IJSSR
International Journal of Social Service and Research

Vol. 03, No. 05, May 2023
e-ISSN: 2807-8691 | *p*-ISSN: 2807-839X

THE ROLE AND EXISTENCE OF JURISPRUDENCY IN THE LEGAL SYSTEM IN INDONESIA

Oding Djunaedi, Jaya Mulya
[1]Guru Besar lImu Hukum UGJ Cirebon, Indonesia
[2]Mahasiswa Program S2 Ilmu Hukum UIN SGD Bandung, Indonesia
*e-mail: pascajunaedi@gmail.com, Jaya290620@gmai.com

Keywords

The Role of Jurisprudence; the Existence of Jurisprudence; Legal System

ABSTRACT

Understanding the importance of jurisprudence in relation to the role of judges in processing a case in court, all of this indicates that jurisprudence is an integral part when judges process a case to make a decision when the written legal rules are not textually stated. And this is also the principle of freedom of action for judges, when the legal text does not stipulate concretely, this is all done to fill the legal void. However, what needs to be considered is the principle of freedom of action (freies ermeseen/discretion) for a state official (judge), may not act as freely as one's own will, but that freedom of action must result in legal decisions that are guided by the values of justice, the value of usefulness and the value of justice. certainty to be felt by all components of society. Thus, the role and existence of a prudential jurist in the legal system in Indonesia is highly expected to build and enforce socially just laws for all Indonesian people. For this reason, a legal issue arises, what is the role and existence of jurisprudence in the legal system in Indonesia? This requires a legal reasoning that is firm, clear and concrete so that in practice the law can be touched by all levels of Indonesian society.

INTRODUCTION

Law is the rules that regulate the order of life of the Indonesian people, so that the legal consequences must be obeyed and obeyed without exception. In line with the development of the times, the law is always faced with social changes both in the context of social changes that occur in individual life, social life, as well as in the life of the nation and state. Therefore, these changes have a direct or reverse impact on changes in the legal system. So that it will shape or reconstruct the nature and character of law and its role in people's lives as well as the demands of society driven by various factors, we can find this in the mutual influence between social change and law (Dirdjosisworo, 1983).

If the law is always faced with social changes, then the law will provide one of the two main legal functions (Arkles et al., 2009). First; Law can be said to function as a control over social changes that occur in society (taal of social control). Second; law acts as a means of change in society (taal of social engineering). The two functions of law arise as a result of the disharmony of social dynamics and legal dynamics in people's lives. In practice, sometimes the development of law is left behind by the development of society which is so complex, but on the other hand sometimes the development of society is left behind by the development of law which is so rapid. Disharmony between community development and legal development will give birth to a social imbalance (social lag). Thus, if changes in

https://doi.org/10.XXXXX/ijssr.xxxx.xx

law are left behind by social changes that are so complex, then there is a demand that law materials should be mixed to meet legal needs in society. Whereas on the contrary, if the law is so complex and advanced, while social development is stagnant, so that legal materials do not need to be changed, as a result the law needs to be enforced to regulate people's lives, the point is law enforcement must take precedence in people's lives.

In the aspect of legal practice in the judicial environment, the term jurisprudence arises from court decisions, especially court decisions at the highest level, namely the Supreme Court. The results of the decisions of the Supreme Court will not immediately give rise to law, but are only a factor in efforts to form a new law. Jurisprudence is said, if the decisions of the Supreme Court are followed by courts at lower levels as a habit that is done repeatedly (Soeroso, 1993). Referring to the opinion above, it can be understood that jurisprudence has a very important position in deciding similar cases. Jurisprudence is new legal values that are not contained in the law, therefore studying jurisprudence is very important, besides jurisprudence as a source of formal law that is recognized by the government. So, understanding law in legislation alone without studying jurisprudence is not complete.

Jurisprudence is the act of judges in deciding cases where there are no written rules, so that judges also act to immediately process the law in order to prevent the occurrence of a legal vacuum, with consideration for the common good. According to Utrecht, if a judge's decision is outside the law or written law in a trial, then the decision is used as a reference by another judge in a similar case, then the first judge's decision can be used as a source of law by other judges (Mak, 2012). A similar opinion was also expressed by Soepomo, he said that the jurisprudence of superior judges is an important source for subordinate judges in finding objective law. Basically a judge is not bound by the decisions of other judges, but in practice the judge serving in the area (below), must obey the judge who is based at the center (MA), therefore the regional judge must still pay attention to the decision of the central judge, especially in appeals and cassation decisions (Fauzan et al., 2017).

Understanding the importance of jurisprudence in relation to the role of judges in processing a case in court, all of this indicates that jurisprudence is an integral part when judges process a case to make a decision when written legal rules are not listed textually. And this is also the principle of freedom of action for judges, when the legal text does not stipulate concretely, this is all done for the benefit of the law which is problematic for society. However, what needs to be considered is the principle of freedom of action (freies ermeseen/discretion) for a state official (judge), may not act as freely as one's own will, but that freedom of action must produce legal decisions that are guided by the values of justice, the value of benefits and the value of certainty to be able to felt by all components of society. Thus, the role and existence of jurisprudence in the legal system in Indonesia is highly expected to build and enforce laws that are socially just for all Indonesian people. For this reason, a legal issue arises, what is the role and existence of jurisprudence in the legal system in Indonesia? This requires a legal reasoning that is firm, clear and concrete so that in practice the law can be touched by all levels of Indonesian society.

METHODS

This type of research is library research because the object studied is a document which is secondary data (Soekanto, 1990). The focus of this research study is normative, namely doctrinal legal research or theoretical legal research. It is called normative legal research because what is studied is law from a theoretical or normative aspect, not to examine the applied or implementation aspects. The approach used is philosophical. The philosophical approach is an approach that views law as an ideal set of values that must be a reference in every establishment, regulation, and law enforcement. The philosophical approach is used because this study is ideal by using the perspective of legal philosophy which views law as law in ideas or ius constituendum. The data used is secondary data. Secondary data is data that is not obtained by researchers directly or comes from other parties in the form of written documents. Researchers obtained data through searching library materials. The data that has been collected was analyzed qualitatively. Qualitative data analysis is a form of analysis by interpreting and describing data through narrative words with scientific logic.

RESULTS

1. The Role of Jurisprudence in the Legal System in Indonesia

In general, in countries that adhere to the continental European legal system (civil law), the term jurisprudence is often interpreted as judge's decisions and obtains permanent legal force, and is

followed by other judges in the same case. There are also those who interpret jurisprudence as a collection of laws (rechtersrecht) or a law generated by the decisions of judges or judicial institutions. Whereas in countries that adhere to the common law (Anglo Saxon) legal system, "jurisprudence" is defined as a legal science that deals with positive legal principles and legal relations. Whereas the decisions of high-level judges that are followed regularly by the judicial bodies below them eventually become part of legal science, they are known as "Case-law", also known as "judge made law" (Lotulung, 1997).

In the Indonesian context, as a former Dutch colony, Indonesia was directly affected by the civil law (continental European) legal system. It is in this context that jurisprudence in the Indonesian legal system is defined as decisions of judges or judicial bodies that have obtained permanent legal force, where the decisions have been followed by judges or judicial bodies under them in the same case. In judicial practice, there is no clear and concrete official statement issued by the judiciary regarding the notion of jurisprudence. However, in various trainings or symposiums on law, the Supreme Court provides an explanation that jurisprudence is only a decision of the Supreme Court, where the decisions of the Supreme Court are compiled in a book form. Thus jurisprudence can be interpreted: First; a science that adheres to the application of judicial laws, and second; a collection or set of judicial decisions, followed by judges to hear and decide in the same case or case (Aziz, 2018).

In line with that, all judges' decisions can be said to be part of formal sources of law, so that jurisprudence has such an urgent position when it is associated with the existence of judges in their duties and authorities. On the other hand, the role of jurisprudence, if it is correlated with the legal school of legalism, the role of jurisprudence is less urgent because all laws are contained in laws, therefore, judges in carrying out their duties and authorities are bound by law, so that judges can be said to be executors of laws. Act (Dahlan, 1996).

Talking about the role of jurisprudence in the legal system in Indonesia, this view cannot be separated from three schools of law which provide space for jurisprudence to emerge in creating new laws that are in line with the values of social justice. There are three schools of law related to jurisprudence, namely:

a. Legism

The legalist school is also known as the formalistic, analytical jurisprudential and positivistic school. This flow of law developed in the 19th century, it grew as a reaction to the non-uniformity of customary law in effect at that time. The solution is to codify it in a set of rules that apply in general. The purpose of codification is for simplicity, certainty and legal unification.

In its development, this school then closes itself on one provision that what can be called law is legislation (wergeving). Because laws are made to regulate one human behavior that has ever happened. Because of this kind of thinking, leads that every Actions that are considered unlawful can be punished if they comply with the legal formulations contained in the statutory regulations.

In 1800, customary law was an unwritten source of law, because of its unwritten nature, legal uncertainty often arose in society. Then an effort emerged to guarantee legal certainty, by establishing an effort to unify the law and write it down in a book or codex (codex). In the end arises the importance of law Habits are to be codified, so the legal codification movement was born which is the background for the birth of the legism school. This flow of legism expressly states that, the main source of law is law, outside the law is not law, so law is synonymous with law. In the end, the judge is only obliged to carry out the law, so that the role of the judge will be passive (Asshiddiqie, 2006).

The position of judges as law enforcement officials must be bound by the dictums of statutory regulations, and judges are not allowed to base their thoughts on other norms which actually could be made possible to serve as more appropriate laws, or in other words law enforcement can provide benefits and a sense of justice for society. Judicial institution only guarantees that the mechanism of the provisions of the law conforms syllogistically to concrete events (cases).

According to the legal school of law that there is no rule of law other than written laws, laws are deemed capable of overcoming various legal problems that occur in people's lives. So far, the influence of legalism has been very strong in influencing various legal systems that have developed in various countries, including Indonesia. Derived from this line of legalism, a legal principle emerged called the principle of legality, one of the most fundamental principles in the criminal law system of Continental European countries. This legality principle is formulated in Latin: "Nullum delictum, nulla poena, sine praevia lege poenali" which means that an act cannot be punished, unless it is based on the strength of the existing criminal law provisions (Sudarto, 1990). This legality principle has

been in effect in various countries that use criminal law that has been codified in a "wetboek" such as countries that adhere to the Continental European legal system. This principle is also contained in the Universal Declaration of Human Rights
Human 1948 in article 11. Of course Indonesia, which was colonized by the Dutch for 350 years with a Continental European style, based on the concordance principle translates and enforces wetboek van stravrecht into Indonesian as the Criminal Code (KUHP). The principle of legality is stated clearly and unequivocally in Article 1 paragraph (1) of the Criminal Code, which reads: "No act may be punished, except for the strength of the criminal provisions in law, which is prior to the act".

Examples of legal thinking in the perspective of legalism are as follows; "Minah's grandmother stole 2 (two) cocoa beans (case in 2009), Minah's grandmother was arrested and charged with Article 362 on theft "Anyone who takes something, wholly or partly belongs to another person with the intention to own it against law, is threatened with theft, with a maximum imprisonment of five years or a maximum fine of sixty rupiahs". In the trial, the judge makes a match between the act and the formulation of the legal rules in the Criminal Code, if there is a match, then the judge determines what punishment and how long it takes for the perpetrators of criminal acts Finally, Minah's grandmother was sentenced to 1 month 15 day. From this case example, the judge only voiced what was stated in the Criminal Code by turning a blind eye to other considerations, considerations The consideration of the existing judges is also just to adjust what is in the regulations other laws such as the Criminal Procedure Code.

Such is the syllogism or the workings of legal science with a legismatic or positivistic wing. Understanding positivism, every legal norm must exist in its objective nature as positive norms, and confirmed in the form of a concrete contractual agreement between citizens or their representatives. Here law is no longer conceptualized as abstract meta-juridical moral principles about the nature of justice, but ius which has undergone positivization as lege or lex, in order to guarantee certainty regarding what constitutes law, and what is even normative must be stated as things that not considered legal.

b. Aliran Free Law Doctrine (Free Law Movement)

Freie Rechtlehre is a school or sect that is contrary to the flow of legism. You need to know that the inability of the legislature to always rejuvenate or update laws, resulting in the law always being left behind by events and unable to keep up with the dynamics of society, is a reason to give judges an active role. So that the Freie Rechtlchre school emerged (1840) as a reaction to the shortcomings of the legal school which turned out to be unable to overcome new problems.

The Free Rechtlehre school is a free school, because it does not always rely on laws (laws) made by the legislature. Of course you still remember the previous description which stated that in the legal system every judge is bound by law, this is very contrary to the freeie rechtlehre school. Because according to Freie Rechtlehre's point of view, judges are free to improvise to determine or create laws, and are also free to distort laws that are no longer relevant. This is due to Freeie Rechtlehre's opinion that the judge's job is to create law. So that an understanding of jurisprudence is primary in studying law, while laws are secondary. In this Free Rechtslehre school, judges actually function as creators of law (Cudge made law), because decisions made are definitely based on the judge's convictions. The judge's decision is also more dynamic and up to date, because it always follows the changing times and the demands of society. In addition, the law is only formed by the judiciary (rechts-spraak). So that laws, customs and so on are only functioned by judges as a means in forming/creating or finding laws in concrete cases (Soeroso, 2021).

This school is the anti-thesis of Legism, totally opposed to what is the legal paradigm for its bearers. Rejecting categorically the submission of judges to the law, which places judges as mere sounders (mouthpieces) of the dictums contained in the law and solves legal problems in a deductive manner. The emergence of this school because the law of legism is felt unable to meet the needs and inability to solve new problems in law. This flow was born in Germany in the 19-20 century with the main character Kantorowics. Furthermore, we can underline that the objectives of Freie Rechtlehre are: a) to administer justice in the best way possible by giving freedom to judges not to be bound by the law, but to live the order of everyday life, and b) to prove that in law There are deficiencies in the law that need to be completed and perfected. And c) assign judges to decide cases based on Rechtsidee (ideals of justice).

c. Rechtsvinding Stream

The Rechtsvinding school or legal discovery is a school whose position is between the two extreme schools above (between legism and Freie rechtlehre). In principle, the Rechtsvinding school is of the opinion that judges stick to the law but are not as strict as the legism school, because judges also have freedom. But the freedom of judges is not like the opinion of the Free Rechtslehre school, so that in carrying out their duties judges have what is known as bound freedom' (gebonded-vrijheid) as well as 'free attachments' (rije-gebondenheid). Because of that, the judge's task is said to be an effort to carry out rechtsvinding (legal discovery), which means to align laws with the demands of the times, with concrete matters that occur in society and if necessary add laws that are adjusted to the principles of justice prevailing in society. The essence of the view of the formation of law from this school is that judges are bound by law, but not as strict as the Legislative school which only positions judges as lawbreakers. The judge is given freedom, but that freedom is not as free as in the free flow of law (free law), bound freedom. The task of the judge in this stream is to harmonize law with the development and changing times. The Rechtsvinding school believes that jurisprudence is very important and good to study. There one can find the method of deciding the judge's law and the sense of justice believed by the judge. The existence and study of laws is also as important as jurisprudence, the existence of laws guarantees legal certainty and legal unification.

According to the Rechtvinding school, law can be formed in the following ways; (a) Through the formation of laws and regulations; (b) Through the interpretation of the law, considering that the law does not yet cover the legal issues faced and the judge's own thoughts in the trial court (rechtpraak): (c) Through the elaboration and refinement of laws by judges and; (d) Through traditions or habits carried out by the community (living law).

From the description above, we can conclude that the rechtsvinding school places jurisprudence as a source of law besides law. With the assumptions mentioned above that in jurisprudence there is a concrete legal meaning needed in social life which is not found in the rules contained in the law. The Rechtsvinding school believes that jurisprudence is very important and good for learned. There can be found the method of deciding the judge's law and the sense of justice believed by the judge. The existence and study of laws is also as important as jurisprudence, the existence of laws guarantees legal certainty and legal unification.

By understanding the three streams of law above, a fundamental question arises, which streams of law apply in Indonesia? This is important to disclose as a basis or guideline when jurisprudence is needed on judicial practices that are useful for creating new laws for the sake of justice in favor of society. Although it is not explicitly stated that Indonesia adheres to the rechtsvinding or legal discovery school, there are several things that we can use to indicate that in reality Indonesia's positive law is colored by the Rechtsvinding school. For example, if we connect with various sources of formal Indonesian law, we will find that laws or regulations are the main source in the Indonesian national legal system, followed later by customs, jurisprudence, agreements and doctrines. We can use the description above as one of the markers that Indonesian positive law is colored by the Rechtsvinding school, which gives judges the freedom not to rely solely on laws, but to explore laws from other sources, for example from jurisprudence.

If we look at the legal regulations that were and are currently in effect in Indonesia, we can say emphatically that Indonesia adheres to the Rechtvinding school. The proof can be found in the laws and regulations that were in effect during the Dutch East Indies era with the abbreviation AB (Algemen Bepalingen van Wetgeving voor Indonesia). In article 20 AB it is stated that "the judge must judge based on the law and in article 22 AB it is stated that" a judge who refuses to settle a case on the grounds that the relevant laws and regulations do not state, are not clear and incomplete, then he can be prosecuted or punished for refusing to adjudicate."

> *"The court may not refuse to examine, try and decide on a case filed on the pretext that the law is ambiguous or unclear, but is obligated to examine and try it"* (article 16 paragraph l).
>
> *"Judges are obliged to explore, follow, and understand legal values and a sense of justice that lives in society"* (article 28 paragraph l).

The rechtsvinding school seems to be a bridge from the two previous extreme schools, but in practice it is not an easy matter to align laws and regulations with the freedom of thought of judges in resolving legal cases. From With these provisions, we can note that the Courts or Judges in the Indonesian legal system have an active role in finding laws or forming new laws. Thus, the Court or judge is a quite important element not only in finding law but also in developing law. It is clear that the court has an important position in the Indonesian legal system. Because they perform a function

which basically completes the provisions of written law through law formation (rechtsvorming) and legal discovery (rechtsvinding). In other words, judges or courts in the Indonesian legal system, which are basically written, have the function of making new laws (creation of new lar). Therefore, the Indonesian legal system, although it is a written legal system, is also an open system.

Understanding the role of jurisprudence in the legal system in Indonesia, at this time it can be concluded, that jurisprudence can be seen as a way to create new laws that are in accordance with the development of society (the era), when written legal rules no longer reach the times that are so fast and complex. In the end there is a legal vacuum, so this is where the role of judges is given the freedom to explore and create new laws that are in harmony with the development of society, based on the benefit of the ummah and guided by social values that grow in society. In addition to creating a sense of social justice for all Indonesian people as a spirit of the role of judges in developing jurisprudence in the legal system in Indonesia.

2. The Existence of Jurisprudence in the Legal System in Indonesia

As a form of legal discovery, the basis that is usually used as a reference for the birth of jurisprudence is Article 5 paragraph (1) of Law No. 48/2009 concerning Judicial Power which states: "Judges and constitutional judges are obliged to explore, follow and understand legal values and a sense of justice that lives in society. The meaning contained in this article is that the judge's decision is in accordance with the law and the sense of justice of society. This provision relates to the principle of "pria curia novit". In this regard, there are several functions of jurisprudence, namely: (a) creating standards law (to settle law standard); (b) creating the same unified legal framework (unified legal framework) and the same unified legal perception (unified legal opinion): (d) creating legal certainty; (e) prevent disparities in court decisions. In line with M. Yahya Harahap's opinion above, Jazim Hamidi and Winahyu Erwiningsih stated more specifically that jurisprudence apart from being a source of law, in the world of justice has several functions, including: (1) Upholding the existence of the same legal standards in cases/cases involving the same or similar, where the law does not regulate it; (2) Creating a sense of legal certainty in the community with the existence of the same legal standards: (3) Creating the existence of equality of law and the predictable nature of the solution to the law; (4) Preventing the possibility of disparities in the decisions of various judges in the same case, so that if there is a difference in decisions between one judge and another in the same case, it should not cause disparities but only be patterned as a casuistic variable. (5) Thus it can be stated that jurisprudence is a manifestation of legal discovery (Hamidi & Erwiningsih, 2000).

Even though jurisprudence has an important function, it does not have a clear legal standing in Indonesia, both at the theoretical and practical levels. Bismar Siregar stated that although historically Indonesia had family ties with the civil law legal system through the Dutch colonial era, there was no standard understanding of what jurisprudence meant (Siregar, 1986). According to Jimly Asshiddiqie, even though the position of jurisprudence is so important, the role of jurisprudence has not received much attention. sufficient, both in teaching law and in legal practice, due to several factors namely: First, the legal teaching system rarely uses judge's decisions or jurisprudence as material for discussion, which is due to: (1) legal teaching emphasizes mastery of the general understanding of law, is abstract in nature in the form of mere theoretical generalizations; (2) the applicable legal system places legal principles and principles originating from statutory regulations as the main basis of applicable law, and pays little attention to new meanings or interpretations of statutory provisions through jurisprudence: (3) jurisprudence publications are very limited so that not easy to obtain and learn/discuss; and (4) legal research policies that provide facilities to the field for research on judge's decisions or jurisprudence (Asshiddiqie, 2016). Second, in terms of legal practice, judges' rulings or jurisprudence are legally non binding, because the Indonesian legal system does not run a precedent system.

Based on the Supreme Court Circular Letter (SEMA) No. 2/1972 concerning Collection of Jurisprudence, it is determined that in order to realize legal unity, the Supreme Court is the only constitutional institution responsible for collecting jurisprudence which must be followed by judges in adjudicating cases. Circular letter regarding the collection of jurisprudence until now has never been revoked by MA and are still listed in the 1951-2007 SEMA and Perma Association issued by the MA in 2007, thus still valid and serving as guidelines in the collection, publication and publication of jurisprudence. Furthermore, by paying attention to the content or substance of SEMA No. 2/1972, the aspects that need attention are: (a) The constitutional authority and responsibility to collect jurisprudence is only with the Supreme Court, institutions outside the Supreme Court, both government

and private, have no authority, unless it has been discussed beforehand; (b) the purpose of these constitutional powers and responsibilities is to maintain eenheid in de recht-spraak (unity/uniformity of the judiciary); (c) A new decision has the nature of riclht-lijn (guidelines/guidelines that must be followed by judges in adjudicating cases) are cases where at the cassation level the law has been confirmed either by trial itself or by refusing cassation; (d) Decisions that have obtained permanent legal force without going through cassation are not have properties direction-line." (Bhakti, 2017).

Jurisprudence in the legal system in Indonesia is not the main source of law, but can only function if the written source of law (Lex scripta) does not regulate the case/problem. It's strange that even though it has been arranged in this way, the application of law enforcement in the system
In Indonesia, legal confusion still arises. In practice, one example of an anomaly in the application of jurisprudence in Indonesia can be seen from several decisions of the Supreme Court which allow the acquittal of (Vrijspraak) the public prosecutor to take cassation proceedings against him.

Meanwhile, Article 244 of the Criminal Procedure Code states "There are decisions in criminal cases that are given a final unified judgment by a court other than the Supreme Court, the accused or public prosecutor may submit a request for cassation to the Supreme Court except for an acquittal". It is clear, based on the editorial formulation of Article 244 of the Criminal Procedure Code in the last sentence of the final part, legally-normatively the Criminal Procedure Code has closed the way for the public prosecutor to file a cassation against an acquittal.

In the practice of criminal justice, finally there was a development initiated by the Executive, namely at that time by the Ministry of Justice of the Republic of Indonesia through the Decree of the Minister of Justice of the Republic of Indonesia number: M. 14-PW. 07.03 dated December 10, 1983 concerning additional guidelines for the implementation of the Criminal Procedure Code which in point 19 in the attachment stipulates that "the acquittal cannot be appealed but based on the situation, conditions and for the sake of law, justice and truth, the acquittal can be appealed for. this will be based on Jurisprudence" (Nusantara et al., 1992). The existence of jurisprudence which was issued was based on the decision of the Minister of Justice Number: M. 14-PW. 07.03 of 1983 in the field of substance is still always a discourse and debate among theorists and practitioners. Following are some juridical facts regarding the jurisprudence of the Supreme Court which granted the request of the Public Prosecutor against Cassation for an acquittal, including:

1. Decision of the Supreme Court of the Republic of Indonesia Reg. No. 275 K/Pid/1983, on behalf of the defendant Raden Sonson Natalegawa.
2. Decision of the Supreme Court of the Republic of Indonesia Reg. No. 579 K/Pid/1983 in the name of Moses Mairulli.
3. Decision of the Supreme Court of the Republic of Indonesia Reg. No. 812 K/Pid/1984 on behalf of Drs. Muhir Saleh.
4. Decision of the Supreme Court of the Republic of Indonesia Reg. No. 1164 K/pid/1985 on behalf of Tony Gozal.
5. Decision of the Supreme Court of the Republic of Indonesia Reg. No. 864 K/Pid/1986 in the name of Ricky Susanto (Musa et al., 2021).

The jurisprudence above is an example of cases from a small number of attempts by the public prosecutor to appeal against the judge's decision which contained acquittal (rijspraak) and was granted by the Supreme Court. Regarding the affirmation of cassation against the acquittal, nothing else is based on the legal principle which argues that unfair regulations do not need to be obeyed (ius contra legem). Furthermore, this principle is definitively positive in the Appendix to the Decree of the Minister of Justice No. M.14-PW.07.03. 1983 concerning Additional Guidelines for the Implementation of the Criminal Procedure Code. However, the problem is not that simple, in the era of legal reform which is obsessed with realizing the paradigm of a democratic rule of law based on the trias politica principle, namely the principle of checks and balances, the legality of jurisprudence remains (jurisprudence that must be followed by later judges, because it has been referred to repeatedly and its implementation is taking place effectively) as a basis for overriding statutory legal products (KUHAP) should be questioned its validity. In the past, ijtihad or rechtvinding was carried out by the Supreme Court through jurisprudential instruments to fill the legal vacuum and often annulled regulatory material at the level of a law based on the argument 'ius contra legem' which is indeed understandable. This is because our constitutional law system before the reform era did not recognize the institution of judicial review of

regulations at the level of laws. The review instrument, if any, is only limited to regulations under UU, and the one who has the authority to do so is none other than the Supreme Court. Therefore it is only natural that the Supreme Court does not only act as a mere mouthpiece for laws, but instead takes the initiative to make legal findings and breakthroughs through its decisions in court (judge made law).

However, currently the legal reasoning used to justify Supreme Court jurisprudence on the basis of ius contra legem can ignore the law, it is clear that it is no longer relevant and even unconstitutional. Because according to the constitution, laws can only be annulled by the Constitutional Court (MK) and not by the Supreme Court. This is also contrary to the spirit of the Principle of Legal Certainty as stated in our Constitution which is contained in article 28D paragraph (1) "everyone has the right to recognition, guarantees, protection and certainty of a just law and equal treatment before the law".

CONCLUSION

The role and existence of jurisprudence in the legal system in Indonesia is very clear as evidenced juridically, namely in Law No. 4% of 2009 concerning Judicial Power in article 16 paragraph 1 and article 28 paragraph I as follows: "The court shall not refuse to examine, try and decide a case submitted under the pretext that the law does not exist or is unclear, rather it is obligatory to examine and try him" (Article 16, paragraph 1)." Judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society" (article 28 paragraph 1). This is an opportunity that the role and existence of jurisprudence in the legal system in Indonesia has been recognized, thus giving freedom to judges to decide a case even though there is no law regulating it, but this is all done to fill the legal vacuum and to create a new law that provides a sense of justice to all people.

Thus, the role of judges is very important not only in finding the law but also in developing the law. It is clear that the role of judges has an important position in the legal system in Indonesia. Because the judge performs his function which basically complements the provisions of written law through the formation of law (echtsvorming) and legal discovery (rechtsvinding). In other words, judges or courts in the Indonesian legal system are subject to written law but have the function or authority to make new laws (creation of new law), therefore although Indonesian law, is a written legal system, but on the other hand it is an open legal system.

REFERENCES

Arkles, G., Gehi, P., & Redfield, E. (2009). Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change. *Seattle J. Soc. Just.*, *8*, 579.

Asshiddiqie, J. (2006). *Pengantar ilmu hukum tata negara jilid II*.

Asshiddiqie, J. (2016). *Putusan monumental, menjawab problematika kenegaraan*. Setara Press.

Aziz, A. (2018). Pendayagunaan Zakat Sebagai Upaya Pengentasan Kemiskinan (Studi di BAZNAS Provinsi Jawa Tengah). *Jurnal Ius Constituendum*, *1*(2), 84–105.

Bhakti, T. S. (2017). *Pembangunan hukum administrasi negara melalui putusan-putusan peradilan tata usaha negara*. Puslitbang Hukum dan Peradilan, Badan Litbang Diklat Kumdil, Mahkamah Agung ….

Dahlan, A. A. (1996). *Ensiklopedi Hukum Islam, Jakarta: PT Ichtiar Baru Van Hoeve, Cet*. Ke-1.

Dirdjosisworo, S. (1983). *Pengantar tentang psikologi hukum*. Alumni.

Fauzan, M., Ardhanariswari, R., & Komari, A. (2017). Model of Judges Supervision for Indonesia Independent Judicial Power Implementation. *Jurnal Dinamika Hukum*, *17*(1), 31–39.

Hamidi, J., & Erwiningsih, W. (2000). *Yurisprudensi tentang penerapan asas-asas umum penyelenggaraan pemerintahan yang layak*. Tatanusa.

Lotulung, P. E. (1997). Penulisan Karya Ilmiah Tentang Peranan Yurisprudensi Sebagai Sumber Hukum. *Badan Pembinaan Hukum Nasional Departemen Kehakiman RI*.

Mak, E. (2012). Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices. *Utrecht L. Rev.*, *8*, 20.

Musa, F. D., Thalib, H., & Yunus, A. (2021). Efektivitas Upaya Hukum Kasasi Jaksa Penuntut Umum Terhadap Putus Bebas Pada Tindak Pidana Korupsi. *Journal of Lex Generalis (JLG)*, *2*(2), 290–305.

Nusantara, A. H. G., Pangaribuan, L. M. P., & Santosa, A. (1992). KUHAP: Kitab Undang-undang Hukum Acara Pidana dan peraturan-peraturan pelaksana. *(No Title)*.

Siregar, B. (1986). *Keadilan hukum: dalam berbagai aspek hukum nasional*. Rajawali.

Soekanto, S. (1990). Sri Mamudji dalam. *Penelitian Hukum Normatif Suatu Tinjauan Singkat*.

Soeroso, R. (1993). Pengantar Ilmu Hukum, Cet. *Ke-1, Jakarta: Sinar Grafika*.

Soeroso, R. (2021). *Hukum Acara Perdata Lengkap dan Praktis: HIR, RBg, dan Yurisprudensi*. Sinar

Grafika.
Sudarto, H. P. I. (1990). Semarang: Yayasan Sudarto. *Fakultas Hukum Universitas Diponegoro*.