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The Study of a Judge Ideological From a Formal Centralist to The Legal Pluralism*

(Analysis of purport arbitration in article 5 paragraph (1) of Law Number 48 the Year 2009 on Judicial Power)

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Abstract:
Article 5 (1) of Law Number 48 the Year 2009 concerning Judicial Power becomes ineffective if a centralistic ideology still working in view of the judge. The type of study used in this research was a non-doctrinal legal study *(socio-legal research)*. Research conducted in the District Court and Religious Court in Madura based on the judge's perception of the meaning of article 5 paragraph (1) law 48/2009 and justices consideration to verdict making process. The results showing the judges majority interpret the Article 5, paragraph 1 Law 28/2009 to legal discovery *(rechtsvinding)* as efforts if a legal vacuum, otherwise the judges did not interpret used living law when there are legal gaps. Thus showing domination of the state law over the law that lives in society.

Keywords: Ideology, Judge, centralistic, Pluralism

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Studi Ideologi Hakim Dari Sentralistis Formal ke Pluralisme Hukum

(Analisis Pemaknaan Hakim Terhadap Pasal 5 ayat (1) Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman)

Abstrak:

Pasal 5 ayat (1) Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman menjadi tidak efektif bila ideologi sentralistik masih berkutat dalam pandangan hakim. Jenis studi yang digunakan dalam penelitian ini adalah studi hukum non doctrinal (socio legal research), penelitian dilakukan di lingkungan Pengadilan Negeri dan Pengadilan Agama di wilayah Madura berdasarkan persepsi hakim terhadap Pasal 5 Ayat (1) UU 48/2009 dan pertimbangan hakim dalam memutus suatu perkara. Hasil penelitian menunjukkan bahwa sebagian besar hakim memaknai Pasal 5 Ayat (1) sebagai upaya mengisi kekosongan hukum, sebaliknya hakim tidak memaknainya sebagai upaya menggali hukum yang hidup dan menjadikannya sebagai pertimbangan utama putusan ketika terjadi legal gap (kesenjangan hukum) antara lebih dari dua sistem hukum. Pemaknaan demikian masih menunjukkan adanya dominasi hukum negara atas hukum yang hidup di masyarakat.

Kata Kunci: *Ideologi, Hakim, Sentralistik, Pluralisme*

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Introduction

Indonesia is a rich country with a culture and value are cannot be ignored in the process of law enforcement, where society is positioned as a legal subject, not vice versa that is the object of law as practiced by law enforcement apparatus today. Giving total legitimacy to the state to enforce the law in a pluralistic country like Indonesia can be categorized as a "newfangled thinking style" model. [1] The dominance of state law in the process of law enforcement in culturally and diverse society indirectly will dwarf the values that grow and develop in the community. In this case, the law is interpreted as a positive law in the form of written rules imposed through state power. Beyond that, it is not called a law. With such meaning, the duty of justice is to judge the cases which will be exposed him is based on the law.

The research team formerly indicated that Madurese tend to choose informal systems when they were faced with disputes. The Solving problem by deliberations of involving their leader (Kades) is chosen by them because of they believed that is cheap, fast and easy accessed than they used mechanism state law. However, the obstacles emerge when there are parties who do not implement the verdict that has been agreed in the deliberation. The enforcement and the right of appeal cannot be done and this ultimately undermines the informal mechanism and the last attempt is to bring the case to the formal. If it has happened like this, the hope is that the judge should make the process that has been done informally as the basis of consideration in taking the decision. [2] The presence of such state law is not without problems. As a consequence of legal centralism, all its provisions, procedures, and enforcement mechanisms provided by the law of the state are unlikely to be recognized by all segments of Indonesian society that are so plural and heterogeneous. At the time of the previous cases that have been resolved through the informal system (rule of law prevailing in the society) has stood in the formal system (courts). The judge made the text as an autonomous, in the sense of all the information and the inspection process must be adapted to the article of the case and used as guidelines by the judge. They are required to explore and understand the legal values and sense of justice in the society in accordance with the Article 5, paragraph 1 of Law No. 48 the Year 2009 concerning Judicial Authority which is referred as Law No. 48/2009.

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[1]Irwansyah, dalam Mahrus Ali, *Menggugat Dominasi Hukum Negara*, (Yogyakarta: Rangkang-Indonesia, 2009), iii.

[2]Rina Yulianti, dkk, "Penyelesaian Sengketa Informal Berbasis Komunitas Adat Terpencil di Kepulauan kangean (Pilihan Hukum dan Posisi dalam Sistem Hukum Negara)", Jurnal Dinamika Hukum, Vol.12 No.2 Tahun 2012 p.197-378.

Perception of Judge Against The Article 5 Paragraph (1) of Law Number 48 the 2009

The judge when enforcing the law other than obliged to decide according to law and fulfill the sense of justice, must also seriously pay attention to the living realities in society, as well as make projections directing the development of society. Only then, the judge's decision according to Pound will provide satisfaction for individual or social justice seekers. Judges are no longer law enforcers in dogmatic meanings, but also as legal engineers in the social, economic, political, cultural, and other aspects of life. Judges are the main components that give birth to the law in a concrete sense, both in applying the abstract law to concrete events and interpreting laws or forming laws. The concrete laws born of the judge's verdict are not always satisfactory. Not only the judge considered to be too attached to the abstract rules of law and because decisions are deemed to rule out a sense of justice or sociological demands. their rulings also are too attached to abstract rules of law cannot be satisfactory because they do not adequately consider individual or social realities. Especially if they only interpret the rule of law as a normative one. In Article 5 paragraph (1) of Law 48/2009, it is stipulated that judges of the constitution are obliged to explore, follow, and understand the legal values and sense of justice living in the community. While in the elucidation of Article 5 Paragraph (1) it is mentioned that this provision is intended to make the decision of judges and constitutional judges in accordance with the law and sense of community justice.

Article 5 of Law 48/2009 consists of 3 verses that have the meaning of the duty of judges in the implementation of judicial power, among others: 1) the recognition of the law that lives in the community so there is a need to dig, follow and understand it, 2) maintain integrity, honesty, justice and professional, 3) limited by code of ethics and codes of conduct. Article 5 of Law 48/2009 is concretely applicable only to the implementation of Paragraph (2) and Paragraph (3) because in this paragraph there is a clear benchmark through the Joint Regulation of the Supreme Court of the Republic of Indonesia (Then it was abbreviated as MARI) and the Judicial Commission (KY) on the Code of Ethics and Code of Conduct for Judges, even for the implementation of the Joint Regulation between MARI and KY Number 02 / PB / MA / IX / 2012 and Number: 02 / PB / P.KY / 09/2012 on Code Enforcement Guide and Judicial Conduct Guidelines. Whereas Article 5 Paragraph (1) of Law 48/2009 which requires the activity of judges to explore, follow and understand the legal

values living in the community there is no specific guidance on how the application of Article 5 Paragraph (1) of Law 48/2009 is. In addition, there is also a document on the Pattern of Custody and Control of Case Administration (Bindalmin) issued by MARI concerning the obligation to explore the legal values living in the community, but these guidelines only repeat what is mentioned normatively as in Article 5 Paragraph (1) of Law 48/2009, which does not specify how the judicial activity to explore the values of living law is done.

The results of this paper which was aimed to know the judge's perception of the effectiveness of the application of Article 5 Paragraph (1) of Law 48/2009, among others: First, the judge interpreted or provided an interpretation of Article 5 Paragraph (1) of Law 48/2009 that if there is a case that law does not regulate it, the judge must dig up, follow, and understand the legal values and sense of justice living in the community. This means that judicial activity by delving into living law will only be done if the law does not regulate, and they refer to it as "Rechtvinding" or the invention of the law. Second, Article 5 Paragraph (1) is effective to fill the legal void or if the law does not regulate, especially for the criminal law because there is the provision of legality principle as Article 1 KUHP. Third, the provision of Article 5 Paragraph (1) of Law 48/2009 is very effective in resolving civil cases, especially if the customary law that has been codified like in Bali and Sumatra. [3]

In this paper the researcher emphasised the perception of the judge on the obligation to do "Rechtvinding" or legal discovery due to legal vacuum, so that the law is interpreted as law according to the meaning of the judges against Article 5 Paragraph (1) of Law 48/2009, thus this chapter is effective only to fill the legal void. What if there is a gap between the law as das swollen and the existing reality (das Sein), this condition will certainly contrast to the law in the framework of the law with the Rule in society. The meaning of "Rechtvinding" in the Article 5 Paragraph (1) of Law 48/2009 according to the judge's perception that the judge has the authority to find the law against cases that have no legal basis but it must have been brought to court. To analyze the cases that have no rules, they must dig, follow, and understand the values of law and sense of justice that lives in the community.

According to Sudikno Mertokusumo there are several terminologies that are often associated with the discovery of the law: First, Rechtsvorming

[3] The result of the close interview with several judges in the Madurese District Court and Religious Court (PA) of Madura region and additional team discussion result with Amrullah Waka PN Rantau Kalimantan Selatan, period February-August 2016.

(formation of the law), namely formulating rules that apply in general and for everyone. Normally it is done by the legislator. Beside of that, they also possible as a lawmaker if the decision becomes vet jurisprudence followed by judges and a guide for the general legal community. Second, Rechtstoepassing (the application of law), that is to apply the rules of law that are abstract in the case. Therefore concrete events should be made into a law event in advance for the rule of law can be applied. Third, Rechtshandhaving or law enforcement can be applied well whether there is a violation or without violation. Fourth, Rechtsshepping or the creation of the law means that the law is completely absent and then created, ie from nothing into existence. Fifth, Rechtsvinding or legal discovery in the sense that not the law does not exist, but the law already exists, but still needs to be explored and found. The law is not always a Sulis or das swollen, but it can also be a behavior or event (das Sein). [4]

The discovery of the law (rechtsvinding) with the formation of law (rechtsvorming) has a difference. Rechtsvinding in the sense that not the law does not exist, but the law already exists, but still need to be explored, sought and found. While rechtsvorming in its legal sense does not exist, therefore there needs to be the formation of the law, so there is also the creation of the law. [5]The judge must always be aware that the written law is only the moment of preference, of the demands or realities that exist at the time set. Society as a place of written law applies always in change . they also must keep the established law up-to-date and in harmony with the living fair of society. Similarly, customary law or law of power. In addition, they also should not simply know the customary law found in books or decisions that have existed because the people in customary law are constantly changing. [6]

This is a the process of legal formation by judges, or other legal apparatus assigned to apply common law rules on concrete legal events. According to the doctrine of functional law, what matters is the question of how in certain situations can be found the best solution that suits the needs of common life and with the hope of living among the citizens against the "game of society" dominated by the "rules of the game". Here is not the result of the invention of the law which is the central point, but the method used although the goal is to produce a verdict. [7] Rule of law is not always in the form of

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[4] Sutioso. B, *Metode Penemuan Hukum*, (Yogyakarta: UII Press, 2006), p. 29.

[5] Sutioso. B, *Metode Penemuan Hukum*, p. 29.

[6] Fauzan, *Kaidah Penemuan Hukum Yurisprudensi Bidang Hukum Perdata*, (Jakarta: Kencana, 2014), p.. 6.

[7]Cut Asmaul Husna, "Penemuan dan Pembentukan Hukum **"the Living Law"** Melalui Putusan Hakim", MIZAN Journal, Vol. 2 No. 3. February 2012, p. 65

written or not, but it can also be a behavior or events. In that behavior, there is the law. From the behavior that must be found or excavated rule or law. Creating a law to fill the legal void is the right thing in terms of resolving a case that is not legally (legislation). It is a fact that the legislator only establishes common law rules so that the consideration of the concrete things handed to the judge. Moreover, lawmakers have always lagged behind the development of society, resulting in a situation such as the existence of new things in the life of society that there is no rule of law. This means that there is a legal vacuum in the legal system that should add by the judge. [8]

An interesting and very important thing to be questioned is who is worthy of making the discovery of the law and creating the law. Although in academic studies that are entitled to make legal discovery and the creation of law are lawyers, advocates, lecturers, prosecutors and others, but when viewed from the definition of the law itself, that is the law is a judge (in the narrow sense) because the judge makes the law (judge made law) and the judiciary (in the broad sense) because the judiciary is a means of law enforcement, it is clear that the competent person for the discovery of the law and the creation of the law is a judge . [9]

The judge is considered important in the discovery of law and the creation of law because they have the authority. The rest of that excavated by a judge is a law, while the results of excavations from legal scientists, lecturers, researchers and others are not laws, but science or doctrine. Doctrine is not the law, but it is the source of the law, but if the legal doctrine is used by the judge then it becomes law. Other requirements for the excavation of legal discovery and the creation of law and this must be owned by the judge, among others are the mastery of jurisprudence, juridical thinking, and the ability to solve legal problems that include legal problem identification skills, legal problem solving skills (legal problem solving) and skills to take decisions (decision making). [10]

Justice is the right of everyone who cannot be postponed or even eliminated. Even delaying legal process alone means delaying justice. Moreover, the community is very supportive and hopes on the professionality that is upheld by the judge as the representative of God. The process that must be done to get a judge like this, of course, must be by performing the correct recruitment patterns and balanced supervision. Sectoral ego should be

[8] *Ibid*, p. 66
[9] Cut Asmaul Husna, *Ibid*, p. 69
[10] *Ibid*, p. 69.

eliminated for the realization of the check and balance system. [11]Legal centralism defines the law as a "state law" which applies uniformly to all persons residing in the jurisdiction of the country. Thus, there is only one law applied in a country, that is the law of the state. Laws can only be established by state agencies assigned specifically to it. Although there are other legal norms, the centrality of the law places the law of the state on top of other legal norms, such as adat law, religious law, and customs. These other legal rules are considered to have weaker connectivity and should be subject to state law.

Sociologically, the living law will always live in society. In this connection, it is worth noting the following assumptions:

1. The unwritten law must exist because the written law will not be possible to regulate all the needs of society that need to be governed by law.

2. In a society that is undergoing rapid social change, the role of unwritten law is more prominent than the written law.

3. The problem is which is an unwritten law that is considered fair.

4. To ensure legal certainty is necessary as much as possible to prepare written a law. This does not mean that the circumstances must be so, for in the public sphere of life the written law is primarily made to prevent the arbitrariness of the ruler. [12]

It is very difficult to remove the dominance of state law in a society, because one theory stated that the state can impose its will on society, therefore, the spaces of society to solve cases or problems that evolve in the environment are always defeated by the law of the country clearly failed to create prosperity and about what the noble ideals of the nation. [13] Arbitrate with rigid legal paradigm as practiced has always put the human being as an object that can be set in accordance with the will of law enforcement and never looked at the importance of the settlement through a cultural approach. Eventually, the law will be lost in the culture-based all-around state law procedural and centralized. Centralism application of the law in the Republic of Indonesia (Republic of Indonesia) as well as to bring our legal world to the brink of an abyss, because

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[11]Akbar Faizal, "Politik Hukum Perlindungan Hakim", Jurnal Cita HukumFakultas Syariah dan Hukum UIN Jakarta Vol.4 No.1 Tahun 2016, P-ISSN: 2356-1440. E-ISSN: 2502-230X.

[12] Rehngena Purba, "Customary Law in Jurisprudence" presented in a Seminar on Reinterpretation of Written Law Value in the Establishment and Discovery of Hearing Law September 28-29, 2005, Makasar, South Sulawesi, p. 1-2.

[13]Mahrus Ali, *Menggugat Dominasi Hukum Negara*, (Yogyakarta: Rangkang-Indonesia, 1999), p. xi

the formation of the Homeland is a mutual agreement of the various shades of culture. Ethnic and religious diversity and empire that became the basic key that the paradigm of state law centralism cannot be the sole source of dispute resolution in society.[14]

Legal pluralism is generally defined as a situation in which two or more legal systems work side by side in a similar field of social life, or to explain the existence of two or more social control systems in one area of social life, [15] or explain a situation in which two or more the legal system interacts with one social life, [16] or a condition in which more than one legal system or institution works side by side in activities and relationships within a community. [17] The concept of legal pluralism is generally contrasted with the ideology of legal centralism. Ideology of legal centralism is defined as an ideology that calls for the enactment of state law as the only law for all citizens, regardless of the existence of other legal systems, such as religious law, customary law, , as well as all forms of local inner-order mechanisms that empirically live and thrive in people's lives. In this context, Griffiths asserts: [18]

> "The ideology of legal centralism, a law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state".

Madurese and Indonesians, especially those who are far from access to justice, have a dispute resolution mechanism or legal problem-solving in their own ways. This proved that the existence of more than the legal system applicable to Indonesian society, unfortunately, this mechanism has a weakness when it should be upheld. This condition ultimately undermines the informal mechanism itself and ultimately must be resolved through the formal channels. When these formal and informal interactions are confronted and become the professional realm of judges to decide cases, then here come legal gaps. The

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[14] Mahrus Ali, *Ibid*, p. xi.

[15] John Griffiths,. "What is Legal Pluralism", dalam Journal of Legal Pluralism and Unofficial Law, Number 24/1986, The Foundation for Journal of Legal Pluralism, 1986, p. 1-56.

[16] M. B. Hooker, *Legal Pluralism: Introduction to Colonial and Neo-Colonial Law*, (London: Oxford University Press, 1975)

[17] F. von Benda-Beckmann, "From The Law of Primitive Man to Social-Legal Study of Complex Societies", dalam *Antropologi Indonesia*, Majalah Antropologi Sosial dan Budaya No. 47 Tahun XIII, FISIP UI, Jakarta, 1989, p. 67-75.

[18] John Griffiths, *Op.cit*, p. 1-56.

occurrence of duality caused by the central government's offensive motion with its national law on the one hand, and the "test-resistant" defensive position of so-called locale rechtsgemeenschappen with its informal law on the other, has led to a phenomenon called the legal gap. There is a difference between what is lived in everyday life as law by the local people. In the face of such a reality, the national government which continues to aspire for a single legal system (which will serve as the only normative reference to the legal behavior of all citizens in the state senator without exception) will always try to narrow the distance if it can not afford to negate the gaps. [19]

The role of judges in dealing with the disparity of this dualism of law is important, but if Article 5 Paragraph (1) is only meant to fill the legal void, whereas the reality is not the existing legal vacuum but the existence of two jurisdictions each recognized to have its own spatial existence, then these legal gaps will continue and this position is less favorable for people's law if the judge's view more interpret the law as a law (law in books). The normative concept of Article 5 Paragraph (1) of Law 48/2009 must be refined by affirming the extent to which judicial activity can be performed by the judge, not just rechtvinding to fill the legal vacuum but also the mechanism that a judge must perform when faced with dualism laws that are actually applicable in society. Such a reality as a manifestation that the state does not ignore the existence of legal pluralism, but must be regulated as well as possible the mechanism of legitimation, especially against the judge who will decide a case with the character of the existence of legal dualism. There is a need for the standard operating procedure (SOP) for judges in conducting judicial activities when going to decide a case that previously involves the interaction of informal mechanisms under the people's law.

Typology Case and Its Influence Decision-Based Law Judge of the Living (The Living Law)

Since 1998 reforms so many complaints against law enforcement in Indonesia, no exception to the judge. Complaints to judges include judges considered to be too legalistic, paying little attention to the sense of community justice, not oriented to change and others, as well as a rancorous verdict (Tempo magazine). What a great reaction from various stakeholders (advocates, legal observers of small cases like Prieta, the theft of two pieces of soap, apple

[19] Soetandyo Wignyosoebroto, *Hukum Dalam Masyarakat*, (Yogyakarta: Graha Ilmu, 2013), p. 52-53.

congealing, or theft of flip-flops, as well as complaints against corruption cases, such as overt punishment.outside judges, there are complaints called selective logging, lack of courage, and others. [20]

This study focused on the study of the notion that "the judge is too centralistic" because the judge only serves as a mouthpiece of the law, the question that needs to be answered in this research is how the judge's judgment character is based on living law, is the judge too legalistic/centralistic so as to put aside the sense of justice .In the civil law legal system, the law is conceived as a written and legally codified legislation that has been perfectly and completely codified. In the civil law tradition, the history of the birth of the law is only seen from the aspect of formal legality alone. The law exists only in the formal rules of legislation that the process of its formation through the legislative body, while the law born outside the legislative process should be regarded as a law that has no authority as a binding applied law. [21] The legal system has placed the judge only as a mouthpiece of a law or spokesman of the law. Judges in performing the functions of judicial power have no competence to interpret the articles in the law, fair or unjust laws should be applied by judges, although contrary to conviction and conscience. [22]

The results of this study found some legal issues that were formally resolved through litigation channels, or in the formal process of formal settlement of the courts have been conducted ways or informal mechanisms against the case or the case. Judges have their own reasons or considerations for the existence of legal dualism when deciding cases that come in both the PN and the PA. Legal issues include: [23]First, in the State Court that there is mediation penal in a criminal case, and the existence of peace in a civil case. Secondly, in the court of Religious Courts, namely for divorce cases.

The judge at the District Court explained that he had found the dualism of the legal system in handling certain criminal cases which had been done by penal mediation, [24] which aimed to repair the damage or loss, whether

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[20]Fauzan, *Op.cit*, p. 7-8

[21]Lili Rasjidi, *Hukum Sebagai Suatu Sistem,* (Bandung: Penerbit CV. Mandar Maju, Cetakan ke II, 2003), p.163.

[22]Cut Asmaul Husna, *Op.cit,* h.. 72

[23] Results of interview with judges PN and PA in Madura, as well as the inventory of cases involving formal interaction mechanism with informal mechanisms, period February-August 2016..

[24] Marck William Bakker defines penal mediation in criminal law as a criminal proceeding process by bringing together the perpetrators of crime and victim to reach mutual agreement regarding the crime committed by the perpetrator and the restitution given to the victim. The

experienced by the victim, the environment or the wider community. Cases that occur include traffic accidents, domestic violence (Domestic Violence), theft cases and cases of fights that cause death. The last case of fights that led to death occurred in the jurisdiction of PN Bangkalan. In this case, it is of interest to be concerned because at the level of police investigation and investigation it has found a peace between the perpetrator and the victim's family, [25] indicating the strength of the law living in the community based on the cultural values of the people in Madura. Agree with what Mahrus Ali said in his research that solving the carok case in Madura[26] by using an out-of-court settlement shows that the building of criminal law is no longer exclusive by giving full authority to the state to determine what actions are prohibited and only law enforcement officers established by the state to which it is entitled to resolve, but to open up to the dispute resolution process outside the court.

Eliminating the role of the state in the example above is still difficult because it is not a minor offense, but herein lies the certainty and legal justice can be achieved through the role of judges in considering the laws that live in the community. Legality is possible through a judge's verdict with mild sanctions or even exemption if both parties have accepted it. Such judges' considerations will not damage the familial relationship between the victim and the perpetrator. The initially peaceful, and pacifist relationship will be restored to a peace agreement. The invaluable advantage of this process is to break the reaction of revenge on the family lineage of the victim.

Another criminal case which is a breach with loss and has been made peace. The result of the agreement will usually also be considered by the judge to reduce his criminal sanctions. Judges are largely unable to give a free verdict against violations despite peace. The judge only reduces the existing sanctions, because according to them the criminal elements have been qualified and limited by the principle of legality so that the state law is applied. In this context, it ap, ears that community law is still a subordination of state law.

The judge stated unequivocally that Article 5 Paragraph (1) of Law 48/2009 was very effective in resolving civil matters, [27] for example in lawsuit

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meeting was mediated by a mediator or better coming from law enforcement, government, people engaged in non-governmental organizations, as well as community leaders. See Mahrus Ali, *op.cit.*, p. 143

[25] The result of a closed interview with police officers at Bangkalan Police Station, in the period of June 2015.

[26] Mahrus Ali, *Op.cit.*, p. 131.

[27] Closed Interview with the judge at Pamengkasan on September 5, 2016.

lawsuits that have been awarded Number: 11/Pdt.G/2016/PN.Pmk. These civil disputes are ultimately awarded peace by the judge because the agreement has been reached by the parties. Revocation of the lawsuit by parties to indicate that there is no more dispute between them. This is certainly different from the criminal case, for civil cases with the legal nature of "anvullend Recht" (supplement/regulate) facilitate the judge to enact the laws that live in society because there is no consequence of the validity of the principle of legality and decides cases beyond what is regulated in law. legislation as criminal law. Different opinions are given by one of the judges in the Religious Courts, according to the judge's decision, especially in the case of divorce should put forward the principle of benefit or benefit, although previously there has been peace/reconciliation to the parties, but when examining the divorce request the responses of the parties to the question of the judge leading to the difficulty of maintaining the continuity of the marital ties to the family, the judge will still issue a divorce verdict, especially on submissions that have been made more than once. [28]

Conclusion

Article 5 Paragraph (1) of Law 48/2009 is often perceived as a judicial activity limited to the discovery of the law (rechtsvinding) because of the vacancy of the law. The normative concept of this article does not reach the legal gaps between state law and the enactment of the living law in society. The actual dualism of the legal system will affect the judge in applying the verdict. In a criminal case the judge firmly put forward the principle of legal certainty that is definitely centralized formal and in civil cases new judges freely use legal pluralism understand. The results of this study conclude that case typology affects the judge's decision based on the law that lives in the community. It is photographed in the settlement of cases studied include: first, the criminal case, the judge carefully apply the law that lives in the community, the judge put forward the principle of legal certainty this is influenced by the centralistic ideology in criminal cases that must be based on the principle of legality. Secondly, in civil cases in the PN, judges are freer to use the ideology of legal pluralism because, in addition to being required to mediate by Supreme Court Regulation No. 1 of 2016, the open nature with the legal character set/complement to civil cases judges more freely based on living law in society. The ideology of such judges puts more emphasis on the principle of justice for

[28] Closed interview with the Judge at PA Pamekasan on September 6, 2016

society. Thirdly, in civil cases through marital law relationships that end in divorce in PA, judges put forward the principle of benefit of the parties.

The normative concept of Article 5 Paragraph (1) of Law 48/2009 needs to emphasize the extent to which judicial activity can be performed by judges, not just rechtvinding to fill the legal vacuum but also to organize mechanisms for judges when faced with a legal dualism that actually applies to society. Standard operational procedures (SOPs) are required for judges to engage in judicial activism when deciding on a case that previously involves the interaction of informal mechanisms based on living laws in the community.

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Interviewed

1. The results of an interview with PN and PA judges in the Madurese area, as well as case inventory involving the interaction of formal mechanisms with informal mechanisms, the period February-August 2016.

2. The result of an interview with some judges in PN and PA of Madura region and additional team discussion results with Mr. Amrullah Deputy Head of Rantau District Court of South Kalimantan, period February-August 2016.
3. The result of an interview with Head of Unit Criminal Polres Bangkalan, in June 2015 period.
4. Interviewed by Judge at PN Pamekasan on September 5, 2016