THE USE OF JURISPRUDENCE IN INDOONESIAN LAW COURT AS A CIVIL LAW COUNTRY
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Article Abstract

Jurisprudence refers to the decisions made by earlier judges regarding cases that are not covered by the law and which serve as a model for later judges when deciding cases of a like nature. The Supreme Court is an entity with judicial authority in Indonesia and has the authority to publish rulings. As a civil law country, Indonesian law courts do not use jurisprudence as a main legal source. Court judgments under this system are predicated on pertinent laws and regulations, such as the 1945 Constitution, MPR Decrees, Laws, Government Regulations, Presidential Decrees, Supreme Court, Ministerial Decrees, and others. This means that the judge's judgement, which is based on the facts or the available evidence, has some latitude. On the contrary, some countries use common law as their legal system. This legal system favours customary law, which changes over time in accordance with societal changes. In order to ensure that the law is always consistent with a feeling of justice and advantages that are felt immediately by the community, it was established via a judicial institution with a jurisprudence system that is regarded to be superior. Although the Indonesian legal system does not operate on a precedent system, general court judges or judges in lower-level courts are nonetheless required to take the Supreme Court's rulings seriously. This paper will be written as a discussion of how Indonesian law court as a civil law country utilises the jurisprudence, which is the product of common law system, even when it is not commonly used. This paper will also be written to elaborate the comparison between the use of jurisprudence in civil law countries such as Indonesia, and the origin countries that are using the common law system.

1. INTRODUCTION

Jurisprudence is the decisions of previous judges to deal with a case that is not regulated in the law and is used as a guideline for other judges to settle a similar case. In Indonesia, the
Supreme Court is an institution holding judicial power that has the power to issue jurisprudence.

There are 3 (three) reasons why a judge follows another judge's decision, namely: (1) because the judge's decision has power, especially the decisions of the High Court and the Supreme Court. The decisions of a higher judge are ordered because this judge is the supervisor of the work of the judges under him also because his services are respected by the judges under him; (2) because of practical considerations. A judge who gives a decision that deviates from the decision of a higher judge who has been handed down in the same case will not be justified by the court if the party who does not accept the decision requests an appeal; (3) because they agree with what was decided by the previous judge.¹

Jurisprudence was born due to the existence of unclear or unclear laws and regulations, making it difficult for judges to make decisions regarding a case. The judge in this case makes a new law by studying the previous judge's decision to deal with the case at hand. So, the decision of the previous judge is called jurisprudence.²

Courts may not refuse to examine cases, adjudicate cases and decide on cases filed for non-existent or unclear legal reasons, but are obliged to examine and adjudicate them. Judges are required to explore, follow and understand justice and legal values that grow and develop in society.³

The Anglo-Saxon legal system is also based on this concept. The main jurisprudential concept is found in the general law system through the principle of stare decisis, but also in the civil law system.⁴

In the field of constitutional law, in general, Jimly Asshiddiqie formulate seven kinds of sources of constitutional law, namely: (a) Values of unwritten constitution; (b) The constitution, both preamble as well as the articles thereof; (c) written laws and regulations; (d) Judicial jurisprudence; (e) Constitutional or constitutional conventions; (f) The doctrine of the science of law which has become ius commisionis opinio doctorum; (g) International law that has been ratified or has entered into force as customary international law.⁵

² Direktori Putusan Mahkamah Agung Indonesia
³ UU No. 48 Tahun 2009 Mengenai Kekuasaan Kehakiman
⁵ Jimly Asshiddiqie, Pengantar Ilmu Hukum Tata Negara, cet. ke-5, Jakarta: PT. RajaGrafindo Persada, 2014. h. 121.
The source of law refers to the understanding of the place of origin of a value or certain norms originate, while the legal basis or legal basis, is a legal norm that underlies an action or legal action so that it can be considered valid, or legally justifiable.

Sources of law can be distinguished into two senses in a formal sense or formele zin (sources of law in its formal sense) or in materiele zin (source of law in material sense).

The source of law in the formal sense can be defined as a formal term in written form from which a rule of law is taken, while the source of law in the material sense is the place where the norm originates, both from written and unwritten meanings.

Meanwhile, according to J.A. Prontier, first of all it is important to know the legal sources used by judges. In doctrine, only acknowledged as a formal and independent source of law: treaties and statutes (sources of written law), and jurisprudence and custom (as sources of unwritten law). In legal practice also used legal meaning which is "larger". Which is also seen as sources of law: legal principles (rechtsbeginselen), demands for prudence sociability (eisen van maatschappelijk zorgvuldigheid), morals and decency (fatsoen), fairness or reasonableness (redelijkheid) feasibility (bilijkheid), and good faith (goede trouw).

2. RESEARCH METHODS

The research used "Normative Juridical Legal Research" in accordance with Soerjono Soekanto's opinion that legal research is carried out by examining secondary materials or library materials or library legal research, through searching for books, laws, literature, and other legal materials.

3. ANALYSIS AND DISCUSSION

3.1. THE USE OF THE CIVIL LAW SYSTEM IN INDONESIAN LAW COURT

The legal system is a legal order consisting of several sub-systems of law that have different functions. This order is applied to achieve the same goal, namely the realisation of security, order and justice.

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6 J.A. Pontier, Rechtswinding, diterjemahkan B. Anel Sidharta, Nijmegen: Ars Aequi Libri, 1995, h. 11
7 Soerjono soekanto, Penelitian Hukum Normatif, Suatu Tinjauan Singkat, (RajaGrafindo Persada, Jakarta, 2011, hal.12)
8 Handri Raharjo, 2018, Sistem Hukum Indonesia: Ketentuan-ketentuan Hukum Indonesia dan Hubungannya, Pustaka Yustisia.
The civil law legal system applies in mainland European countries and their colonial countries, including Indonesia. This judicial system is inquisitorial in nature or judges have a major role in directing and deciding a case.

In this system, court decisions are based on applicable laws and regulations, for example, the 1945 Constitution, MPR Decrees, Laws, Government Regulations, Presidential Decrees, Supreme Court, Ministerial Decrees and others. So, the court's decision is flexible depending on the judge who decides based on the facts or evidence available.

The civil law legal system uses a basic division into civil law and public law. The civil law legal system has three characteristics, namely the existence of a codification system; judges are not bound by precedent or the stare decisis doctrine, so that laws become their main legal reference; the judicial system is inquisitorial.\(^9\)

The codification system is needed to create legal uniformity within and amidst legal diversity. This is so that the custom that has been established as a king’s rule can be determined to become law that applies in general. For this reason, the solution needed is codification of law. The civil law legal system tends to plan, systematise and regulate everyday matters in a comprehensive manner formed by legal rules as a product of legislation.

In handling a case, the judge will look for references to the rules that are in accordance with the case being handled. Judges in the civil law legal system are active in finding facts and careful in assessing evidence, so they can get a complete picture of the case. The civil law system has the term jurisprudence constant which has a similar concept to the precedent principle. This requires that judges need to carefully consider previous decisions on cases that have similar facts and legal issues.\(^10\)

The legal approach in law enforcement according to the Civil Law System is through administering the law, which starts with making legal regulations, formulating sanctions, and so on according to a juridical pattern. The pattern of law enforcement with a legal approach that has been practised so far is using procedural law which, when linked to the material law being upheld, becomes civil procedural law or criminal procedural law. Each of these procedural laws has its own principles and principles, however, in general its implementation is emphasised in


ways according to law, so that in law enforcement with this legal approach the benchmark is the answer to the main problem, whether the law -in this case procedural law- has it run properly?

The procedural law is a legal regulation that regulates how to guarantee compliance with the law through the mediation of judges who exercise state power. The judge exercises this power by carrying out examinations, making decisions by decisively determining what and who will win legally in a legal dispute.11

However, in practice and development, the judiciary in Indonesia is no longer fully in line with the civil law system because it already has and applies several characteristics that are identical to the common law justice system.

The influence of the rapid flow of information technology has led to the acculturation of one legal system to another. Although the Indonesian legal system departs from civil law, in certain fields, especially in corporate law, corporate concepts derived from the common law system have been adopted.

Nowadays in the practice, no country adheres 100% to the common law or civil law system. For example, even though Indonesia departs from the civil law system, in practice, many court decisions have been used as the basis for deciding cases in addition to statutory provisions, as explained in the Application of the Stare Decisis Doctrine in Landmark Decisions.

3.2. THE USE OF JURISPRUDENCE IN INDONESIAN LAW COURT AS A CIVIL LAW COUNTRY

Jurisprudence has a major role and contribution in the development of national law. Therefore, to support the aspired development of the National Legal System and to (1) expedite governance, (2) fill the legal vacuum, (3) provide legal certainty; and (4) overcoming government stagnation in certain circumstances for the benefit and public interest,12 judges have the obligation to form jurisprudence on issues that have not been regulated in statutory regulations or have been regulated in statutory regulations but are incomplete or incomplete clear, or the provisions of the legislation provide an option and because of government stagnation for broader interests.13

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11 Sudikno Mertokusumo, Hukum Acara Perdata Indonesia, Yogyakarta: Liberty, 1988, h. 3-4.
12 Pasal 22 ayat 2 Undang-Undang No. 30 Tahun 2014 Tentang Administrasi Pemerintahan
13 Pasal 23 Undang-Undang No. 30 Tahun 2014 Tentang Administrasi Pemerintahan
Jurisprudence is intended as the development of the law itself in meeting the legal needs of justice seekers. Concretely, through jurisprudence the judge's duties become a factor in filling the legal vacuum when the law does not regulate or is out of date.\(^\text{14}\)

Even though the Indonesian law enforcement system is not based on a precedent system, general court judges or lower-level courts are obliged to seriously follow the decisions of the Supreme Court. In addition, judges are required to provide good and correct legal considerations in the legal considerations of their decisions, both from a legal perspective and from a jurisprudential perspective, taking into account the decisions of higher judges and/or previous judges' decisions. And if the judge wants to deviate from jurisprudence, then the judge concerned is obliged to provide reasons and legal considerations for differences in the facts in the case he is dealing with compared to the facts in previous cases.

At the theoretical level, in order to make legal development efforts through Supreme Court Jurisprudence, it is necessary to carry out an inventory of court decisions that fulfil the jurisprudential element which are carried out jointly by the Supreme Court, High Courts and Courts of First Instance, so that legal certainty and legal unification efforts can also be carried out through judicial bodies.

These decisions are made into jurisprudence if they fulfil a number of elements. First, the decision on a legal event that is not yet clearly regulated in law. Second, the decision must be a decision that has permanent legal force. Third, it has been repeatedly used as the basis for deciding the same case. Fourth, the decision has fulfilled a sense of justice. Fifth, the decision was justified by the Supreme Court.

The feasibility of a jurisprudence that can guarantee the existence of a beneficial value is that decisions contain breakthrough value and decisions are followed by judges constantly so that they become permanent jurisprudence that maximises legal certainty. If regarding an issue there is already a permanent jurisprudence, then it is considered that the jurisprudence has given birth to a legal regulation that complements the law. Strengthening legal principles can first be done in the effort to establish national law through the process of legislation. However, at the stage of implementation, the principles were confirmed through jurisprudence.

\(^{14}\) Paulus Effendi Lotulung, Penulisan Karya Ilmiah Tentang Peranan Yurisprudensi Sebagai Sumber Hukum, Badan Pembinaan Hukum Nasional Departemen Kehakiman RI, 1997, hal. 24
Jurisprudence is a fundamental requirement to complement various laws and regulations in the application of law because in the national legal system it plays a role as a source of law. Without jurisprudence, the function and authority of the judiciary as the executor of judicial power will lead to infertility and stagnation. Jurisprudence aims to keep laws current and effectively applicable, and can even increase the authority of judicial bodies because they are able to maintain legal certainty, social justice and protection.

For the sake of the realisation of legal unity, only the Supreme Court is the only constitutional institution responsible for collecting jurisprudence which must be followed by judges in adjudicating cases.\textsuperscript{15} To date, this circular letter regarding the collection of jurisprudence has never been revoked by the Supreme Court and is still included in the SEMA Association and PERMA 1951-2007 issued by the Supreme Court in 2007, thus it is still valid and serves as a guideline for the collection, issuance and publication of jurisprudence.

One example of a general criminal law case that uses jurisprudence as a source of law is in the 2018 Supreme Court Jurisprudence. In decision 1/Yur/Pid/2018, the Supreme Court was of the opinion that the defendant could be said to have intentionally committed murder.

This was based on the fact that the defendant attacked the victim with a certain tool to a vital part of the victim's body which could have caused the victim's death.

This opinion can be found in Decision No. 908 K/Pid/2006 (Otniel Layaba) which stated that: Whereas by shooting the witness the victim in a dangerous part of the body, namely the left and right lungs, the actions of the defendant can be qualified as intention to kill another person (Hoge Raad decision dated 23 July 1937), thus this element has been fulfilled.\textsuperscript{16}

However, Even though jurisprudence has an important function, it does not have a clear legal standing in Indonesia, both at the theoretical and practical levels. Although historically Indonesia has had family ties with the civil law legal system through the Dutch colonial era, there is no standard understanding of what is meant by jurisprudence.\textsuperscript{17}

From the point of view of legal practice, judge's decisions or legally non-binding jurisprudence, because the Indonesian legal system does not implement a precedent system. However, Sebastian Pompe distinguished the meaning of precedent from jurisprudence, for him

\textsuperscript{15} Surat Edaran Mahkamah Agung (SEMA) No. 2/1972 tentang Pengumpulan Yurisprudensi
\textsuperscript{16} Yurisprudensi Mahkamah Agung Tahun 2018
\textsuperscript{17} Bismar Siregar, Keadilan Hukum dalam Berbagai Aspek Hukum Nasional, (Jakarta: Rajawali, 1986), hlm. 19.
jurisprudence is a decision of a judicial body while precedent is a decision that binds the next judge. He gave an example that in the Netherlands there are provisions that require the precedent to be followed. Thus, the doctrine of precedent is not only known in the common law tradition but also in the civil law tradition. This is further strengthened by the tendency of European Union member states to adhere to the civil law tradition, but are increasingly opening up space for the application of the principle of precedent. This can be seen from the tendency of the European Court of Justice (ECJ), both in civil law theory and practice, to increasingly recognize the benefits of establishing legal rules from jurisprudential law (case law).  

3.3. THE USE OF JURISPRUDENCE IN INDONESIAN LAW COURT AS A CIVIL LAW COUNTRY

The Anglo Saxon Legal System or Common Law is a legal system based on jurisprudence. This legal system tends to prioritize customary law, law that runs dynamically in line with the dynamics of society. Established through a judicial institution with a jurisprudence system that is considered better, so that the law is always in line with a sense of justice and benefits that are felt directly by the community. This legal system is implemented in Ireland, England, Australia, New Zealand, South Africa, Canada, and the United States. In addition to these countries, several countries also apply the Anglo Saxon system along with customary law and religious law, such as Pakistan, India and Nigeria. Judges' decisions are a source of law in the Anglo-Saxon legal system.

In this system, the role of judges is very broad. The function of the judge is not only to determine and interpret legal regulations, but also to shape the whole system of community life. Judges can also create new laws that will serve as a guideline for other judges to resolve similar cases. This legal system adheres to the Stare Decisis doctrine. The point is that in deciding a case, a judge must base his decision on legal principles that already exist in the decisions of other judges from previous similar cases.

In the Common Law System law enforcement uses an approach known as the administration of justice. This approach views law enforcement as a collaborative process. The doctrine used, therefore, is the administrative doctrine. A management doctrine that is more

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18 International Lecture of Sabastian Pompe, Praktik Yurisprudensi di Negara Civil Law dalam Mendorong Konsistensi Putusan: Tantangan Pengadilan Indonesia Masa Kini, Senin 5 Maret 2012, Jentera School of Law, Puri Imperium Office Plaza UG 15, Jalan Kuningan Madya Kav. 5-6, Jakarta Selatan
concerned with the work efficiency of the institutions involved in the process of adjudicating or upholding law and justice, which is also supported by an analysis or systems approach.\textsuperscript{19}

Jurisprudential law (case law) refers to the creation and refinement of law in formulating court decisions. Because it is oriented towards concrete cases, where among a series of cases legal principles are then extracted which then become the norms applied and followed in various similar cases, the doctrine of precedent or stare decisis is at the heart of the English legal system (or the common law system in general). The doctrine of binding precedent refers to the fact that in the hierarchical structure of the judiciary in England, higher court decisions are hierarchically binding on lower courts. In general, this means that when judges try cases, they will check whether the same matter has been decided by a previous court.\textsuperscript{20}

In the Common Law System, it is known that there is an adversary system in the judicial process. In this system, the disputing parties use lawyers when dealing with each other in court. The parties, assisted by their respective lawyers, develop a strategy to convince the judge to win the case. The parties are like entering the battlefield, evidence and witnesses are weapons and ammunition that must be managed effectively and efficiently in their use for victory in battle. The statements of the opposing witnesses and the evidence submitted were examined in depth to then be searched for, compiled and put forward statements and evidence to the contrary in order to immobilise the opponent, or if he thinks he needs a jury, he will order the jury to declare win or lose, right or wrong. The jury’s statement is a decision that must be accepted by the judge, regardless of whether they agree or disagree.\textsuperscript{21}

Most laws in the common law system originate from court decisions that create laws, so that in this case judges act as legislatures who create laws. Even though in the common law system judges follow the doctrine of precedent (stare de cisis), in using this doctrine judges must use two standards.

First, every case must always be "einmalig" in nature, meaning that it only happened once and cannot be exactly the same as existing cases. Judges are only required to follow the doctrine of precedent in the form of matters directly related to the case product (ratio dedicendi), while additional or illustrative matters (obiter dicta) can be set aside or judged according to their

\textsuperscript{21} Peter Mahmud Marzuki, Op. Cit, Pengantar Ilmu hukum, h. 298.
convictions. Second, it must be reasonable, that is, it must be seen within the context of the
relevant legal system (possibilities or fairness). So, the previous decision, if there is no
reasonableness, does not need to be followed.

4. CONCLUSIONS

The function of jurisprudence is very important because in addition to filling legal voids it
is also important to realise equal legal standards or legal certainty. Legislation never regulates in
full and in detail, therefore jurisprudence will complete it. With the existence of the same legal
standards, a sense of legal certainty can be created in society, and prevent disparities in decisions.
With the creation of a sense of legal certainty and legal equality in the same case, the judge's
decision will be predictable and open.

In Indonesian law court, the civil law system is focusing on the use of statutory regulations
and written law, however, jurisprudence is still commonly used in the practice of the court trial.
The principles contained in the legal approach in the Civil Law System are legal principles or
principles which emphasise the application of the procedural law as it should be, while the
principles of the administrative approach are principles or principles of effectiveness and
efficiency which emphasise the achievement of legal objectives efficiently.

Thus, the differences in the Civil Law and Common Law legal systems should be
understood and accepted more openly. The a priori nature of highlighting the differences should
have been abandoned, so that the advantages and uses of each legal system can be utilised one
over the other.

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