

The Role of Jurisprudence in the Development of Civil and Criminal Law

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ABSTRACT

Judgments of cassation-level courts that are already *inkracht* or jurisprudence as a source of law are still debatable in legal studies, notably the use of jurisprudence in judges' legal considerations. Even though jurisprudence is quite constructive in providing reinforcement of the judge's considerations in their decisions, jurisprudence can also be used as a legitimate legal statement, which can complement the legal void. The research aims to examine the position of jurisprudence in the national legal system and its role in the development of civil and criminal law. The method used in this research is normative legal research combined with the statutory and conceptual approaches. The outcomes of this research show that although jurisprudence is recognized as a source of law, it is not included in the hierarchy of laws and regulations. The application of jurisprudence is in fact in line with the mandate of Article 5 of Law Number 48 of 2009 concerning Judicial Power which states that judges and constitutional judges are compulsory to explore, follow, and comprehend legal values and a sense of justice that lives within the society. Therefore, it becomes important to consider the legal standing of jurisprudence in reinforcing and developing national law (civil and criminal).

Keywords: civil law, criminal law, jurisprudence, legal development, role.

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I. INTRODUCTION

The law in its development has 4 functions, namely law as the maintenance of order and security, as Sunaryati Hartono quoted the opinion of Roscoe Pound in her well-known book entitled *An Introduction to the Philosophy of Law*, that state: "*The first and simplest idea is that law exists in order to keep the peace in a given society, to keep the peace at all events and at any price. This is the conception of what may be called the stage of primitive law*" (Hartono, 1995, p. 72). The law is also applied as a tool of development, law as a tool of upholding justice, and law as a tool of public education.

Laws, legal institutions, and legal scholars play a highly important role in carrying out amendments to a new system of norms and values at each stage of development (Fauzia *et al.*, 2021, p. 13). Law arises because humans live in society. Laws regulate rights and obligations in social life and also regulate how to implement and maintain these rights and obligations. Such laws are included in civil law, scilicet those that regulate rights and obligations in living in a society are referred to as "material civil laws", while civil laws that regulate how to implement and defend rights and obligations are referred to as "formal civil laws" (Wignjosoebroto in Donardono, 2007, p. 94). Meanwhile, for violations and crimes against the public interest, legal instruments are available in the form of criminal law.

In the social life of living in society, humans are central. Humans are the activators of community life because humans are proponents of rights and obligations (Fauzia & Hamdani, 2021, p. 161). Thus, material civil law first determines and regulates who is meant by a person as a proponent of these rights and obligations. Likewise, the presence of criminal law, in the relation to rights and obligations, sometimes creates contact and disputes that lead to violations or even crimes that can cause harm, both to individuals and to the public interest.

Observing the two laws, namely Civil Law and Criminal Law, whereas: *First*, the situation of civil law in Indonesia from the past until now has no uniformity (pluralism). Subsequent to the Indonesian nation obtaining its independence up to the current moment, the Civil Code (KUHPerd) which was codified in 1848 is still applicable in Indonesia. The legal basis for the application of KUHPerd is Article 1 of the Transitional Rules of the 1945 Constitution of the Republic of Indonesia (UD NRI 1945) which reads in full "All existing laws and regulations are still valid as long as new ones have not been enacted according to this Constitution", apart from that, written law (statute) has never been comprehensive, evident, and thorough in regulation people's lives so that it often lags behind community developments, and for this reason, these laws need to be constantly developed so that they remain recent and suitable for the current

era development (up to date) (Apeldorn, 1993, p. 112). *Second*, likewise the criminal law that also shows the existence of pluralism, various kinds of law that mark the wealth of Indonesian laws, both those formed due to political aspects in the form of special laws such as Nangroe Aceh Darussalam and Special Region of Yogyakarta, as well as due to the state's recognition of the existence of society as regulated in Article 18B paragraph (2) of the UUD NRI 1945.

In order to overcome the shortage of written law, it is requisite to plan so that it is not too visible to the surface so as to create injustice within society. The role of judicial power is indispensable in terms of reducing the adverse effects of deficiencies in the Legislation. Judges are not spokesmen for laws and regulations, but judges are able to explore the values of justice in society, so it is hoped that if laws and regulations are unable to fill in a sense of justice in society, the role of judges is to restore this sense of justice, one of which is through jurisprudence.

Therefore, based on the description above, it is interesting to study further related to the position of jurisprudence in the national legal system and its role in the development of civil and criminal laws.

II. METHOD

The method applied in this research is normative legal research combined with statutory and conceptual approaches. This normative legal research is aimed at finding a rule of law, legal principles, and legal doctrines to answer the legal issues faced, particularly relating to the position of jurisprudence and its role in the development of national law. The use of statutory and conceptual approaches is intended to assist the author in examining the legal issues faced in order to obtain comprehensive study outcomes.

III. THE LEGAL STANDING OF JURISPRUDENCE IN THE NATIONAL LEGAL SYSTEM

Judgments of cassation-level courts that are already *inkracht* or jurisprudence as a source of law are still being debated in legal studies, mainly the use of jurisprudence in judges' legal considerations. Law Number 12 of 2011 concerning The Establishment of Legislation as amended for the second time by Law Number 13 of 2022 (PPP Law), whereas legal sources that are classified as the written law or Indonesian laws and regulations as stipulated in Article 7 paragraph (1) are as follows:

- 1) The 1945 Constitution of the Republic of Indonesia.
- 2) Decree of the People's Consultative Assembly.
- 3) Laws/Government Regulations in Lieu of Laws.
- 4) Government Regulations.
- 5) Presidential Decree.
- 6) Provincial Government Regulations; and
- 7) District/City Regional Government Regulations.

If observed from the hierarchy of laws and regulations, the PPP Law does not regulate court judgments that are *inkracht* or jurisprudence as statutory regulations, as well as when looking at the provisions in Article 8. The criminal or civil litigation system is a series of sub-systems that move in a dynamic way, systematic, and integrative in order to embody legal certainty and justice.

In the application of criminal sanctions, jurisprudence is almost never applied as a source of law in the consideration of judges imposing criminal sanctions. There is no regulation/formulation in jurisprudence as a source of law in the laws and regulations of criminal justice institutions. However, in the practice of civil litigation, state administration, and constitution, litigants and judicial apparatus include jurisprudence as a source of law to strengthen the legal position (*posita*) or arguments of a case, and in the judge's decision, there are also those who include jurisprudence as an additional basis for making a judge's decision.

For instance, the Constitutional Court Judgment Number 37/PUU-XVIII/2020 applied more than 1 (one) jurisprudence as follows:

- a. Jurisprudence of the Supreme Court Number 2/Yur/Pid/2018 and 3/Yur/Pid/2018 where the Supreme Court consistently considers that actions that are categorized as "known or should be presumed to have been obtained from a crime" are:
 - 1) When an item is sold or purchased below the market/standard price.
 - 2) When a person purchases a motor vehicle without being equipped with valid vehicle documents.
- b. Jurisprudence of Constitutional Court's judgments, the Constitutional Court (MK) often states that articles regulated in the laws are conditionally constitutional, as long as they are

interpreted according to the interpretation of the Constitutional Court as stipulated in the Constitutional Court Judgment Number 147/PUU-VII/2009, dated 30 March 2010 or conditionally unconstitutional, as long as it is not interpreted according to the interpretation of the Constitutional Court as regulated in the Constitutional Court Judgment Number 4/PUU-VII/2009, dated 24 March 2009;

- c. Jurisprudence of Constitutional Court Judgment Number 27/PUU-VII/2009, "From the practice of the Court (2003-2009), individual Indonesian citizens, particularly taxpayers (taxpayer, vide Judgment Number 003/PUU-I/2003) various associations and NGOs (or LSMs in Indonesian legal term) that are concerned about a law in the public interest, legal entities, regional governments, state institutions and others, are considered by the Court to have legal standing to submit requests for judicial review, both formal and material, of the Law against the 1945 Constitution;
- d. Jurisprudence of the Constitutional Court through Judgment Number 138/PUU-VII/2009 concerning Judicial Review of Government Regulation in Lieu of Law Number 4 of 2009 concerning Amendments to Law Number 30 of 2002 concerning the Commission of Corruption Eradication.
- e. The Doctrine on the nature of act against the material of the law, in a negative function can be discovered in the jurisprudence of the Supreme Court Number 42/K/Kr/1966 dated 8 January 1966 on behalf of the accused Machroes Effendi, followed by the Supreme Court Judgment Number 71/K/1970 dated 27 May 1972, Judgment Number 81/K/Kr/1973, which basically outlines that there are three characteristics that eliminate elements against the law or reasons for eliminating crimes i.e. if the state is not harmed, the public interest is served, and the accused does not benefit.

However, it is different in civil litigation where the application of jurisprudence is infrequently found, even in criminal litigation at the Cassation level there is no application of jurisprudence as a source of law for judges in giving consideration to their judgments, as stipulated in the Cassation Judgment Number: 8/PID.SUS-TPK/2021/PT PBR, Cassation Judgment Number 26/Pid.Sus-TPK/2020/PN.JKT.Pst, and Cassation Judgment Number 124 K/Pid.Sus/2019. In fact, jurisprudence is adequately constructive in providing reinforcement of judges' considerations in their judgments, and jurisprudence can also be applied as a legitimate legal statement, which can complement legal void. This matter is emphasized in Law Number 48 of 2009 concerning Judicial Power Article 10 paragraph (1), whereas the Court is prohibited from refusing to examine, hear, and decide on a case filed on the pretext that the law does not exist or is obscure, but is obliged to examine and put it on trial. Unwritten laws become a solution, but on the other hand, jurisprudence can also be applied as a solution to the legal void.

IV. THE ROLE OF JURISPRUDENCE IN THE DEVELOPMENT OF CIVIL LAW AND CRIMINAL LAW

The application of jurisprudence is in fact in line with the mandate of Article 5 of Law Number 48 of 2009 concerning Judicial Power which states that judges and constitutional judges are required to investigate, comply with, and comprehend legal values and a sense of justice that lives within the society. A decent judge is a judge who can embody a sense of justice in society even though there are no adequate laws and regulations. However, the principle referred to in Article 5 of the Judicial Law is often misused by amending the existing legal order so that as an outcome is that legal certainty is extremely challenging to obtain.

The implementation and development of laws and regulations occur through the judiciary with a judge's decision. If related to Soetandyo Wignjosobroto's opinion, legal reform through judge's decisions is classified in the category of legal reform in the sense of law reform. Reform of legal substance in this context, particularly unwritten law, is carried out through a law discovery mechanism as stipulated by the provisions of Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power, which provides authority to judges and constitutional judges to investigate, comply with, and comprehend legal values and a sense of justice that lives within the society regarding problems or issues that have not been regulated, in the sense that have not been regulated by the written law or in terms of the formulation for regulations that are obscure in the written law (Wargakusumah, 1992, p. 64).

In one of the legal studies on increasing jurisprudence as a source of law conducted by the National Law Development Agency in 1991/1992, several definitions of jurisprudence had been collected as follows:

- a. Jurisprudence, i.e., permanent litigation or judicial law (Poernadi Poerbatjaraka and Soerjono Soekanto).

- b. Jurisprudence is the legal doctrines established and held by the court (Fockema Andrea Dictionary).
- c. Jurisprudence is a systematic aggregation of judgments of the Supreme Court and Superior Court which are adhered to by other judges in giving decisions in the same matters (Fockema Andrea Dictionary).
- d. Jurisprudence defined as the *rechtsgeleerheid rechtspraak, rechtsopvatting gehudligde door de (hoogste) rechtscolleges, rechtslichamen blijklende uitgenomende beslisstinge* (dictionary of *koenen endepols*);
- e. Jurisprudence defined as the *rechtsopvatting van de rechterlijke macht, blijklende uitgenomen beslisstingen toegepasrecht de jurisprudentie van de Hoge Raad* (dictionary of *van Dale*).

According to R Soebekti, jurisprudence is the decisions of judges or courts which are permanent and justified by the Supreme Court as the Court of Cassation or the judgments of the Supreme Court itself which are permanent. Jurisprudence has a major role and contribution to the development of national law.

Therefore, to support the aspired National Legal System Development and to: (1) Expedite governance, (2) Complement the legal void, (3) Provide legal certainty, and (4) Overcome government stagnation in certain circumstances for the benefit and public interest (Article 22 paragraph (2) of Law Number 30 of 2014 concerning Government Administration), judges have the obligation to form jurisprudence on issues that have not been regulated by the laws and regulations or have been regulated but are incomplete or obscure, or the provisions of these laws and regulations provide an alternative and because of government stagnation for broader interests (Article 23 of Law Number 30 of 2014 concerning Government Administration). Jurisprudence is intended as the development of the law itself in meeting the legal requirements of justice seekers. Concretely, the judge's duties become a factor in complementing legal void through jurisprudence when the law does not regulate or is outdated (Lotulung, 1997, p. 24).

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

At the theoretical level, in order to apply efforts in developing Indonesian Civil Law and Criminal Law through the Supreme Court Jurisprudence, it is obligatory to carry out an inventory of court judgments that meet the elements of jurisprudence which are jointly carried out by the Supreme Court, Superior Courts, and Courts at First Instance, so that legal certainty and unification attempts can also be carried out through judicial bodies.

Those judgments are applied as jurisprudence if they comply with several elements. First, the judgment on a legal event that distinctly has not been regulated by the law. Second, the judgment must be a decision that has permanent legal force. Third, it has been repeatedly used as the basis for deciding similar cases. Fourth, the judgment has fulfilled a sense of justice. Fifth, the judgment was justified by the Supreme Court.

The feasibility of a jurisprudence that can guarantee the existence of a beneficial value is that the judgments contain innovation value and judgments that are constantly complied with by judges so that they become permanent jurisprudence that maximizes legal certainty. In terms of relating to an issue that is already a permanent jurisprudence, then it is considered that the jurisprudence has established legal regulation that complements the law. Stabilization of legal principles can first be carried out in the attempts to establish national law through the legislative process (legislation). However, at the stage of implementation, the principles were confirmed through jurisprudence.

Jurisprudence is a fundamental requirement to complement various laws and regulations in the application of law as it plays the role of a source of law in the national legal system. 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 actual and effective, and able to even increase the prestige of judicial bodies since they are able to maintain legal certainty, social justice, and aegis.

V. CONCLUSION

- 1) In the application of criminal sanctions, jurisprudence is almost never applied as a source of law in the consideration of judges imposing criminal sanctions. However, in the practice of civil litigation, state administration, and the constitution, the litigants and judicial apparatus include jurisprudence as a source of law to reinforce the legal position (*posita*) or arguments of a case, and in the judge's

decision, there are also those who classified jurisprudence as a subsidiary basis for making a judge's decision. This condition shows that although jurisprudence is recognized as a source of law, its legal standing is still frail in both the civil and criminal justice systems in Indonesia. In fact, jurisprudence is adequately constructive in providing reinforcement of the judge's considerations in their decisions.

- 2) Jurisprudence is intended as the development of law itself in meeting the legal requirements of justice seekers. Concretely, the judge's duties become a factor in complementing legal void through jurisprudence when the law does not regulate or is outdated. At the theoretical level, in order to apply efforts in developing Indonesian Civil Law and Criminal Law through the Supreme Court Jurisprudence, it is obligatory to carry out an inventory of court judgments that meet the elements of jurisprudence which are jointly carried out by the Supreme Court, Superior Courts, and Courts at First Instance, so that legal certainty and unification attempts can also be carried out through judicial bodies.

CONFLICT OF INTEREST

Authors declare that they do not have any conflict of interest.

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