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# Jurisprudence as a Source of Law in Indonesia: Lessons from the Common Law

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**ABSTRACT**

**Purpose:** This study analyzes the applicability of jurisprudence in Indonesia and the extent to which its role can influence the decisions of other judges. It also scrutinizes the role of jurisprudence in common law system country to comprehend how jurisprudence have strong influence in court decision.
**Methodology:** The research method used is juridical normative wherein this research analyzes several court decisions in Indonesia and Australia. This research also utilizes secondary data in the form of literature and relevant laws and regulations relating to jurisprudence.
**Results:** This study found that the lack of use of jurisprudence would lead to inconsistencies, i.e., disparities. Nonetheless, jurisprudence as a source of law has its own merits and shortcoming. Therefore, albeit Indonesia should apply jurisprudence, it must be applied prudently.

**Applications:** This study provides the analysis of jurisprudence in common law system as the basis to strengthen the role of jurisprudence in Indonesia as a civil law country.
**Novelty/Originality:** This study compares the use of jurisprudence as a source of law in Indonesia and Australia as well as analyzed the practical use of jurisprudence in Indonesian court decisions.
***Keywords:*** *Jurisprudence, Indonesia, Common Law System*

***ABSTRAK***

***Tujuan:*** *Penelitian ini menganalisis penerapan yurisprudensi di Indonesia dan sejauh mana perannya dapat mempengaruhi keputusan hakim. Penelitian ini juga meneliti peran yurisprudensi dalam negara dengan sistem common law untuk memahami bagaimana yurisprudensi memiliki pengaruh kuat dalam putusan pengadilan.*
***Metodologi:*** *Metode penelitian yang digunakan adalah yuridis normatif dimana penelitian ini menganalisis beberapa putusan pengadilan di Indonesia dan Australia. Penelitian ini juga memanfaatkan data sekunder berupa literatur dan peraturan perundang-undangan terkait yang berkaitan dengan yurisprudensi.*
***Temuan:*** *Penelitian ini menemukan bahwa kurangnya penggunaan yurisprudensi akan menyebabkan pada inkonsistensi dalam putusan, atau dengan kata lain disparitas putusan. Meskipun demikian, yurisprudensi sebagai sumber hukum memiliki kelebihan dan kekurangannya sendiri. Oleh karena itu, meskipun Indonesia sebaiknya menerapkan yurisprudensi, yurisprudensi harus diterapkan dengan hati-hati.*
***Kegunaan:*** *Penelitian ini memberikan analisis yurisprudensi dalam sistem common law sebagai dasar untuk memperkuat peran yurisprudensi di Indonesia sebagai negara civil law.*
***Kebaruan/Orisinalitas:*** *Penelitian ini membandingkan penggunaan yurisprudensi sebagai sumber hukum di Indonesia dan Australia serta menganalisis penggunaan praktis yurisprudensi dalam putusan pengadilan di Indonesia.*
***Kata kunci:*** *Yurisprudensi, Indonesia, Common Law*

## INTRODUCTION

Indonesia as a country that adheres to the civil law legal system uses 'code' or codification (can also be interpreted as statute) as the main source of law (De Cruz, 2017, p. 66). Nonetheless, albeit statute is the main source of law, it is not the only source of law. Kansil submitted that there are 5 (five) sources of law in Indonesia, namely statute, custom, jurisprudence, treaty, and doctrine

(Kansil, 1989, p. 46). This classification is relevant until the present day albeit it is not enacted by any statute (A. Siti, 2005, p. 9; Hartono, 2011, p. 9). The underlying reason of such absence of statute is because it is quite rare to discover a source of law enacted in a code or constitution, it is generally formed by a legal tradition (Bell, 2018).

In the case of jurisprudence, Kansil analyzed that jurisprudence as a source law is derived from Article 22 of the Algemene Bepalingen van Wetgeving voor Indonesia 1847 (AB) wherein judges is not permitted to refuse a case because the said case is not regulated or if the current regulation does not completely or clearly regulate it (Kansil, 1989, p. 47). Other than in AB, similar stipulation also found in Article 10 Law Number 48 of 2009 on Judicial Power. Therefore, judges can create law in certain circumstances wherein judges in similar cases can follow and make these rules as the basis of law. Nevertheless, jurisprudence is not binding as a source of law in the civil law system (Agustine, 2018, p. 643), i.e., judges can follow or deviate from previous court's decision.

Jurisprudence is more often associated with the common law rather than civil law (Jacob, 2014, p. 832; Kischel, 2019). This can be seen from the fact that countries with a common law system adhere to the doctrine of *stare decisis*, which is a doctrine that requires judges to follow decisions taken by previous courts, this doctrine is often referred to as the law of precedents. Anthony Mason, former chief justice of Australia, supports this and states that the doctrine of precedent is known as the legal principle that distinguishes the common law legal system from other legal systems (Mason, 1988, p. 93). Mason also states that precedent provides fairness, rationality, sustainability, and predictability because these principles eliminate inconsistencies in law (Mason, 1988, p. 93). It should be noted that inconsistencies in rulings are something that is commonly found in countries that adopt the civil law system (Engel, 2004, p. 3), e.g., Indonesia.

Inconsistencies in judge's decision in a similar case are also referred to as decision disparities or sentencing disparities for criminal cases. The Judicial Commission of the Republic of Indonesia (KY) in 2014 released a book entitled "Disparitas Putusan Hakim: Identifikasi dan Implikasi" (Disparity of Judges' Decisions) in which KY divided the issue of disparity in judges' decisions in Indonesia into 6 parts consisting of disparities in corruption, narcotics, bankruptcy, brand, divorce, and land disputes. Albeit the book was released in 2014 the issue of decision disparities is still relevant until today (Alexsander & Widowaty, 2020; Gulo & Ade Kurniawan, 2018; Komisi Yudisial (Indonesia), 2014; Putra, Sepud, & Sujana, 2020). This illustrates that in

Indonesia there is indeed a disparity in court decisions. Unfortunately, the inconsistencies of decision make the law dishonorable because the decisions issued are considered unjustified and unreasonable (Mason, 1988, p. 93).

On the grounds that there are inconsistencies of decision in Indonesia that adopt the civil law system, it is interesting to look at and study the use of jurisprudence as main source of law in common law countries where *stare decisis* is argued to eliminate inconsistencies since judges are bind by the previous comparable decisions or judgments (American Bar Association, n.d.). One of the countries that adheres to the common law legal system is Australia. The main reason for choosing Australia as a comparison or as a representative of the common law system is because Australia and Indonesia are both inheriting their legal system from another country wherein Indonesia inherits its legal system from the Dutch and Australia inherits it from England. This can be seen from the fact that in Australian courts were obliged to employ 'the common law of England ' under Section 80 of the Judiciary Act 1903 (Cth) albeit this was later amended as 'the common law in Australia' (Zines, 2004, p. 337). Based on this, this study will compare the application of jurisprudence in Indonesia and Australia along with their advantages and disadvantages. In addition, this study will provide suggestions to correct inconsistencies in judges' rulings in Indonesia.

## RESEARCH METHOD

This is a juridical-normative research wherein the arguments in this study will be built based on data obtained from literature studies (Ali, 2013, p. 105), including laws and regulations, judges' decisions, and books on jurisprudence that discuss the position of jurisprudence in Indonesia and in countries that adopt the common law system. This research analyzes several court decisions in Indonesia and Australia to observe the use of precedent or jurisprudence in each legal system. The nature of this research is descriptive where the author will describe the characteristics of jurisprudence in countries that adopt the civil law system, Indonesia, and countries that adopt the common law system (Muhammad, 2004, p. 52). This research was conducted with a statute approach, case approach, comparative approach, and conceptual approach. The analytical technique in this study is descriptive analysis (Suryana, 2010, p. 25).

## RESULTS &DISCUSSION

### *The Status Quo of Jurisprudence in Indonesia*

The legal system in Indonesia is inherited from the Dutch which adopt the civil law system. This legal system was applied in Indonesia due to the influence of Dutch colonialism in Indonesia for 3.5 (three and a half) centuries. The civil law system is ofttimes associated with several continental European countries, so it is often referred to as the Continental European Legal System (Ramadhan, 2018, p. 214). The characteristics of a country that adheres to the civil law system is to place the constitution at the highest level in the hierarchy of laws and regulations (Nurhardianto, 2015, p. 34). This is different from countries that adhere to the common law system or known as the Anglo-Saxon legal system which is based on jurisprudence (Nurhardianto, 2015, p. 34). Indonesia has adopted the civil law system so that the main principle is to implement the law in the form of written rules or set forth in the form of statute (Aditya, 2019, p. 38). Judges in countries that adopt the civil law system are not obliged to refer to the decisions of other judges. This is different from countries that adopt the common law system because in the common law system judges are bound by previous rulings (Ramadhan, 2018, p. 220).

Nevertheless, Indonesian law does not completely reject the decisions of other judges as a source of law, i.e., Indonesian judges also utilize jurisprudence. This can be seen from several decisions of the Constitutional Court in testing laws wherein the said decision becomes jurisprudence and followed by subsequent decisions and even becomes a requirement in submitting legal tests (Aditya, 2020, p. 100; Agustine, 2018, p. 643). For example, the Constitutional Court decision Number 006/PUU-III/2005 and the decision Number 11/PUU-V/2007 related to the loss of constitutional rights and/or authority which has been followed by subsequent courts (Agustine, 2018, p. 643). The ratio decidendi in those decisions is then used as the requisite for filing judicial review to Constitutional Court (Agustine, 2018, p. 648). There are also several Constitutional Court decisions regarding the interpretation of the State's right to control in Article 33 UUD NRI 1945 used as the jurisprudence, namely Constitutional Court decision Number 001-021-022/PUU-I/2003, 002-PUU-I/2003, and 058-059-060-063/PUU-II/2004 (Agustine, 2018, p. 649). The following table will show some Constitutional Court decisions used as the jurisprudence as well as its ratio decidendi.

**Table. 1** Constitutional Court Jurisprudence

| No. | Court Decision Number | Law being Reviewed | Ratio Decidendi |
|---|---|---|---|
| **1.** | Constitutional Court Decision Number 006/PUU-III/2005 | Judicial Review of Law Number Law Number 32 of 2004 on Regional Administration | The Requisite for Filing Any Judicial Review to Constitutional Court |
| **2.** | Constitutional Court Decision Number 11/PUU-V/2007 | Judicial Review of Law Number 56 (Prp) of 1960 on the Determination of the Area of Agricultural Land | |
| **3.** | Constitutional Court Decision Number 001-021-022/PUU-I/2003 | Judicial Review of Law Number 20 of 2003 on Electricity | The uniformity of definition of the State's right to control in Article 33 UUD NRI 1945 |
| **4.** | Constitutional Court Decision Number 002-PUU-I/2003 | Judicial Review of Law Number 22 of 2001 on Oil and Gas | |
| **5.** | Constitutional Court Decision Number 058-059-060-063/PUU-II/2004 | Judicial Review of Law Number 7 of 2004 on Water Resources | |

In conclusion, there has been a convergence of the civil and common law system in Indonesia as explained by Choky R. Ramadhan in his article entitled "*Konvergensi Civil Law dan Common Law di Indonesia dalam Penemuan dan Pembentukan Hukum*" (Ramadhan, 2018). This means that although Indonesia adopts civil law system, in certain cases Indonesia also applies the doctrine of precedent as used in the common law. Thus, it may not be far-fetched to say that Indonesia has a hybrid system.

***Jurisprudence in Indonesian Legal System***

Indonesia, as a former Dutch colony, adheres to the legal positivism school of thought wherein what defined as law is the law made by a law-forming institution, i.e., legislative (Hariri, Wicaksana, & Arifin, 2022, pp. 565–570). Therefore, the position of a judge's decision in the civil law system is substantially different than in the common law (Rohaedi, 2018, p. 49). Consequently, the significance of jurisprudence in a civil law country will depend significantly on how the law

place jurisprudence within its legal system. Thus, the existence of jurisprudence in a civil law country must be analyzed in a case-by-case basis.

The *raison d'être* why jurisprudence is recognized as a source of law in the Indonesian legal system according to KY is because judges cannot find justice solely grounded in statute, therefore judges' decisions ofttimes construct new rules as the result of ignoring the provisions of laws and regulations (Komisi Yudisial (Indonesia), 2014, p. 27). This is supported by Enrico Simanjuntak's argument that the codified-law system of the civil law has its limitations wherein statute never regulates comprehensively and in detail how to fulfill the rule of law in every legal event that might occur, thus jurisprudence will complement it (Simanjuntak, 2019, p. 83). In this case, the role of jurisprudence, in addition to filling legal vacancies, is also a legal instrument in order to maintain legal certainty (Simanjuntak, 2019, p. 83).

It is established that judges are bound by the principle of *ius curia novit*, wherein judges are considered to know the law thus cannot reject any case given to them. In addition, Indonesian law has regulated this principle in Article 10 paragraph (1) of Law No. 48 of 2009 on Judicial Power which states that: "The court is prohibited from refusing to examine, adjudicate, and decide a case submitted under the pretext that the law does not exist or is unclear but is obliged to examine and try it". Therefore, jurisprudence in Indonesia is considered as part of the source of formal law albeit its binding power is still uncertain.

The uncertainty of jurisprudence binding power is caused by the fact that Indonesian legal system does not consider jurisprudence as the primary source of law. The main source of Indonesian law is the application of relevant laws or its derivative regulations. Nevertheless, jurisprudence is not the only alternative for statute. There are still other sources of law such as customary law, which may play a greater role in certain communities in Indonesia. This is due to Indonesia being very plural, not only from its people but also from its legal sources and national legal system. The National Law Development Agency (BPHN) formulates that a decision is said to be a permanent jurisprudence if it has at least 5 (five) main elements, namely: (a) Decision on an event for which the statutory regulation is not yet clear; (b) The decision is a permanent decision; (c) Has been repeatedly decided by the same decision and in the same case; (d) Have a sense of justice; (e) The decision is confirmed by the Supreme Court (Mahkamah Agung, 2005, p. 28; Simanjuntak, 2019, p. 94). However, the binding force of jurisprudence in Indonesia is certainly not the same as the doctrine of *stare decisis* in common law countries. It is conceded that

the binding force of decisions from Indonesian higher courts in a similar case is a persuasive precedent. That is to say that its enforceability is not binding and only becomes a reference for judges if they find similar cases, or the judge is conducting legal discovery (Aditya, 2020, p. 89).

Albeit the binding power of jurisprudence in Indonesia is ambiguous it is argued that jurisprudence is still considered a fundamental source of law in the Indonesian legal system because of its role in legal development. First, reiterating the previous argument, jurisprudence is a tool to fill the gap in statutes or as its complementary. Second, jurisprudence is utilized as guidance, although not binding, for judges in deciding cases. This would create harmony in courts' decisions which in turn will improve legal certainty. Legal certainty is arguably the crux of the purpose of law itself (Lifante-Vidal, 2020, p. 456; Pejovic, 2001, p. 840). Therefore, the Supreme Court is currently also continuing to publish the decisions of previous judges who are considered to meet the criteria as a jurisprudence. Nonetheless, albeit the said attempt to publish decisions by the Supreme Court, it is observed that judges' is still reluctant to mention previous decisions in their consideration.

***The Applicability of Jurisprudence in Indonesia***

Jurisprudence can still be used as a valid source of law if it meets the criteria formulated by BPHN as outlined in the previous subchapter. In addition to the position of jurisprudence in Indonesian law, which is not the main source of law, there are several factors that can cause difficulties in using jurisprudence in Indonesia, including the principle of independence of judges and the relevance of the use of jurisprudence in certain areas of law.

First, judges in carrying out their duties to examine, adjudicate, and decide a case must comply with the principle of independence. The principle of independence means that judges have freedom from interference from any party (personal freedom) and are free to decide cases based on beliefs obtained from the evidentiary process at trial (substantive freedom) (Islam, 2018, p. 20). Based on this principle, judges are given the freedom to judge a case based on their personal points of view and beliefs as well as to decide based on their own beliefs (Islam, 2018, p. 20). Subsequently, the binding force of precedent is arguably considered to derogate the said principle of independence.

However, a judge's independence is not absolute wherein it is limited by several factors, namely applicable law, professional code of ethics, and moral norms (Adonara, 2016, p. 221). In addition, judges in deciding a case must ensure the achievement of legal objectives, namely achieving justice, legal certainty, and benefits. Therefore, following previous decisions cannot

necessarily be viewed as a practice that derogates the freedom of judges to decide according to their beliefs. Judges can wisely use jurisprudence to make interpretations of regulations that are considered unclear or irrelevant to current conditions so that the absence of clear law is not followed by another crucial problem, namely legal uncertainty (Mahkamah Agung, 2005, p. 28).

Second, other than the factor of independence of judges, another issue related to the application of jurisprudence is the relevance of the use of jurisprudence in certain areas of law. It is a common misconception that using jurisprudence as the basis for deciding cases is the same as using analogical interpretations (Schauer, 2008, p. 454). Consequently, the misassumption is that jurisprudence cannot be applied in the field of criminal law because criminal law prohibits the use of analogous interpretation in interpreting cases or regulations (Myftari & Guço, n.d., p. 20). However, Schauer submitted that the use of jurisprudence differs from the interpretation of analogies (Schauer, 2008, p. 457). Schauer stated that in analogical interpretation, decision-makers will look for various alternative analogies that are considered most relevant or helpful to help them support their argument. In contrast to this, decision-makers constrained by precedent do not have this option but are bound by previous decisions (Schauer, 2008, p. 457). This means that precedent-constrained decision-makers have no room to analogize cases handled as appropriate analogical interpreters. This is strengthened by the existence of jurisprudences that came from criminal cases that have been determined by the Supreme Court, namely prosecution, fraud, murder, and corruption. The Supreme Court has also enacted some decisions as jurisprudence originating from various fields of law, as can be seen in Table 1.

**Table. 2** List of Jurisprudence Enacted by the Supreme Court of Indonesia

| No. | Field of Law | Jurisprudence | Source of Jurisprudence |
|---|---|---|---|
| **1.** | Criminal Law | Jurisprudence No. 1/Yur/Pid/2018 | Supreme Court Decision No. 908/K/Pid/2006 |
| **2.** | Civil Law | Jurisprudence No. 3/Yur/Pdt/2018 | Supreme Court Decision No. 179 K/Sip/1961 |
| **3.** | State Administrative Law | Jurisprudence No. 1/Yur/TUN/2018 | Supreme Court Decision No. 421 K/TUN/2016 |

| | | | | |
|---|---|---|---|---|
| **4.** | Civil Procedure Law | Jurisprudence 1/Yur/Pdt/2018 | No. | Supreme Court Decision No. |

The table shows that jurisprudence is relevant to be used in any field of law. Moreover, this also elucidate the fact that Indonesian High Court acknowledges the use of jurisprudence albeit unfortunately Indonesian middle and lower courts rarely use it, if any.

***The Implication of Not Using Jurisprudence***

It is argued that one of the main implications of not using jurisprudence is the occurrence of decision disparity. Based on previous research conducted by the Judicial Commission of the Republic of Indonesia in 2014, it was found that in fact not all judges' decisions on similar cases using the same legal basis have the same verdict or decision. Amir Aswan, a judge in the corruption chamber stated that the existing statute which does not have guidelines on sentencing contributes to the decision disparity (Komisi Yudisial (Indonesia), 2014, p. 252). This problem, however, could be managed by applying jurisprudence.

It is conceded that sentencing disparity greatly boosts injustice for convicts (Ardiansyah, 2017, p. 98). The disparity in decisions will be fatal if it is related to the administration of prisoner development because when a convict compares the crime imposed on him with that imposed on others then would arguably feel that he is a victim of uncertainty or inconsistencies which in turn the convicted person would not respect the law and thus the purpose of punishment is not achieved (Komisi Yudisial (Indonesia), 2014, p. iii). The disparity in sentence could cause: 1) a sense of distrust from the community, 2) a sense of dissatisfaction because they were not treated the same as other perpetrators/convicts, 3) could lead to a sense of injustice, 4) could cause hatred towards the court system, and 5) could generate distrust of law enforcement officials (Hamka, 2018, p. 72). The said convict would disdain the law further if they found out that their sentence was a product of judicial mafia.

With so many disparities in verdicts, law enforcement in Indonesia can be concluded as inconsistent. This inconsistency causes a lack of public legal trust because the outcome of the case/verdict cannot be predicted. Based on this, it is interesting to see how consistency of decisions in common law countries can be created where the consistency of these decisions is ascribed to the application of jurisprudence.

***Looking at the Use of Jurisprudence in Australia***

Before going into more detail regarding the use of jurisprudence in countries that adopt the common law system, it should be noted that the lower courts in Australia are not bound by the entire content of the decisions of the higher courts (Harding & Malkin, 2012, p. 242). The lower-level courts are only bound by the higher ratio decidendi of judgments, where the ratio decidendi is determined from the analysis of the reasons used by the majority of judges (Valvoda & Ray, 2018, pp. 20–21). Ratio decidendi can be interpreted as the "reason for the verdict" or the basis needed to reach a decision (Szabados, 2015, p. 125). Based on this, all opinions of judges who dissented by majority vote (dissent) and all irrelevant issues (obiter dicta) did not set a binding precedent (Shulayeva, Siddharthan, & Wyner, 2017, p. 116). Nonetheless, Jones stated that Australia's supreme court urged the courts below it to be bound by an obiter dicta that had been seriously considered by the court (Jones, 2017, p. 126). This is proven to be true if we see the High Court judgement on *Farah Constructions v Say-Dee*, regarding the claim of remedy by Say-Dee for Farah having breached a fiduciary duty owed to Say-Dee, wherein the majority held that "But, contrary to the Court of Appeal's perception, the statements did not bear only "indirectly" on the matter: they were seriously considered […] The changes by the Court of Appeal with respect to the first limb, then, were arrived at without notice to the parties, were unsupported by authority and flew in the face of seriously considered dicta uttered by a majority of this Court" (*Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, 2007, p. [134], [158]). This decision indicates that the High Court subtly compels lower court to follow their 'seriously considered dicta'. Nonetheless, this would in turn leave the question when a dicta is classified as a seriously considered one.

When speaking in relation to judgments in common law countries, a distinction must be made between the legal principles used as the basis for the judgment and the binding force of the judgment itself. When a supreme court sets aside/amends a previous decision, it is only the ratio decidendi and not the validity and effect of the decision itself (Kirby, 2007, p. 246). In addition, it should also be noted that Australia's supreme court is generally bound by its own rulings that have been issued previously (Thomson & Durand, 2021, p. 139). However, the effect of being bound to this previous decision is not an inviolable legal principle (Thomson & Durand, 2021, p. 139). Australia's High Court is not obliged to issue rulings on grounds that it follows the doctrine of stare decisis (Thomson & Durand, 2021, p. 139). The doctrine of stare decisis applies strictly only to lower and middle-level courts. In contrast, The High Court can overrule its own decision.

It is observed that The High Court of Australia has considered in multiple cases on the question of whether it should reverse its own decisions. For example, in the case of *Imbree v McNeilly* wherein this case overruled a more than 20 year long standing law held in *Cook v Cook*. The majority in *Imbree v McNeilly* held that "*Cook v Cook* should no longer be followed in this respect […] The principle adopted in Cook v Cook departed from fundamental principle and achieved no useful result" (*Imbree v McNeilly*, 2008, p. [71]-[72] per Gummow, Hayne, Kiefel JJ). Heydon J, however, albeit agreed with the conclusion of the majority seems to be reluctant to overrule *Cook v Cook* which can be seen from his honour judgement that "a conclusion arrived at by the trial judge and upheld by a majority of the Court of Appeal – could be supported without overruling *Cook v Cook*. […] It is thus not necessary to consider the correctness of *Cook v Cook* from the point of view of liability" (*Imbree v McNeilly*, 2008, p. [186] per Heydon J). This shows that it is not a trivial matter to overrule a long-standing decision and even the occasion to overrule shows it is arguably rare to see all of the judges concurred to overrule the said decision. This also shows the prominence of stare decisis wherein stare decisis is considered to have advantages in providing stability, continuity, and legal consistency (Kirby, 2007, p. 243).

In stare decisis, the general public must obey the decision issued by the judge which is the norm of law, and other courts must interpret and implement the decision (Varsava, 2018, p. 67). According to Varsava, one of the goals of stare decisis is predictability and public trust in the law. Predictability can be realized because the community can predict the outcome of a dispute based on a previous decision, when the outcome of a dispute can be guessed then the community can trust the law (Varsava, 2018, p. 70). Based on this, legal certainty will be realized, where legal certainty is one of the reasons the law is respected (Mason, 1988, p. 93) In addition, it should be noted that the purpose of the legal system, both civil law and common law, is to provide legal certainty to the community (Pejovic, 2001, p. 840).

However, precedent is not necessarily without flaws. Mason argues that precedent can lead to injustice if applied too rigidly without considering the economic and social development of society (Mason, 1988, p. 94). This "injustice" recently happened in the United States of America (Rice, 2023, pp. 608–609). In other words, applying precedent rigidly would render the decisions to be unable to adapt to society development, i.e., not applicable, which in turn would result in unfair decisions. Based on this, common law courts want a balance between consistency and flexibility to be able to deliver a fair decision. This balance may be seen when the doctrine of precedent is not undermined while the decision itself is suitable with today's society. It is

conceded, however, to balance the two is difficult because it would raise the question when does a decision undermine the doctrine of precedent and when it does not? In other words, the indicator itself is debatable. Thus, until now, this is still a problem faced by courts in Australia. Another problem by country that adopt the common law system is whether, when, and how previous decisions apply to future ones (Varsava, 2020, p. 118). This would lead to many distinct views from the judges which in turn would lead to confusion for lawyers.

***Lesson Learned from Common Law***

It is conceded that finding a balance between consistency and fairness is not easy since prioritizing one of them could undermine the other. This is the crux of the issue of every legal system, whether legal certainty takes precedence over justice. Does the court have to prioritize legal certainty in every decision? Or set aside legal certainty for the sake of justice? There are no definitive answers to these questions because they are both important aspects of enforcing the law, although there is an argument that some areas of law prioritize certainty over justice and vice versa (Worthington, 2006, p. 329). Although it is difficult, efforts are still needed to achieve this balance, especially in Indonesia.

Research conducted by Anderlini et.al. in 2020 found that in general common law is more consistent and predictable than civil law (Anderlini, Felli, & Riboni, 2020, p. 26). However, looking at Mason's explanation we can see that even precedents have weaknesses when applied too rigidly. Based on this, Indonesia does not necessarily need to use precedent as its main legal principle. However, it would be better if the decisions issued by the courts in Indonesia at least refer to or consider previous decisions. If there is indeed no similar decision, at least the judge's decision can provide consideration and justification for why the case he handles is different from cases that have been decided before. The reason is to create decisions that are not too different from existing decisions. Consequently, this would support consistency which in turn uphold legal certainty.

For referring to or considering previous rulings, Nielsen and Smyth in their article "One Hundred Years of Citation of Authority on the Supreme Court of New South Wales" explain the various reasons why Anglo-American judges cite previous rulings in making judgments (Nielsen & Smyth, 2008, p. 192). First, judges are required to show that their rulings relate to previous rulings in the same court and higher up in the judicial hierarchy. Second, ascertain the laws that apply to a particular case. Third, it explores the evolution of legal principles. Fourth, to criticize

legal developments or make recommendations to parliament for legal reform. This is supported by Dudu Duswara, an ex-Judge of High Court of Indonesia, who submitted that one of judge's role is as law reformer (Machmudin, 2013, p. 45). Fifth, increase the persuasive power of the judge's reasoning. These reasons can also be used as reasons why judges in Indonesia need to cite previous rulings.

In addition to upholding consistency, referring to previous decisions can increase judicial efficiency because judges do not need to decide a case from scratch, but can start from previous judges' decisions. This is supported by Miceli which argued that the value of binding precedent stems from its capacity to prevent biased judges from moving the law away from efficiency (J. Miceli, 2009, p. 157). On the other hand, this can also have an impact on increasing the quality of judges. The judge will be required to understand cases that have been decided before and understand the ratio behind the verdict. So that judges in Indonesia will have a broad and comprehensive legal insight related to existing legal problems.

**CONCLUSION**

One of the implications of adopting the civil law system is that it is not mandatory for judges to apply jurisprudence in making decisions. Unfortunately, this would lead to the disparity of decisions. Decisions disparity, i.e., inconsistencies in rulings, have the potential to cause public distrust of law enforcement. Learning from the use of jurisprudence in Australia which adheres to the common law system, lower-level courts are bound by the ratio decidendi of higher rulings. Australia adheres to the doctrine of stare decisis which aims to realize predictability and public trust in the law. However, one of the problems with the application of stare decisis is that the application of laws that are too rigid and could cause injustice. Therefore, there are advantages and disadvantages of implementing jurisprudence.

Nevertheless, Indonesia still needs to learn from the application of the common law system in Australia given the consistency of their rulings. Indonesia does not need to necessarily apply precedent as its main legal principle, i.e., applying stare decisis, but it would be better if the decisions issued in Indonesia to at least refer or consider previous rulings. The inclusion of previous rulings in judges' consideration is not prohibited, but seeing the existence of judge's independency this will be proven difficult to apply if there is no provision requiring judges to consider jurisprudence in their decisions. There are arguably several factors that limit the efficacy of jurisprudence usage in Indonesia, namely the principle of independence of the judiciary and the

relevancy of jurisprudence usage in some fields of law. However, those factors are not the ultimate reason for the incapability of using jurisprudence.

The author's first suggestion for the Supreme Court of the Republic of Indonesia to make a circular wherein judges are bound to consider jurisprudence of similar cases and ones that have been handed down by the Supreme Court. The second suggestion is for judges in Indonesia to expand knowledge of court decisions that have been *in kracht* as a consideration or guide for handing down decisions.

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