in *recht* construction of the norm in the *rechtvinding* model reflecting the *recht idee* begins with the first stage of interpreting the meaning of human behavior. Peter Mahmud Marzuki states that hermeneutics stems from a proposition that there is a meaningful interdependence between human life and culture, unlike the lifeless nature, man is not conditioned by *causa* but by thought or rule. This means that humans give meaning to life. This must be understood from the human side itself. Given that law is the rule, those who study the law should actually be able to describe what that reality is. People's behavior is actually based on interpretations that mean what they do. In social interaction they relate to each other in frames that are full of norms. So the human relationship in social interaction is not value-free. The contents of the rules can not be deduced from the observed external behavior, because they will lose the meaning of what is actually done in relation to the norm.²⁵

This *rechvinding* model is a legal logic model whose character has been in accordance with the normative jurisprudence study by using scholastic and dialectic methods, the settlement of legal cases where there are elements of legal facts that are not given and un predictable then the step of interpreting an act, event and circumstances allegedly out of the frame of conditions with norms through hermeneutics to understand the meaning behind an act, events and circumstances associated with concrete norms. If an act has not had the basis of norm, then in the construction of norms, hermeneutik supported by scholastic and dialectic method becomes a means for logic *diontik* to assess a severity so that human carry out the

²⁵ Peter Mahmud Marzuki. *Op. Cit.*[106-107].

obligation of moral which is considered good which come from something which is judged to be effective and through experimental in social, philosophical and cultural issues solving practical legal problems.

Furthermore, the application of this *rechtvinding* model has universal criteria and specific juridical criteria that make the basis of rationality of legal argument in anticipating the development of legal dynamics of society. For example in the legal aspect in the development of information technology, human *cloning* technology, political dynamics, and so on which is actually a cultural product because Judges have found firm footing in the way of thinking and arguing law.

Conclusion

Rechtvinding in Indonesian is translated as legal discovery (literally translated), this translation could cause mislead that the *rechtvinding* function is to find concrete norms to be associated with related legal facts. Holding to the understanding of the *rechtvinding*, the judge in carrying out his duty to adjudicate a legal case is inseparable from finding concrete norms to be linked to legal facts. Norm consists of a series of concepts, to understand the norm must be started by understanding the concept (conceptual approach). Notions such as age (*meerderjarig*), responsibility, unlawful action (*onrechtmatige daad*) and unlawful (*wederrechtelijk*) are normative understandings and a concept that is needed in society in Interact. The concept of law can then be determined by norms in the form of command (*gebod*), *verbjelling* (*verbod*), more concrete permits (*toestemming*) leading to a rule of law.

Furthermore, when the legal facts do not have the basis of the norms governing them, therefore *mutatis mutandis* is not regulated in the rules of positive law or customary law. So dialectics are used to solve the void of norms through diontik logic that the obligations to humankind must be fulfilled solely through examine morally good act is by looking for something effective and useful (experimentation) in social, philosophical and cultural issues that are worth it solve legal practical problems. Scholastic and dialectic methods are used to support the interpretation of hermeneutics of legal facts in order to reconstruct the construction of a new legal

norm whose normative idea should not be separated from the *recht idee* itself. The *rechvinding* model is contained in the provisions of Law No. 48 / 2009 Article 1 in conjunction with Article 5, Article 10 jis Article 50 paragraph 1 because in this *Rechtvinding* model the approach is carried out through the norm which is a series of concepts concerning moral and justice as well as the practices considered Society as a law and in the criminal law the *rechtvinding* model also prohibits the concrete (new) norms to assess the act so that it constitutes an exit permit of an action which has not been regulated in the provisions of the law so that the action is not punished.

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