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DECONSTRUCTION OF THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW AS AN EFFORT TO REALIZE PROCEDURAL AND SUBSTANTIVE JUSTICE

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Abstract

The principle of legality contained in Article 1 paragraph (1) of the Criminal Code (KUHP) emphasizes the principle of 'no delict, no crime without criminal provisions that precede it,' which emphasizes procedural justice. This principle of legality, contrary to Article 5 paragraph (1) and Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, regulates the opposite, namely more emphasis on substantive justice, thus causing a blurring of meaning in the principle of legality. This study aims to understand, find, and deconstruct the principle of legality in criminal law to realize procedural and substantive justice. This methodology uses normative legal research with philosophical, statutory, and hermeneutic approaches. The results of this study concluded that the development of the principle of legality in criminal law that is understood today is inseparable from the paradigm of positivism through Article 5 paragraph (1) and Article 10 paragraph (1) of the Law on Judicial Power, this principle of legality has undergone a shift in meaning. Testing the principle of legality with the falsification method, it was found that the principle of legality *was uncorroborated (not solid) as a universal statement. Hence,* the truth of the principle of legality was only *probable.* The conflict between Article 1 paragraph (1) of the Criminal Code, Article 5 paragraph (1), and Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power can be resolved by applying discretion proportionally and reinterpreting the objectives of the law, namely, law in terms of justice, practicality in terms of sociology, and certainty in terms of *political ethics*, with the application of this, can find *a common denominator* between procedural and substantive justice on the principle of legality in criminal law.

Keywords: The Principle of Legality, Deconstruction, Paradigm, Falsification, Fairness, Procedural, Substantive.

INTRODUCTION

In criminal law, there is an essential principle, namely the principle of legality. The principle of legality is stated in Article 1 paragraph (1) of the Criminal Code (KUHP) which is formulated in Latin: "*Nullum delictum Nulla poena sine praevia legi poenali*, which means: "no delict, no criminal without criminal provisions preceding it (Hamzah, 2012). This principle is known as the principle of formal legality, which emphasizes procedural fairness.

The principle of formal legality, contrary to the principle of *rechtweigering* contained in Article 10 paragraph (1) of the Law on Judicial Power, states that the Court is prohibited from refusing to examine, adjudicate, and decide a case submitted under the pretext that the law does not exist or is unclear, but is obliged to examine and try it. Article 5, paragraph (1) of Law Number 48 of 2009 concerning Judicial Power states that Judges and Constitutional Judges are obliged

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to explore, follow, and understand the legal values and sense of justice that live in society. This rechtweigering principle implies applying the material legality principle, which emphasizes substantive justice more. This leads to the emergence of antinomy (Andreae et al., 1983). The antinomy that occurs against these two principles, makes the meaning of the principle of legality vague (*vage normen*) or unclear. Antinomy is two different but complementary things (Butar-butar, 2012).

According to Fockema, the solution to antinomy can be done through interpretation (Andreae et al., 1983). In this case, the use of interpretation or interpretation uses the epistemology of deconstructive hermeneutics. Jacques Derrida developed this deconstruction. This deconstruction does not focus on logical inconsistencies, weak arguments, or inaccurate premises contained in a text but rather unpacks or traces elements that philosophically determine or allow the text to be philosophical (Norris, 2003).

One of the aims of this deconstruction is to identify contradictions in the politics of the text to help gain a higher awareness of the existence of forms of inconsistency in the text as well as to treat text, context, and tradition as means capable of opening up new possibilities for change through impossible relationships (Haryatmoko, 2016). Developing this deconstruction will be associated with investigating the development of the paradigm of the principle of legality and then re-examining the principle of legality with the falsification method. This is an attempt to reinterpret and understand the principle of legality using deconstruction. It aims to find *a common denominator* between procedural justice and substantive justice in the principle of legality.

RESEARCH METHODS

The writing of this journal uses normative legal research methods. Normative legal research examines laws conceptualized as norms or rules that apply in society and become a reference for everyone's behavior (Ishaq, 2017). The type of approach used in this study is philosophical inquiry, statutory, and hermeneutic. At the same time, the nature of this research consists of exploratory, descriptive, and explanatory (Ishaq, 2017). Secondary data collection techniques or legal materials in this study use literature study techniques. In contrast, the analysis of legal materials used in research is qualitative, namely by interpreting (interpreting) legal materials that have been processed (Muhaimin, 2020).

RESULTS AND DISCUSSION

Development of the Legality Principle Paradigm in Legal History in Indonesia

According to Thomas S. Kuhn, a paradigm is what the members of a scientific society have in common. Conversely, a scientific society consists of people who have a common paradigm (Kuhn, 2005). A paradigm is a base or pattern of thinking that will require an interpretive understanding of a person individually or a group of people collectively in the knowledge group with the theories he masters (Suryoutomo & Febriharini, 2020; Wignjosoebroto, 2013). Thomas Kuhn says that throughout history, human communities have only maintained their

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existence based on their ability to develop the same pattern or model of thinking to define their knowledge and structure it as a science that is accepted and believed together to be "normal and truest," to be then used as a support for life that it considers "most normal and truest" as well (Wignjosoebroto, 2013). Thus, the paradigm greatly influences the attitude and stance of scientists in developing their science.

Criminal law itself influences the development of the basic paradigm of legality in criminal law. Therefore, the development of the paradigm of legality principles can be observed through historical developments, which began before colonization. According to Kuhn, science has developed in a revolutionary way formulated in a series of processes, which can be described as follows (Rasjidi & Putra, 2003):

P1– Ns – A– C– R – P2

P1 is symbolic of a paradigm that already exists in a scientific society (Rasjidi & Putra, 2003). Before the colonial period, the law in force in Indonesia was an unwritten customary law. Customary law as a paradigm is a thought, idea, idea, concept, and understanding resulting from the mind of a magical religious community. Indigenous peoples use this paradigm to solve existing legal problems.

Ns (*Normal Science*) is a period of accumulation of knowledge in which scientists are oriented to uphold the paradigm of their predecessor (P1) (Rasjidi & Putra, 2003). Customary criminal law is open and does not adhere to the *pre-existent (non-pre-existent) Regel system,* so customary law only recognizes the principle of material legality. This conceptualization is used as the basis of normal science for indigenous peoples as a pattern or model in determining punishable actions and as a foundation or frame of mind for solving legal problems.

A (Anomaly) is a period of conflict between the group of scientists who hold fast to the old achievements (P1) and the scientists who respond to the presence of the new symptoms. The main reason for the presence of this period is the failure of the old paradigm (P1) to solve new problems (Rasjidi & Putra, 2003). This anomaly to the principle of material legality occurred in 1918 when Dutch law applied to all classes of law in Indonesia. This was an invasion carried out by the Dutch against indigenous communities. The invasion of the Dutch legality principle paradigm aims to ensure legal certainty for the Dutch *ruling class*, so the invasion of this paradigm causes a *paradigm shift* towards the basic concept of legality. *This paradigm shift* is an assimilation of the basic concept of legality from *non-pre-existent regel* (the principle of material legality) to the principle of legality, which is pre-existent regel (the principle of formal legality), which is considered capable of answering criminal law problems. The consequence is to recognize only the paradigm of formal legality derived from Dutch law.

C (crisis**)** is a period of scientific development that points to conflict between adherents of the old paradigm (P1) and groups wanting to change the old paradigm. In this period, new ideas usually emerge that shake the existence of the old paradigm (Rasjidi & Putra, 2003). In 1928, a "*keerpunt in de adatrecht politiek*" was held, i.e., the politics of customary law was given another direction. *This "keerpunt*," which caused customary law to receive greater and proper attention, then gave birth to several schools that wanted to abandon the principle of unification

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and codification of criminal law in Indonesia. According to these schools, it would have been better if non-Europeans had been given a separate codification of criminal laws, but these schools did not succeed in changing the state of the law (Utrecht, 1994). The application of *non-pre-existent rules or the principle of material legality (customary law) has not been* proven to fail in resolving conflicts between communities. The anomaly occurs precisely when assimilation of this principle, which creates crisis conditions, consequently results in the denial of customary law's ontology, epistemology, and axiology. This is certainly a rejection of science itself.

R symbolizes scientific revolution: the emergence of new theories that radically replace old theories (Rasjidi & Putra, 2003). The Enactment of Law No. 1 of 1946 of the Republic of Indonesia concerning the Regulation of Criminal Law and Law No. 73 of 1958 concerning Declaring the Enactment of Law No. 1 of 1946 of the Republic of Indonesia relating to the Regulation of Criminal Law for the Entire Territory of the Republic of Indonesia and Amending the Criminal Code, is the culmination of the paradigm of the principle of legality in criminal law in Indonesia, so that criminal law in Indonesia is closed and only recognizes the principle of legality in the concept *of pre-existent regel* (principle of formal legality). The acceptance of this paradigm was certainly inseparable from political developments at that time.

P2 is a symbol of the understanding of the new paradigm, namely the paradigm of the scientific revolution that replaces the position of the P1 Paradigm (Rasjidi & Putra, 2003). Departing from the Scientific Revolution that has been described, strengthening the paradigm of positivism through the principle of legality contained in Article 1 paragraph (1) of the Criminal Code as *"normal science"* which is considered capable of answering criminal law problems in Indonesia. However, this principle becomes an anomaly and enters into crisis conditions again if it is connected with Article 5 paragraph (1) and Article 10 paragraph (1) of Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power, which is a scientific revolution, thus requiring a new paradigm or *paradigm shift* in criminal law. This is in line with efforts to reform criminal law. Criminal law reform is essentially an effort to review and reassess Indonesian society's central socio-political, socio-philosophical, and socio-cultural values that underlie social policies, illegal policies, and law enforcement policies in Indonesia (Arief, 2011).

In *Ius constituents* through Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code that will apply in Indonesia. The law, reinforcing the meaning of the principle of formal legality, is contained in Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code, in Article 1 paragraph (1): No act can be subject to criminal sanctions and actions, except for the strength of illegal regulations in laws and regulations that existed before the act was committed. Paragraph (2): Dalarn stipulates that the existence of a criminal offence is prohibited from using analogies.

Although Article 2 paragraph (1) of the law recognizes the law that lives in the community, in Article 2 paragraph (3), the law that lives in the community must be regulated by Government Regulation so that the principle of legality in the *ius constituent*, remains a derivative of the concept of the principle of legality is *pre-existence regel* (principle of formal legality). The

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logical consequence is that the paradigm of positivism, formalism, or legalism in criminal law in Indonesia remains a *regular science.*

Article 5 paragraph (1) and Article 10 paragraph (1) of Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power is a *captive mind* caused by the paradigm of positivism through the principle of formal legality. The paradigm of positivism as a *standard science* at this time is inseparable from the shackles of Eurocentrism thought that are generally attached to lawmakers, law enforcers, and, in particular, legal scientists in Indonesia (Teng, 2016). This certainly causes a poverty of thought that hinders the exploration of Indonesian society's central socio-political, socio-philosophical, and socio-cultural values.

Falsification: Testing the Scientific Principle of Legality in the Criminal Law System

In developments in criminal law, the idea of "*nullum crimen sine poena legali*" is in harmony with the basic concept of legal positivism, that law is only positive, that is, criminal law. With the main points of Legal Positivism, the principle of legality is increasingly firmly positioned as the concept of final and absolute truth (Yuherawan, 2017).

The propositions contained in the principle of legality are obtained from the constellation of facts in the history of the French Revolution, namely the exercise of *arbitrium judicis*. These facts are concluded, namely, the need to limit the power of the ruler and the authority of judges to protect citizens from the arbitrariness of the ruler through law so that the principle of legality was born as a result of the method of induction, which was considered capable of answering the problems at that time (A Soelaiman, 2019). The principle of legality is then generalized as a general (universal) principle. It can be concluded that the basic knowledge of legality is scientific and empirical, so the test of its truth is obtained through the principle of verification.

Karl Raimund Popper saw a weakness in the verification principle in the form of *justification* for existing theories. Karl Popper rejected the notion that a theory is formulated and can be proven true through the principle of verification, as held by positivists. Scientific theories are always hypotheses. There is no final truth. Every theory is always open to being replaced by a more precise theory.

Testing a theory, according to Karl Popper, can be taken several different paths, namely:

"First, a logical comparison (Fernando & Manullang, 2007) of the conclusions between them, with which the internal consistency of the system is tested. Second, an investigation into the logical form of the theory to determine whether it has empirical or scientific theoretical characteristics. Or is it, for example, tautological. Third, comparing other theories is primarily needed to determine whether the theory that will shape a scientific advance should withstand our various tests. And finally, the testing of the theory through the empirical application of the conclusions that can be obtained" (Manullang, 2022; Manullang & Berkeadilan, 2007; Yuherawan, 2017).

Karl Popper used the term hypothesis based on the provisionality of a scientific theory. This effort, called *the thesis of refutability*, is a scientific hypothesis if refutability is possible. In other words, there needs to be a possibility to carry out criticism (Muslih, 2004).

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According to Karl Popper, the growth of knowledge is achieved by eliminating errors through systematic, rational criticism. It becomes a scheme of searching for truth and content through rational discussion. It describes the way of developing human knowledge. It provides a rational picture of evolutionary emergence and transcendence through rational criticism. This can be described with the following scheme (Chairul Huda, 2015; Putro, 2011):

P1 → TT→ EE → P2

The symbol **P** represents the problem, **TT** denotes "tentative theory," and **EE** denotes "disposal of attempted errors" made primarily through critical discussion. The scheme reads as follows: Every problem (**P1**) is born through articulating the theory, and every theory is tentative (**TT). This** tentative theory must be open to be tested through the falsification process (**EE). The** results of that test may cause the theory to be falsified or unfalsified. This testing process produces new problems (**P2**) to resolve the same procedure as the stages through which the first problem passed. If a theory survives (unfalsified), it is closer to the truth, but this does not mean that it takes away the tentative nature of the theory. This mindset is called Critical Rationalism (Shidarta, 2006).

Popper says that its truth is only temporary as long as no errors have been found in a hypothesis, law, or theory (Muslih, 2004). As is known, the concept of legality principle has 3 (three) theses, namely: the first is the concept of *pre-existent Regel,* which will be symbolized by (**TT1**); the second is the prohibition of analogy, which will be symbolized by (**TT2**), and the third is the principle of non-retroactivity, which will be symbolized by (**TT3**). Thus, in testing the scientific principle of legality, it will be tested (*testable*) with theses that become *the thesis of refutability* of the principle of legality, which will be symbolized by (**EE),** with the following description:

(1) Criminal Liability (EE^1)

The principles of accountability in criminal law are geen straf zonder schuld; *actus non facit reum nisi men's sit rea*, meaning "no conviction if there is no fault" symbolized by (**EE1**). This principle will determine whether the person who committed the crime can be punished, as threatened or not. This is certainly different and contrary to the *statement of pre-existence regel* (**TT1**), which states that an act can be criminalized if the act and the threat of the act have been determined in advance in the criminal law.

Moeljatno expressed a view that Indonesian criminal law is known as dualistic teaching, which, in essence, teaching separates criminal acts from criminal responsibility (Chairul Huda, 2015). Thus, a proposition can be made in the form of a syllogism to test (*testable*) the thesis of **TT1**, which departs from the dualistic views or teachings contained in criminal law in Indonesia, with the assumption of criminal acts as (**p**), criminal liability as (**q**) or equal to **EE1**, and criminal as (**r**).

Thesis (**TT1**) states that (p)⊃(r) or if a person commits an act that is prohibited and threatened with a crime by law, then that person is criminalized. In this case, the thesis will be tested (*testable*) for correctness with the thesis (**EE1**), which is *the thesis of refutability* of the thesis

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(**TT1**), namely by comparing the conclusions of each thesis to see their consistency and making comparisons between the thesis (**TT1**) and thesis (**EE1**). The elaboration of hypothetical propositions is as follows (Sidharta & Gunarsa, 2016):

No.	(p)∧(q)	(TT1) (P)⊃(R)
1	(**p**)∧(**q**) ⊃ (**r**)	true
2	(~**p**)∧(~**q**) ⊃ (~**r**)	true
3	(~**p**)∧(**q**) ⊃ (~**r**)	true
4	(**p**)∧(~**q**) ⊃ (~**r**)	False/ falsified

From the description above, it can be described as follows:

Point 1:	If a person commits an act that is prohibited and carries a criminal threat by law and can be held criminally liable (there is a mistake), then that person is convicted ((**p**)∧(**q**) ⊃ (**r**)). This is "true" and strengthens the thesis of (**TT1**), namely that if a person commits an act that is prohibited and accompanied by criminal threats by law, then that person is convicted (**p**)⊃(**r**).
Point 2	If a person commits an act that is not prohibited and is not accompanied by a criminal threat by law, and cannot be held criminally liable (there is a mistake), then that person is not convicted ((~**p**)∧(~**q**) ⊃ (~**r**)). This is "true" and strengthens the thesis of (**TT1**), namely that if a person commits an act that is prohibited and accompanied by criminal threats by law, then that person is convicted (**p**)⊃(**r**), or in its negative form (~**p**)⊃(~**r**), that is If a person commits an act that is not prohibited and is not criminally threatened by law, then that person cannot be criminalized.
Point 3	If a person commits an act that is not prohibited and is not accompanied by a criminal threat by law, but that person can be held criminally liable (there is a mistake), then that person is not convicted ((~**p**)∧(**q**) ⊃ (~**r**)). This is "true" and strengthens the thesis of (**TT1**), namely, if someone commits an act that is prohibited and accompanied by criminal threats by law, then that person is convicted (**p**)⊃(**r**), as it is known that the dualistic teachings of criminal law in Indonesia state, that guilt must be preceded by a criminal act for a person to be convicted, even though The act violates the "unwritten law," therefore the unlawful nature of criminal liability is the nature of "material unlawfulness in its negative function."
Point 4.	If a person commits an act that is prohibited and carries a criminal threat by law, and that person cannot be held criminally liable (absence of guilt), then that person is not convicted ((**p**)∧(~**q**) ⊃ (~**r**)). This is "false" and refutes the thesis of (**TT1**), which states that no act can be punished except on the strength of the penal code in existing legislation before the act is committed (**p**)⊃(**r**). Such denial occurs because of the relationship between contradictory propositions (Hiariej, 2009; Kanter & Sianturi, 2002). Proposition (TT1) uses the phrase "no deed," which means without any exceptions and restrictions. Thus, it means that all acts prohibited and accompanied by criminal threats by law are "definitely" criminalized, but (**EE1**) or (~**p**) denies that "certainty" on the proposition. However, all acts prohibited by law and accompanied by criminal threats can be punished; they are not punishable if there is no mistake. So the statement (**p**)⊃(**r**) is false and falsified with the statement (~**r**)⊃(~**q**), so that the statement (**p**)⊃(**r**) becomes (**p**)⊃(~**r**) then, the statement (**p**)⊃(**r**) is *uncorroborated.*

So it can be concluded that:

	***Pra-existente regel* (TT1)**	**Criminal Liability (EE1)**	**Conviction**
Notasi Silogism	(**p**)	(**q**)	(**r**)
If (**p**) is (**q**), then (**r**)	✓	✓	✓
If (**p**) is (~**q**), then (~**r**)	✓	x	x

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If a person commits an act that is prohibited and carries a criminal threat by law and can be held criminally liable (there is a mistake), then that person is punished ((**p**)∧(**q**)⊃(**r**)). However, if a person commits an act that is prohibited and carries a criminal threat by law, and that person cannot be held criminally liable (no-fault), then that person is not punished ((**p**)∧(~**q**)⊃(~**r**)). So, the entrance of a conviction does not lie in the act prohibited by law (**TT1**) but in whether a person can be held criminally responsible (wrongdoing). (**EE1**).

(2) The principle of *rechtweigering* (EE2)

The principle of *rechtweigering* is contained in Article 10, paragraph (1) of Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power. The principle *of rechtweigering* **(EE2)** is certainly contrary to the principle of formal legality, so the principle *of rechtweigering* **(EE2)** is *the thesis of refutability* or denial of *pre-existent regel* (**TT1**), for which it will be tested (*testable*) the truth is by comparing with other theses or theories, namely in the form of an investigation of the position of these two principles in the hierarchy of laws and regulations in Indonesia. The thesis **(EE2)** is contained in the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power, while the thesis (**TT1**) is contained in the Criminal Code. Both theses in the hierarchy of laws and regulations have an equal level, namely contained in *Formelegezetze* or formal legislation. However, the thesis **(EE2)** contained in Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power is directly related to Article 24 paragraph (1) of the 1945 Constitution, which states that judicial power is independent to administer justice to uphold law and justice.

The principle *of rechtweigering* in Article 10 paragraph (1) and Article 5 paragraph (1) of Law of the Republic of Indonesia Number 48 of 2009 concerning Partial Judicial Power with the provisions of Article 24 paragraph (1) of the 1945 Constitution, so it can be concluded that, although in *Formelegezetze*, the principle *of rechtweigering* contained in Article 10 paragraph (1) of Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power, but philosophically, this principle is intrinsic in *the Staatsgrundgezet*, namely Article 24 paragraph (1) of the 1945 Constitution, thus this places the principle of *rechtweigering* as a constitutional principle. The following illustrates the level of the *rechtweigering principle* **(EE2)** with the legality principle (**TT1**) in the hierarchy of laws and regulations in Indonesia:

Types and Hierarchy of Legal Regulations		
1945 Constitution	⟶	The principle of rechtweigering **(EE2)**
TAP MPR		
Law/Perpu	⟶	The Principle Of Legality (**TT1**)
Goverment Regulation		
Regulation		
Bylaws		

The law of a country is a system that does not require a permit or condone any conflict or conflict therein. The lower-level rule of law should not conflict with the higher ones that govern the same thing. If there is a conflict, then the higher rule of law will cripple the lower rule of law, the higher rule of law that will come first. This base is called adagium, which reads *lex superior derogate legi inferiori* (Mertokusumo, 2013).

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From the description above, it can be concluded that the position of the principle of *rechtweigering* **(EE2),** which is higher than the principle of legality, can paralyze or deviate the principle of legality so that the thesis of *pre-existent regel* (**TT1**) contained in the principle of legality (Article 1 paragraph (1) of the Criminal Code), which states that: no act can be punished except on the strength of criminal rules in legislation that There was before the act was done, *uncorroborated.* In the basic thesis of *rechtweigering* **(EE2),** it is stated that the court is prohibited from refusing to examine, adjudicate, and decide a case submitted under the pretext that the law does not exist or is unclear but is obliged to examine and try it so that the *pre-existent regel* thesis (**TT1**) is falsified with the basic thesis *rechtweigering* **(EE2)**. With the principle of *rechtweigering* (**EE2**) as a constitutional principle, it can be completely formulated as follows:

	***Pra-existente regel* (TT1)**	**Criminal Liability (EE1)**	**Conviction**
Notation Silogism	(**p**)	(**q**)	(**r**)
If (**p**) is (**q**), then (**r**)	✓	✓	✓
If (**p**) is (**~q**), then (**~r**)	✓	x	x
If (**~p**) is (**q**), then (**r**)	x	✓	✓

If (**~p**) is (**q**), then (r), this formulation states that if a person commits an act that is not prohibited and is not accompanied by a criminal threat by law but can be held criminally liable (the existence of wrongdoing), then that person can be criminalized. The main idea of this formulation is to avoid rigidity or absolutism of the concept of *pre-existent regel. It is* a form of judicial correction to the principle of legality so that judges not only enforce laws but also enforce laws oriented to social benefit.

(3) Use of Analogies (EE3)

As stated by Moeljatno, one of the basic notions of legality is that analogy interpretation should not be used. To prove whether the prohibition of analogies is consistent in its *corroboration* form in the principle of legality, testing it must begin with the question, has the prohibition of analogies ever been violated in the practice of criminal law? or has the denial of the prohibition of analogies proven to answer the legal problems that exist? Therefore, the prohibition of analogy (**TT2**) against the use of analogy **(EE3)** will be tested through empirical applications obtained from the thesis. It is difficult to argue that criminal judges do not use analogies in court practice. The issue of this analogy has caused controversy among criminal law experts since the late 19th century (Hiariej, 2009). The breakthrough of analogy has been widely carried out in the practice of criminal law at the international and national levels. The breakthrough against the prohibition of analogy in some criminal law practices at the international level is as follows:

a) *Arrest Hoge Raad*, W. 10728 (N.J. 1921, 564), dated May 23, 1921, known as a verdict on theft of electricity that qualifies as a felony of theft in general. This ruling has interpreted the word 'goods' to be broad, to include 'tangible' and 'intangible,' so electricity is classified as goods (intangible), and electricity theft is qualified as a criminal offense of theft (Yuherawan, 2017).

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b) *Arrest* of the Arnhem High Court (N.J. 1984, 80), that computer data in certain respects are qualified as the same as 'goods.' In this ruling, computer data is considered intangible (Yuherawan, 2017).

c) Rechtbank Leeuwarden *Decree* dated December 10, 1919, NJ 1920. The case stands next to someone else's cow in an animal market. A stands next to cow B as if the animal were his own. Then C, who was about to buy a cow, thought that A became the cow's owner. After C paid the price of the cow to A, the cow, presumably bought, went to his house. *Rechtbank* regarded the "*het gaan en blijven staan*" next to the cow as if it was its own, as an act of taking (Utrecht, 1994).

Breakthrough of analogy violations at the level of several criminal law practices in Indonesia as follows:

a) The decision of the Medan High Court Reg:144/PID/1983/PT.Mdn, for a case known as the 'Perayu Gombal' case, in which Bismar Siregar, as the Chief Judge, had interpreted (analogy) the definition of 'goods' in the formulation of Article 378 of the Criminal Code to include 'girlhood of a woman,' (Yuherawan, 2017) but the Supreme Court later overturned the decision because it was considered to be an analogy (Putro, 2011).

b) Case Decision Number: 91/Pid.B/2013/PN. Pwi, against crime by hypnotic mode. Victims of hypnosis voluntarily hand over belongings and possessions when requested by the perpetrator. At first, the victim interacts in ordinary conversations with potential victims. After the victim is immersed in the perpetrator's conversation, the perpetrator gives certain commands with prayers and mantras to the victim, and the hypnosis process begins to run. However, the provisions in the Criminal Code have not reached this hypnosis crime, so no single Article in the Criminal Code regulates and describes this act. In this case, the judge's legal consideration equates this hypnosis crime with fraud (Nonet & Selznick, 2007; Yonar, 2015).

Departing from the description described above, it can be concluded that the practice of prohibiting analogy (**TT2**) in criminal law cannot be strengthened (uncorroborated); this can be proven by a breach of the prohibition of analogy (**TT2**) in criminal law practice. By itself, analogy **(EE3)** denies the practice of prohibiting analogy (**TT2**) in criminal law. Therefore, the prohibition of analogy (**TT2**) is falsified by analogy **(EE3).**

(4) Retroactive principle (EE4)

The principle of non-retroactivity (**TT3**) states that criminal provisions in the law should not be retroactive. This principle is the principle of legal law in general and the principle of criminal law as stated in Article 1 paragraph (1) of the Criminal Code. This is intended to enforce legal certainty for all *justisiable* (Kanter & Sianturi, 2002). Thus, the retroactive principle **(EE4),** which is the thesis of refutability, will be tested with the non-retroactive principle **(TT3)** through empirical applications to test whether the non-retroactive principle (**TT3**) is consistent in its corroborated form in the principle of legality.

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This non-retroactive principle (**TT3**) has been ignored several times in criminal law practice, resulting in the empirical application of the retroactive principle **(EE4).** The waiver of the non-retroactive principle (**TT3**), both in national and international criminal law practices, can be seen as follows:

(a) The decision of the Constitutional Court Number: 065/PUU-II/2004, March 2, 2005, in the Case of Application for Examination of Law No. 26 of 2000 concerning Human Rights Courts against the 1945 Constitution, which decided Article 43 paragraph (1) and paragraph (2) of Law Number 26 of 2000 concerning Human Rights Courts was not proven to be contrary to the 1945 Constitution, and therefore the application must be declared rejected (Yuherawan, 2017).

(b) Verdicts *of The International Military Tribunal* (IMT) *in Nuremberg* and *The International Military Tribunal* (IMT) in Tokyo. The two international military courts were established under the London *Charter* to try perpetrators of war crimes in World War II. States establishing international military tribunals have designated the defendants' actions as *war crimes* and *crimes against peace*, previously unfamiliar. Neither '*war crime*' nor '*crimes against peace*' are known in German and Japanese criminal laws (Utsman, 2016).

(c) The decision *of the International Criminal Tribunal for the Former Yugoslavia* (ICTY), in 1993, established under UN Security Council Resolution No. 827, with the aim *"for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia*." As well as the decision *of the International Criminal Tribunal for Rwanda* (ICTR) in 1994, which was established under UN Security Council Resolution No. 995. Both international criminal courts enacted criminal laws retroactively (Soekanto, 2004; Yuherawan, 2017).

Testing non-retroactive (**TT3**) through empirical applications obtained from the thesis, it can be concluded that the principle of non-retroactive (**TT3**) contained in the principle of legality does not apply absolutely (*uncorroborated*). This can be proven by applying the retroactive principle **(EE4)** in criminal law practice nationally and internationally. So, the non-retroactive principle (**TT3**) is falsified by the retroactive principle **(EE4).**

Thus, that statement (**TT1**) is falsified with statements (**EE1)** and **(EE2).** In contrast, statement (**TT2**) is falsified with **(EE3),** and statement (**TT3**) is falsified with **(EE4),** so statements (**TT1**), (**TT2**), and (**TT3**) contained in the thesis of the principle of legality, if tested with *the thesis of refutability,* namely **(EE1), (EE2), (EE3)** and **(EE4)** then the resultant principle of legality is 0 (zero), meaning that all theses contained in the principle of legality prove to be unsolid (*uncorroboration*). Therefore, the principle of legality, considered a final concept and has absolute truth in the criminal law system, cannot be maintained, even though the principle of legality has power over legal validity but does not have legal effectiveness.

In turn, the principle of induction is regarded not as 'true' but only as '*probable'* (Sutrisno & Putranto, 2004). The proposition of the principle of legality, although it can be falsified throughout its statements, does not mean that this principle of legality is incorrect. Departing from the 'truth of probability,' that the principle of legality can be true but in certain

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circumstances or not absolute, it means that the truth of the principle of legality will be bound to space and time. The epistemological investigation of the paradigm and falsification of the principle of legality is a form of deconstruction. This deconstruction aims to show that arguments in the principle of legality are doctrinal, influenced by ideological thinking, and can show how the method of criticizing and destroying the defense of the basic text of legality or legal doctrines that have been firmly held.

Reinterpretation: Harmonization between Justice and Certainty

The principle of legality is central in criminal law. This principle is certainly a cognition for law enforcement to assess a legal event, whether or not a person can be convicted for his actions. The principle of legality contained in Article 1 paragraph (1) of the Criminal Code, and Article 1 and Article 2 of Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code uses a formalism format or formal legality principle that is a reference for law enforcement in conducting assessments so that it will only produce procedural justice.

Procedural justice only recognizes the teaching of the nature of formal lawlessness so that criminal law becomes resistant to a dynamic in society. This dynamic can be classified as an understanding of the teaching of the nature of material lawlessness, which is the focus of the principle of material legality, which will ultimately produce substantive justice in society.

Nonet and Selznick term procedural justice as an autonomous type of law (Ali, 2009), while substantive justice belongs to the responsive type of law (Utsman, 2016). The relationship between the principle of formal legality and autonomous law can be seen from the statements of Philippe Nonet and Philip Selznick, who stated that:

"*Legality*, understood as high accountability to regulations, is a promise of autonomous law; Legalism is the problem. Focusing on regulation narrows the scope of legally relevant facts, thus separating legal thinking from social reality. The result is legalism, a tendency to rely on legal authority at the expense of problem-solving at the practical level of regulatory application no longer characterized by considerations of goals, needs, and consequences. Legalism is detrimental, partly because of the rigidities it imposes, and partly because the regulations interpreted *in the abstract are too aimed at the formal observance,* which hides the distortion of public policy (Nonet & Selznick, 2007)."

The main concern of autonomous law is how to maintain institutional integrity. To achieve this goal, the law isolates itself, narrows its responsibilities, and accepts blind formalism to achieve integrity (Nonet & Selznick, 2007). Thus, formal legality is used as a basis for controlling and asserting authority, thus ignoring the community's rights and limiting law enforcement's obligations to uphold justice in society.

Good law should offer something more than procedural fairness. Good law must be competent as well as just. Such laws should be able to recognize the will of the public and commit to the achievement of substantive justice; this is known as the responsive legal model (Nonet & Selznick, 2007). For responsive law, an institution must be responsive and maintain its integrity while still paying attention to new forces in its environment. Responsive institutions regard

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social pressures as a source of knowledge and an opportunity for self-correction, thus setting standards for critiquing established practices and paving the way for change (Nonet & Selznick, 2007).

The procedural formal legality principle is aimed at protecting the people from the ruler's arbitrariness; for that, it is necessary to limit the ruler through law. Then, what if the principle of formal legality delegates to give birth to that arbitrariness? In this case, law enforcement has a strategic role to balance this.

According to Soerjono Soekanto, the problem of the role of law enforcement is that it is more focused on discretion. This discretion involves decision-making not bound by law, where personal judgment also plays a role. Soerjono Soekanto argued that discretionary law enforcement is very important, due to (Soekanto, 2004):

(a) No legislation is so complete that it can regulate all human behavior.

(b) There are delays in adjusting legislation to societal developments, causing uncertainty.

(c) Lack of costs to implement legislation as desired by the framer of the law.

(d) There are individual cases that require special handling.

The fundamental relevance of legality with discretion, Soerjono Soekanto submits:

"... complement to the principle of legality, namely the legal principle that states, that every act or act of the State Administration must be based on the provisions of the law... In "free discretion," the law sets only boundaries. The state administration is free to make any decision as long as it does not go beyond these limits. On "bound discretion," the law applies several alternatives. The State Administration is free to choose any of the alternatives" (Soekanto, 2004).

The use of discretion in law enforcement has the following advantages (Soekanto, 2004):

(a) The main focus is the dynamics of society,

(b) It is easier to project because it focuses on the processual aspect.

(c) More concerned with implementing rights, obligations, and responsibilities rather than the position with its symbols that tend to be consumptive.

The principle of formal legality is identified with the concept of legal purpose, namely certainty – law. The phrase 'there is no crime without a criminal provision preceding it' is representative of certainty – law. To deny this principle of legality is to deny certainty – the law, so to get out of the shackles of this principle of formal legality, it is necessary to reinterpret the purpose of law understood so far.

The available legal literature explicitly mentions the enforceability of law (the purpose of law) juridically, sociologically, and philosophically taken from the ideas of Gustav Radbruch (Manullang, 2022). Radbruch bluntly said that he prioritized the certainty of the law and subordinated justice. Radbruch even dared to declare that, sincerely, do injustice rather than

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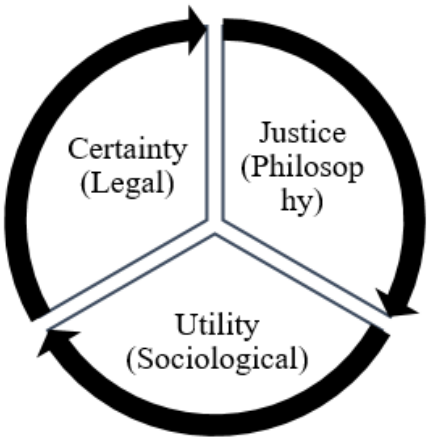
tolerate order. Thus, Radbruch had the conviction that with legal certainty, the ostensibly endless validity of the juridical and sociological stages could be ended, but, as it was well known, after World War II, Radbruch was considered to abandon the element of legal certainty (Haryatmoko, 2016), and return to justice. However, Radbruch has left behind the element of legal certainty. However, this doctrine of legal certainty is still used and attached, both in Indonesia's academic field and legal practice. From the description, the purpose of the law can be described as follows:



The purpose of the law that has been understood so far and accompanied by the paradigm of positivism will give rise to *vicious circle arguments*. This happens because positivism considers the original substance of certainty to be law. In contrast, in positivism, law is interpreted as law, so certainty is used as the beginning and end of a "truth" in legal arguments (especially law enforcement).

If certainty is considered in terms of law, then law here is ontological. On the other hand, if justice is considered in terms of philosophy, then philosophy here is epistemological. But isn't it that when one speaks law, one speaks justice (ontology)? Isn't epistemology a "tool" found in all concepts of the purpose of law in finding truth? Or can justice only be obtained when philosophizing? Mixing the dichotomy of these two concepts of certainty-law (ontology) and justice-philosophy (epistemology) in the purpose of the law is the fallacy logic that keeps the *vicious circle argument* going.

Departing from this, it is necessary to reinterpret ontologically the legal objectives that have been maintained. According to Haryanto Cahyadi, ontological interpretation is an autonomous mode of being understood by the actors in their primary original context. It brings together the horizon of existence in the context of life with them. Ontological truth in revealing human phenomena or social dynamics always precedes attempts to reconstruct epistemological truths. In this case, the truth of knowledge always presupposes certain positions within the ontological truth (Sutrisno & Putranto, 2004).

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Certainty means "provision; provision," whereas if the word certainty is combined with the word law to become legal certainty, it means "legal instrument" of a state that can guarantee every citizen's rights and obligations (Manullang & Berkeadilan, 2007). According to Sudikno Mertokusumo, certainty (law) is judicial protection against arbitrary actions, meaning a person can obtain something expected under certain circumstances (Mertokusumo, 2013).

According to the understanding in mainland Europe, law is an aspired rule drafted in law but has not yet been realized and will never be fully realized. In accordance with that dichotomy (separation), there are two terms to signify law (Ali, 2009):

(1) Law in the sense of justice (justice equals *iustitia*) or *ius*/*recht* (from *regere* equals to lead). So here, the law signifies a just regulation of people's lives, as aspired to.

(2) Law in the sense of statute or *lex*/*wet.* The rules that require it are seen as a means to realize this just rule.

If the law is the law and the regulations apply, then where there is a law, there is a law. This is in accordance with the theory of positivism, which approaches the phenomenon of life scientifically, that is, as fact, and does not want to know about its value. As a result, justice demands are removed from the legal sense. Fair and unjust laws are considered just as powerful as laws.

If certainty is equated with law (law), then law is equated with state power. In the view of "law-certainty," the law comes from the state, so law comes from the ruling in a state, namely the government. The government regulates people's lives through its politics so that the government, through its politics, becomes the source of law.

In continental legal systems, laws are intertwined with the principles of justice. Laws are just laws. Law is *ius* or *recht.* If a concrete law, that is, a law, contradicts the principles of justice, then the law is no longer normative and cannot be called law anymore. A law is said to be a law if it is just. Fairness is the constitutive element of all notions of law (Utrecht, 1994).

Departing from the description above, that normative dogma that lays down certainty in law cannot be maintained. Ontologically, certainty is the result of *political ethics*. Certainty in terms of *Political ethics* is defined as the accountability of state administrators and law enforcers in creating or ensuring justice, peace, and harmonization between society and society, society with state, and society state with the environment (nature). This conclusion can be described as follows:

Legal purpose		Ontology
Law (Juridic)	⇒	Justice
Sociology	⇒	Benefits
Political ethic	⇒	Certainty

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From the above statement, juridical (law) ontology is justice. According to Theo Huijbers, the essence of law is to bring about just rules in society (*rapport du droit, inbreg van recht*). Justice is constitutive law because it is considered part of man's ethical duty. Human beings must form a good life together by managing it fairly. Law is the realization of justice that arises spontaneously in the human heart, so the law is a statement of justice. An unjust law is not a law. There are several supporting reasons, namely:

(1) The governments of any country always defend their actions by showing real justice in them.

(2) Laws no longer compatible with the principles of justice are often considered obsolete and no longer valid.

(3) By acting unfairly, a government acts unlawfully outside its authority.

Placing certainty in terms of *political ethics* is intended to provide affirmation in all actions of the ruler in providing legal guarantees to the community. This certainty ensures that the law is fair and that the regulatory rules have contained an element of justice in the law. Suppose the law (law) does not contain elements of justice. In that case, law enforcement can deviate from it, and if there is a legal vacuum, law enforcement is obliged to explore the values of justice that live in society; this is an effort to provide legal certainty to the community.

CONCLUSION

Article 5 paragraph (1) and Article 10 paragraph (1) of Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power is a scientific revolution that requires a new paradigm or *paradigm shift* in interpreting the principle of legality in criminal law. Testing the scientific principle of legality with the falsification method proves that every proposition contained in the principle of legality can be falsified so that the principle of *legality is uncorroborated* (not solid) as a universal statement.

Applying the principle of formal legality that only emphasizes procedural justice is a manifestation of autonomous law, which is only intended to maintain institutional integrity. *The common denominator* between procedural fairness and substantive justice to the principle of legality can be exercised by proportional exercise of discretion.

The principle of legality is identified with the concept of the purpose of law, namely certainty – law. So, to get out of the shackles of this principle of formal legality, it is necessary to reinterpret the purpose of the law, which was originally justice in terms of philosophy, practicality in terms of sociology, and certainty in terms of law, replaced by: law in terms of justice, practicality in terms of sociology, and certainty in terms of *political ethics.*

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