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REFLECTION AND PARADIGM IN STUDYING LEGAL SCIENCE

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ABSTRACT

The study of legal science cannot be separated from philosophy as the mother of all sciences. Philosophy as a contemplative process that is free will show direction in an effort to find *episteme* (knowledge of the ultimate truth). The epistemological aspect cannot be separated from its ontology and axiological aspects, because it will become a reference for the characteristics of legal science. The philosophical paradigm, in the study of legal science from a philosophical aspect, cannot be separated from space and time. The development of science is always made possible by the existence of new findings and it is even possible to break old knowledge with new ones. The values of objectivity towards new developments of science must always be given space and time so that the attainment of truth can be better, although the absolute truth of science cannot be attained. The paradigm of legal science cannot be separated from new discoveries that doubt previous findings because they are unable to answer events that occur and are always developing in society.

KEYWORDS: Philosophy, Paradigm, Legal Science, Reflection.

1. INTRODUCTION

Preliminary

One of the main focuses that emerged in the study was to obtain clarity about what the law meant, the efforts made could not be separated from the steps of identifying the law itself. After doing the identification, then define the law. In the history of thought and scientific study, it has been tried to provide a definition and examine it from various points of view. In the end, various terms and definitions emerged with limitations given from their respective points of view.

In subsequent developments, the study of law is increasingly not as simple as at the beginning people understand the law as a rule of life that must be obeyed together and in it, there are sanctions for those who violate it. However, broadly speaking, thoughts, studies and studies on what is called law have been carried out by people from generation to generation at three levels of abstraction. To get a more basic picture, like it or not, anyone will be motivated and moved to also look further into more abstract levels, namely first to the theoretical configuration of these norms, and further to the higher levels. more assumptive, more speculatively approachable, is the philosophical level.[1]

At the philosophical level, the search for the nature and origin of the law that manifests in the universal order, which is then also manifested in the common life of human society, is believed to be part of the universe. This is studied continuously and the question arises whether the order is an external force called divine power, or is it an autonomous internal force that was previously preceded by the irregularity of human life, so that it condenses into order to overcome the irregularity that occurs. that the process of existence of order as an autonomous internal force takes place gradually from disorder to moving progressively towards order.

To obtain an answer to the question of the origin of the power to bring order into existence, is a quest carried out

[1]Soetandyo Wignyosoebroto, 2004, *Bahan Kuliah Teori Hukum*, Master of Law UNTAG Semarang, p. 1.

by philosophical thinkers. Philosophy as a free contemplative process will show direction in an effort to find *episteme* (knowledge of the ultimate truth). No doubt, in the realm of philosophical thought, every single fruit of contemplation is always faced with criticism and thought of its antithesis.[2] In the realm of philosophical thought, the study cannot be separated from the discourse of the search for truth starting from the Greek philosophers (Aristotelian Paradigm) and starting from the world of sensory observations (Galilean Paradigm) to the last one pioneered by Thomas Kuhn and his contemporaries.

Based on the search for knowledge of the ultimate truth (*episteme*), the aspect of epistemology in the study of philosophy cannot be separated from its ontology and axiological aspects. The study of the three aspects will show the existence and scientific character of Legal Science and influence the development and practice of Legal Science in society.[3]Another function of jurisprudence is to critique the enactment of the law. This will show that the law can follow, accompany and give direction to the development of society. The purpose of criticism is to suppress abuses of law and power. This means that the bearers are responsible for the development of the law, its direction and its influence on the lives of individuals and society.[4]

This paper cannot be separated from philosophical studies, considering that studying legal science cannot be separated from the philosophical aspects of legal science. Reflection on the science of law rests on the conception of the science of law, while the paradigm rests on aspects of the development of the science of law itself.

2. RESEARCH METHODS

This research method uses a normative juridical approach, with secondary data as the main data. Secondary data is mainly based on secondary legal materials and primary legal materials that prioritize references from various sources of writing/research, while primary legal materials consist of various dictionaries to obtain clarity on the various terms in this writing.

3. REFLECTION ON THE PHILOSOPHY OF SCIENCE ON LAW

Philosophy of science developed from the philosophers Plato, Aristotle, and Socrates, and a few decades later the *Renaissance* and *Humanism* of the Western world emerged from the XV century until then entered the modern era and then emerged the flow of legal philosophy. Characteristics of the influence of the *Renaissance* and *Humanism* is to highlight the individual with all the interests and freedoms that characterize it. This prominence of the individual and freedom permeates all aspects of life, from art, philosophy, politics and individual freedom.

Entering the 20th century, a new colour emerged from the development of the philosophy of science that broke away from the principles of empiricism, positivism and determinism such as Emile Durkheim, Lucien Levy Bruhl. Also appeared at the same time, namely the Vienna Circle (*Wiener Kreis* or *Vienna Circle*) and Karl Raimund Popper and continued to develop along with the emergence of new views.

According to Van Perusen, there is what is called (*the new philosophy of science*). This designation is more or less vague, because when does the "new" start? However, this is not related to an indication of time, but to a change of insight (*herziene visie*) towards science, and the emerging influence is *Neopositivism* (Logical Positivism and Logical Empiricism;

[2] *Ibid*, p.2.
[3]Sidharta, B. Arief 2000, *Refleki Tentang Struktur Ilmu Hukum*, Mandar Maju, Bandung, p. 10.
[4]Ibid, p. 10-11.

Analytical Philosophy).[5]Some figures that can be mentioned in this philosophical school include Thomas Kuhn, Paul Fereyabend, Hanson, R Palter and Stephen Toulmin and Imre Lakatos. What they have in common is that they want to break into the history of science and its role in acquiring and constructing the face of science, which is often called the "rebellion against positivism".[6]

Neopositivism draws a line between meaningful and meaningless and rejects traditional philosophy because its statements in the field of theology, such as the existence of God, creation, soul, death are expressions that have no meaning at all. This is a typical picture that exists in this positivism is referring to the empirical sciences, especially the natural sciences.

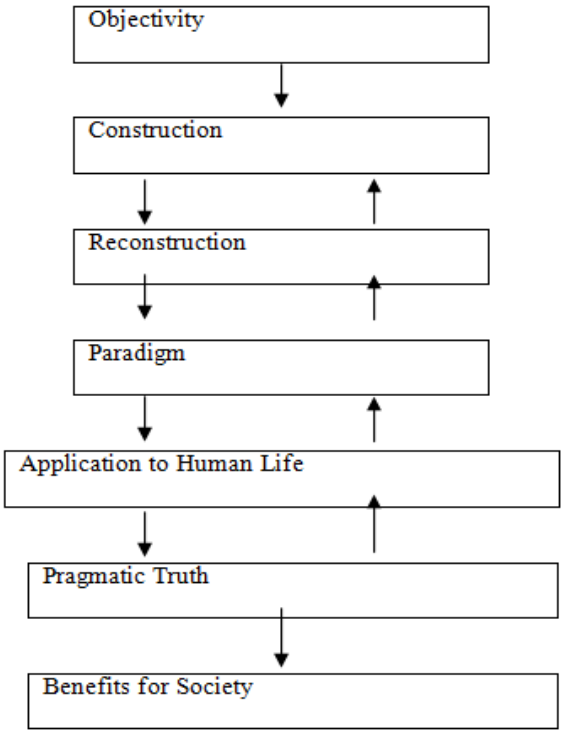
The reaction to the *Vienna Circle* came from Karl Raimund Popper with his falsification theory as a scientific activity. Popper's first objection is regarding the distinction between *meaningful* and *meaningless* and he replaced it by separating the scientific and unscientific aspects which lie in the presence or absence of an empirical basis for the expression. The theory which is tentative is used to solve the problem. If the theory used is appropriate and useful, it will eliminate errors and errors (*error elimination*) that cause the problem. Popper's falsification theory states that the theory is tested through empirical tests to prove wrong what it is testing (falsify).

Popperian received criticism from Ludwig Wittgenstein with his analytic philosophy. Wittgenstein introduced a new paradigm in the philosophical perspective by developing an epistemological perspective based on the logical analysis of language.[7]

According to Guba , objective aspects of the truth of science must be known from its operational capabilities and pragmatic truth. Its objectivity lies in the ability of scientists to see the weaknesses of the existing paradigm by reconstructing it. This paradigm will be solid if it can be applied and able to anticipate the various problems that exist.

Science will always develop, not static, not absolute truth and always open to various possibilities, including criticism of science and can be reconstructed. The objectivity update on the paradigm construction is in the chart:

[5]Van Peursen, C, 2005, *Filsafat Ilmu*, (B. Arief Sidharta, Translator), Parahyangan Catholic University, Bandung, p. 18.
[6] Verhaak, C and R. Haryono Imam, 1989, *Filsafat Ilmu Pengetahuan*, Gramedia, Jakarta, p. 163
[7] Kaelan. S., 2004, Analytical Philosophy According to Ludwig Wittgenstein, Paradigm, Yogyakarta, pp. 54.



Guba, 1990: 25-26, Budianto, 2002: 90.

Another response to Popper emerged from Thomas Kuhn, P. Feyerabend and Imre Lakatos as a group that developed a new philosophy of science. Kuhn's work began with the publication of *The Structure of Scientific Revolutions* (1962). Kuhn's most important concept is Paradigm, although Kuhn did not define what a paradigm is. The philosophy of science should study the new history of science as the starting point for all investigations. This means that Kuhn is at odds with the old science. According to the old view, scientific progress occurs cumulatively. This is a myth that must not happen again. and in his view the development of science is revolutionary. Kuhn's model is as follows:[8]

Paradigm I *Normal Science Anomalies Crisis Revolution* Paradigm II

According to him, the dominance of science is dominated by one particular paradigm at a certain time, namely the fundamental view of the subject matter of a branch of science and the paradigm will shift along with new problems.

Normal science is a period of gathering knowledge, developed by scientists based on the paradigm that is currently in effect. Scientists can not avoid the deviations that occur (*anomalies*). Paradigm I explains the problems that arise well. At the peak of the deviation, a crisis will arise and there will be sanctions on the validity of the paradigm. The crisis that peaked, caused a revolution and gave rise to a paradigm that would be able to solve it. The old paradigm is replaced by a new paradigm.

Other figures who reject logical positivism are Paul Feyerabend with anarchist theory. In his book *Against Method*, it is said: science and its development cannot be regulated by various rules, systems and laws.[9]Feyerabend wants to break the notion that order is in the development of science. Scientists must be free and should not be restricted. A

[8]Ritzer, George, 1985, Sociology: *A Multiple Paradigm Science*, (Alimandan, translator), Rajawali, Jakarta, p. 4.
[9]Verhaak, *Op Cit*, p. 166.

scientific activity is an effort that is anarchistic in nature.

From the results of the above explanation, the study of legal science from a philosophical aspect cannot be separated from space and time. The development of science is always made possible by the existence of new findings and it is even possible to break old knowledge with new ones. The values of objectivity towards new developments of science must always be given space and time so that the attainment of truth can be better, even though the absolute truth of science cannot be achieved.

4. PARADIGM IN LEGAL STUDIES

a. Aristotelian Paradigm

Aristotle (384 – 322 BC) was a Greek thinker who stated that the universe is something that is completely ordered (called *nomos* or *order*) and is *pre-established*, which means that it was ordered from the beginning. The universe also runs in harmony as well as the design of the order as the most perfect creation of the creator. This shows that the purpose of the Creator is final (*causa finalis*), that is, perfection that will not be disturbed.[10]

Aristotle's epistemology is to understand that the universe is a single order / final. This illustrates that the universe is already in a natural order, so that the order in this universe will always be maintained. This Aristotelian paradigm starts from the view that the universe is a final natural totality.

Aristoteles made many contributions to the philosophy of law and legal theory. Aristotle's first contribution to legal theory was to inspire encyclopedic studies of the existence of various constitutions and laws. Aristotle's doctrine is not only the foundation of legal theory, but also western philosophy in general. The second is about justice, namely distributive justice and corrective justice. The third contribution distinguishes justice according to law and according to nature, the first is based on what is stipulated as law, and the second is based on human nature, not limited by space and time. The fourth contribution is the distinction between abstract justice and propriety. Laws must be treated equally and often require violence in their application. Violence is tested and reduced by propriety on the basis of individual considerations.

The fifth contribution is its legal definition, namely as a set of rules that bind society but also judges. The law, because of its position to supervise judges in carrying out their duties and to impose penalties on those who are guilty[11]

Aristotle's opinion regarding this legal definition, many legal experts reject, but as a basis for thinking and Aristotle's contribution to the law itself is very large.

b. The Galilean Paradigm

Galileans were born in the 18th century and are based on the view that the universe is an infinite number of fragments, and the process is endless. The universe is a network of causality, which is subject to natural imperatives that are universal, and are always factual and actual.

Further than merely reproducing, mastery of various causal relationships between variable factors carried out to produce new relationships in combinations between variables that will produce new facts that are often not previously thought. Things are not final.

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[10]Soetandyo, *Op Cit*, Hlm. 6
[11]Friedman. W, 1990, *Legal Theory*, *Composition I* (Mohamad Arifin, translator), Rajawali Pers, Jakarta, pp. 10-11.

Human control over the laws of nature, which is manifest in the form of the regularities of the universe, will also continue the process of humans giving birth, in increasing numbers, from the philosophers to the scientific and technological ones.

c. Paradigm of Legism and Legal Positivism

Positivism was born in the early 19th century, and was born from the flow of tradition Galilean with its pioneer Auguste Comte (1798-1857). According to him, the concepts and methods of natural science can be used to explain human collective life that occurs under the imperative of the law of cause and effect with all its conditions and probabilities. Every event in human life can always be explained in terms of its rational, natural, and scientific causes.

His view is that studying the behavior of inanimate objects in physics and the behavior of humans who have souls and spirits are no different. These two behaviors in different areas are equally controlled by the law of cause and effect as universal imperatives.

The positive law school bases its views on the facts of experience, which can be checked for truth and falsity. The adherents of the positive law school oppose the metaphysics of the supernatural, namely what is beyond the limits of human experience. According to this school, law is the command of the ruler (*law is a command of the law givers*). Another thing is to consider the importance of the legal and moral relationship, however, the two must be separated. In this case, it can be seen that there are two schools of legal positivism:

- analytical law school (*Analytical Jurisprudence*);
- pure law school (*Reine rechtslehre*).

According to Austin (one of the pioneers of the analytical flow), that the law as a ruler's command, essentially lies in that order, the law as a logical, fixed and closed system. Austin's theory can be returned to the teachings of Hobbes because the law is basically an order from the ruler.

There are two types of Austin theory, namely:

- the laws from God to man (*the divine laws*);
- Laws made by humans, which are divided into positive laws made by rulers and those made by individuals. The actual law has 4 elements: a. commands (*commands*); b. sanctions (*sanctions*); c. obligation (*duty*) and d. sovereignty (*sovereignty*). The element that contains the order comes from the ruler, who is ordered to suffer, if not obeyed the order will be subject to sanctions and those who are subject to sanctions will be burdened with obligations, for example: fines, imprisonment, etc. The existence of sovereignty means that there is a society. If it does not contain these 4 elements, then it is not a positive law but a positive moral.

Untrue law, namely law that is not made by the authorities and does not meet the requirements as law, for example: provisions in a community association.

In subsequent developments, several jurists in Europe objected to Austin's opinion about orders from the authorities. According to this opinion, that people do not have a measure that can be used to distinguish between the orders of a robber: "your money or your life: (*gunman-situation*) and orders from the rightful ruler. Herbert Lionel Adolphus Hart offers a system theory (*system theory*) which rejects the command theory and argues that the law of the ruler alone is not

sufficient, and who accepts the order as an obligation (not merely forced) to obey the order.

This theory is one of the most important in legal positivism. Law as a stelsel of rules that relate to one another organically, in a pyramidal manner and hierarchically formed norms. The system is closed, meaning that outside the system there is no law. On the other hand, people can, in that case, they must resolve all legal issues with the help of the system, then the enactment of a rule of law is based on its adjustment in the system.

The starting point of Hart's theory is the so-called *command theory* from Austin which can be returned to the teachings of Hobbes. But Hart considers this teaching too simplistic. If the judiciary will simply obey because they are forced to do so, then there is no difference between a lawmaker issuing a tax law and a robber shouting: 'your money or your life (*gunman – situation*).

According to Hart's analysis, the relationship between citizens and the law comes to the conclusion that there is a clear difference between judicial compliance and the obedience of persons under the threat of a robber. Thieves force people who pass through the place to give their money, who have to adapt to the situation (a state of being forced, *being obliged*), while the rule of law raises the obligation of citizens to comply with these rules and citizens feel that it is an obligation that must be borne (has an obligation, *having on obligation*)[12].

This does not mean, it is required that citizens accept each rule of law as a norm of behavior because he agrees with its contents, or because he believes that the rule must read like that and cannot be otherwise. It is enough that the citizen recognizes the regulation as valid, as a rule that occurs in a proper way[13]

Hart's analysis of the problem of validity and compliance is based on a primitive (hypothetical) society. In it there are no lawmakers, judges and employees and this situation can only be maintained because everyone accepts the rule as a measure for his own behavior and that of others. Every member of the community agrees with the contents of the rules. One member of the community criticizes the other if his behavior is not in accordance with the rules. The issue of the validity (legitimacy) of the rule does not exist here, because there is no standard to measure its validity.

To solve according to Hart is to include rules of a completely different nature. Those rules are called *primary rules* and *secondary rules. The primary rules* contain the actual law, while the secondary rules are auxiliary rules and regulate the authority/competence of the bodies and give it power to officials who are specifically tasked with establishing law and implementing the law (these *secondary rules* are specifically aimed at them, because it specializes in the maintenance of law).

Hart distinguishes three kinds of *secondary rules*:

- Doubts about the legal substance can be overcome by *secondary rules of recognition*
- The legal rigidity is removed by conformity with the supporting rules for change *(secondary rules of change*). Procedures will be established to form rules, for example, a law-making body will be formed.

[12]The obligation to obey the law by citizens goes further than simply being forced by the threat of loss. Yustisiabel felt that the regulation was something that should exist and that he had to fulfill, because it was precisely what he asked for.

[13]There is the same problem here, as Kelsen is very interested in. Hart's solution is very different from Kelsen's. If Hart tries to find a solution by starting from the reality of society, for Kelsen the reality (which is included in the sein) is in theory irrelevant (not related to the subject matter).

- Legal incompetence can be overcome by establishing a body. Supporting rules to assist judicial officials (*secondary rules of adjudication*). This rule determines whether a primary norm has been violated.[14]

Law always consists of a combination of *primary rules* and *secondary rules*. A requirement for the existence of a legal system is that the functionaries accept the secondary rules as the norm for their behavior. They have to agree to the rules. This is a basic requirement and if this principle is always undermined, then the *legal system* will be destroyed.

The most famous figure of legal positivism is Hans Kelsen with his *theory Reine Rechtslehre*. Kelsen wanted to purify law from elements of politics, morals, sociology, history, psychology and others. Pure here has two meanings:

- methodically pure,
- purely according to non-juridical aspects.

The basics of Kelsen's theory:

- the goal of this theory of law is to reduce confusion and promote unity;
- is knowledge and not a will. In other words, it can be said that knowledge of existing laws and not what they should be (about das sein not das sollen).

Sollen and *sein* are two very different things, because they are subject to its provisions. In the world of sein, there is a causal law, for example, A is the result of B, while in sollen there is a law of responsibility, for example, A occurs then B should occur[15]. Thus we should not mention: the punishment of the thief is the result of the theft (causal relationship), but only he (the thief) should be punished under the Criminal Code, which provides sanctions for theft. Likewise: if a mistake (injustice) is committed, then an act as a result of the error (injustice) must be carried out (a sanction). The result of the error (injustice) does not arise from an error such as the expansion of metal due to heating, but the result of the error (injustice) is responsible for the error (injustice).

This legal school argues that the law does not deal with the effectiveness of norms, but regarding the existence of norms (*die reine Rechtslehre*– pure legal teachings). Legal science is normative in nature, not a natural science (normative – norm – contains existing regulations, not values). Therefore, according to Kelsen, the facts/natural things are not the object of research but the rules regarding what should (norms) be the object of research.

Legal science is a normative science with its own method, and is not aimed at examining causal relationships (such as natural science, sociology and so on), but is directed to the investigation of responsibility relationships. Through this path, Kelsen sought to achieve purity of method.[16]

Separation *signal* – *sollen* has another very important role for Kelsen. According to Kelsen, people can never derive a supposed rule (*sollen*) from a real situation (*sein*). From a *sollen* rule (norm) it cannot be said: it applies, because it is actually obeyed (there is no normative effect from the facts). If so, where is the basis for this rule? According to Kelsen, a rule applies because it is based on another higher rule and a higher rule is based on a higher one (*Stufenbau*), until finally, the highest rule is *Grundnorm* (basic norm).

[14]Algra. NA, *et al*, *Mula Hukum*, Bina Cipta, Jakarta, p. 145-146.
[15] *Ibid*, p. 141.
[16]*Ibid*, p. 141.

Questions about the basis for the application of the basic norm, *Grundnorm*, then Hans Kelsen could not give an answer. This is because *Grundnorm* cannot be based on a higher norm, because it is already the highest. *Grundnorm* cannot be based on facts, because in Kelsen's teachings, norms cannot flow from that fact, because of the separation between sein and *sollen*. Kelsen emphasized that it must be accepted, because if in a society there is an orderly system of rules, then there must be such a *Grundnorm*. So this is an approximate norm (*hypothetische norm*). The application of the final rule of positive law rests with *Grundnorm*. A *Grundnorm* cannot be incorporated into the constitution. The *Grundnorm* does not include, as does the constitution on applicable law,[17]

Included in this stream is the *legism* which states: Laws and laws are the same, and the state as much as possible refrains from taking action in people's lives. The state can only create marginal conditions, so that the power of society can freely develop. This should happen with a small number of general rules that are clearly formulated, and can be understood by everyone. Law serves to protect society, not to regulate society. This safeguard can be carried out properly by maintaining the law carefully and carefully.

This legism is different from legal positivism. Legal positivism does not limit itself to the law of law. According to legal positivism, good habits, customs, and public opinion are also sources of law, so that the scope is wider.

The teachings of legal certainty and The law is the law as a value that is glorified by the legislature, which in the end invites a lot of criticism.

d. Paradigm of *Critical Legal Studies (CLS)*

Critical Legal Studies emerged in the early 1970s, and criticized the thinking and rationality and rationality of liberal legal jurists. Isn't the rationality of the legislators only good according to their ideals, but will be very less realistic in practice? The *CLS* paradigm is that society is not a structure built entirely on consensus, and then able to survive fully. It is a fact, according to *CLS* statement, that statutory law, in its utilization practice to resolve cases, does not always start from the normative premise that has been agreed upon, both at the stage of its formation as a law, and in its application as a ruling. The law is a process full of economic and/or political motives and interests.

Criticism and resistance to the ideas of the liberal legislators from the 1970s actually came first from the mouths of *legal realists*, who discovered their mass in the 1940s. Realists reject the existence of law as an institution which is limited to a "logic game" in its formal realm. Oliver Wendell Holmes stated, that "*the life of law has not been logic, it is experience*". This school emphasizes the importance of the context of experience as input in an effort to think more realistically and to make every statutory rule more sociological, and its use as a *judge-made law* can bring benefits as a *tool of social science engineering*, which was once proposed by Roscoe Pound.[18]

5. HERMENEUTIC PARADIGM

Hermeneutics was originally used in the fields of theology and literature, then used in the humanities, and one of them is to study the science of law.[19] Its use is for understanding the legal values that develop in society, which reveals the meaning of the message so that it can be accepted by others and reveals what is in the legal values.

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[17] *Ibid*, p. 142
[18] Soetandyo, *Op Cit*, page 15.
[19] Sigit Irianto, 2016, *Urgensi Hermeneutika Dalam Hukum Kontrak,, Jurnal Spektrum Hukum*, Vol. 13/No. 2/October 2016, *Program Studi Hukum Program Magister*, Faculty of Law UNTAG Semarang, p. 183-184.

According to Soetandyo Wignjosoebroto, the hermeneutic approach is an approach to understanding objects (products of human behavior that interact or communicate with each other). Paradigmatically, every form and product is always determined by the interpretations made and agreed upon by the actors in the process[20], on the object under study.

The hermeneutic approach emphasizes the interpretation of law, thus opening up opportunities for legal studies not only to be carried out by academics and legal professionals, but also by structuralists and behaviorists. Law does not have to be embedded in the paradigm of legal positivism and formal logical methods, but also examines the law through the meanings of law users or justice seekers (justisiabele).

The hermeneutic approach is an alternative in the realm of legal studies. Grammatical interpretation, logical interpretation of language such as Wittgenstein's theory, futuristic interpretation, sociological and so on are ways to understand law. Even this hermeneutic approach is not without its shortcomings, as Fish said, that the hermeneutic approach will not require people to always study social facts and legal facts through interpretation, even though "*the only thing to know about interpretation is that it has to be done every time*"[21]

At the level of legal function, it is true what B. Arief Sidharta said, that legal science also has a function to carry out criticism of the applicable law. The function of criticism is to prevent or reduce the abuse of law and power. In this case, its bearers share responsibility for the development of the law and the direction it takes, as well as its influence on individual and community life.[22]

6. COVER

The philosophical paradigm is a scientific exploration that always experiences influence and changes based on the discoveries of the philosophers. This philosophical paradigm is also closely related to the legal paradigm. Legal science is always evolving and cannot be separated from the scientific structure, because legal science only occupies one corner of the scientific structure.

Scientific paradigms in a certain period are controlled and dominated by certain scientific structures. In its development, scientists always develop a paradigm of knowledge that is being influential to find new things. Scientists cannot avoid *anomalies* contradictions with the previous paradigm. Deviations that will lead to a crisis and the validity of the paradigm began to be doubted. A serious crisis, giving rise to a revolution and a new paradigm that is able to solve the problems at hand.

The paradigm of legal science cannot be separated from new discoveries that doubt previous findings because they are unable to answer events that occur and are always developing in society. From the Aristotelian paradigm to the study of crisis law, the legal science paradigm has undergone many changes. An example of a paradigm of legism that glorifies the law is that the law has undergone a revolution. HR's decision dated January 31, 1919, is an example of a new paradigm.

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