

# The Anglo-Saxon System of Common Law and the Development of the Legal System in Indonesia

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**Abstract:** - Indonesia's legal system is dynamically developing. Courts and constitutional judges often make legal discoveries to fill in the absence of law or to update existing laws. They do so to suit the most current needs. This condition should be an anomaly in Indonesia's existing legal system as it applies to the civil law legal system. This research aims to track the roots of Indonesia's legal system and to discover its development. Indonesia generally applied the civil law system. The practice where judges find and form laws in court is a convergence of the Common Law justice system. This system influences the legal system in Indonesia. In addition, Indonesian laws and regulations also adopted several legal concepts that are commonly found in the Anglo-Saxon legal system or the Common Law, such as Class Action, Citizen Lawsuits, and other concepts.

**Key-Words:** - Convergence, Anglo-Saxon, Civil Law, Legal System, Indonesia.

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## 1 Introduction

Two legal systems originated from the European continent, namely:

**First**, the (Anglo-Saxon) Common Law system. It is a system that is applied in England and countries that were formerly colonized by this country. This legal system has three characteristics, namely: (1) jurisprudence is the main source of law, (2) there is an adherence to the precedent system (the *stare decicis* doctrine), and (3) there is the existence of an adversary system in the judiciary. This system applies unwritten or customary laws that develop through court decisions. As the basis for justifying their decisions, judges use *stare decicis* or previous judges' decisions in similar cases. The position of the judge is limited to examining and deciding the law, while the jury examines the case to determine whether or not the defendant is guilty.

The *stare decicis* doctrine (jurisprudence) implies that in deciding a case, a judge must base his decision on legal principles that existed in the previous decisions of other judges in similar cases (precedents). In addition, this principle can create a

new law that can be used as a basis for other judges to resolve similar cases. In this case, judges do not only function to establish and interpret legal regulations. They also play a major role in shaping the whole order of community life. Judges have the great authority to interpret applicable legal regulations. Judges can make decisions according to customs or fully implement this principle. With broad magistrates, judges can form new laws through their interpretation. With their jurisprudence, they can create norms or rules following people's sense of justice, [1].

**Second**, the Continental Europe system of Civil Law. This legal system is applied in countries that were formerly French and Dutch colonies. As a country that was formerly colonized, based on the principle of concordance, Indonesia applies the Civil Law system. This legal system has some characteristics, namely: (1) the law is a codified rule, (2) judges are not bound by a system of precedents (the *stare decicis* doctrine), and (3) judges have a major influence in directing and deciding cases (inquisitorial). In this system, when deciding upon the cases they handle, judges are

bound by law. This means that there is legal certainty in the form of written laws. Judges have a very central position, as they directly examine the case materials they handle. They determine whether or not the accused is guilty. They also impose the sentence. This increases the responsibility of judges, as they must examine legal facts, determine errors, and apply punishments. At the same time, they must pass judgment on those who are suspected of being guilty and must be punished, [2].

These two legal systems are rather different. The Common Law system offers flexibility in applying the law because judges do not always have to adhere to written law. On the contrary, in making decisions, they can use laws that have developed in society (customary law and/or the living law). They adhere to the jurisprudence of judges. The formed rules do not have to depend on the executive and legislative elements (as in the civil law system). But decisions can be used as a source of law, [3]. Therefore, this research aims to track the roots of the legal system in Indonesia and its development even though Indonesia generally applies a civil law system.

Indonesia's legal system has a special reality. As a legal system, the civil law system does not stand alone. It is associated with society's aspects of life. It is also influenced by the common law legal system, especially since the reform process. As a comprehensive and gradual reformation effort, legal reform should be implemented in the legal system. This must include legal substance, legal apparatus, and legal culture.

This article discusses the influence of the Anglo-Saxon system on the Indonesian legal system, even though Indonesia applies the civil law system. To some degree, the Anglo-Saxon system influences the Indonesian legal system. This influence strengthened because the Indonesian government doesn't want to be too dependent on the legal system inherited from the Dutch (i.e., the Civil Law). In making decisions, an Indonesian judge named Sarpin Rizaldi used the principle of evidence fulfilment as the basis. This is like what is applied in the Anglo-Saxon legal system. In this principle, if a person wants to file a lawsuit against a suspect to the court, she must submit all elements of strong evidence before the trials to the judge to continue the courtly process, [4].

Solly Lubis believes that the Indonesian people are looking for a new legal format to be established as the basis for their legal life. Lubis called it the concept of a state based on *rechtsstaat* law. This is a concept of the civil law legal system, [5].

The derogation of the state-based concept in the *rechtsstaat* law affects the government and the legal

system. They refer to the *rechtsstaat* which is based on the civil law legal system. According to Mahfud MD, after the third amendment to the 1945 Constitution, Indonesia's legal system used a 'prismatic concept', [6]. Based on the background of the problem above, this paper aims to analyze the influence of the Anglo-Saxon system of Common Law on the Indonesian legal system.

## 2 Research Methods

This research used the normative juridical method with literary and statute approaches. This research analyzed how far the Anglo-Saxon legal system influences Indonesia's system of civil law and why this influence is developing.

## 3 Results and Discussion

The word *system* came from the Greek word "*systema*" which can be interpreted as a holistic thing consisting of various parts. As quoted by Inu Kencana, Professor Subekti stated that a system is an orderly arrangement or an order, a holistic thing consisting of interrelated parts that are arranged according to a plan or pattern, and the result of writing to achieve a goal, [7]. A good system shall have no conflicts between the parts. In addition, there should be no duplication or overlap among the parts. A system contains several principles that guide its formation. A system is inseparable from the principles that support it.

Law is a system. It is an orderly arrangement of rules of life consisting of interrelated parts. It can be concluded that the legal system is a unified order consisting of parts or elements that are closely related to one another. To achieve a unitary goal, it is necessary to cooperate with the parts or elements according to a certain plan and pattern, [8].

In a system, legal regulations do not stand alone. Instead, they are interrelated. This is a consequence of their relationship with society's aspects of life. In fact, in society, the whole rule of law constitutes a legal system. Bellefroid states that the legal system is a series of legal regulations that are arranged in an orderly manner according to their principles. Sudikno Mertokusumo said that a legal system is a unit consisting of elements that interact and cooperate to achieve the goals of the unit. From these definitions, the legal system is a unitary legal regulation consisting of parts (laws) that interact with one another, [9]. Then, according to Scholten as quoted by William, a legal system is a unit within

the legal system. In that system, no legal regulations conflict with each other, [10].

According to Lawrence M. Friedman, the legal system is a system that includes elements of the legal structure, legal substance, and legal culture. The first element of Friedman's view is the legal structure. The legal structure is the whole framework of the legal system. The legal structure gives shape to the legal system, thus supporting it. It encompasses the rights and authorities of each institution in the country, as well as the country's judicial system, [11].

The second element is a legal substance which is the applicable legal regulations. This substance relates to positive legal products associated with legislative products. This legal substance fills the legal system. It determines how society can and must work, as well as what can and cannot be done.

The third element is legal culture. This regards the positive and negative attitudes and values related to law, behavior, and its institutions, [12]. In his book *Legal Theory*, Friedman states that legal culture is the orientation, views, feelings, and behavior of a person in society towards the law and all its concreteness. According to Friedman, the legal culture provides fuel for the motor of justice, [13].

All legal regulations in a country can be said as a legal system. In the Indonesian legal system, there are various fields of law with systems. There is the civil law system, criminal law system, state administrative law system, economic law system, and so on. Each of them is then divided into several legal systems. In a country, there are levels of the legal system. The overall positive law in Indonesia is the Indonesian legal system, [14].

Some differences between the continental European legal system and the Anglo-Saxon system are as follows, [15]:

1. The continental European legal system recognizes the administrative justice system, while the Anglo-Saxon legal system only recognizes one court for all types of cases.
2. The continental European legal system was modernized because of studies carried out by universities while the Anglo-Saxon legal system was developed through the practice of legal procedures.
3. Law according to the continental European legal system is a *sollen sein* (the gap between how the legal situation should ideally be and what the real condition is like) while according to the Anglo-Saxon legal system, it is a reality that is applied in the community and is obeyed by the people.

4. The discovery of the rules is used as a guide in making decisions or resolving disputes. According to the continental European legal system, it is conceptual or abstract in nature. Meanwhile, according to the Anglo-Saxon legal system, the discovery of concrete rules is directly used for settling cases.
5. In the Continental European legal system, there is no need for an institution to correct the rule, while in the Anglo-Saxon legal system, an institution is needed to correct it, namely an equal institution. This institution provides the possibility to elaborate existing rules to reduce rigidity.
6. In the continental European legal system, there is legal codification, while in the Anglo-Saxon legal system, there is no codification.
7. Past judicial decisions (jurisprudence) in the continental European legal system are not considered rules or sources of law while in the Anglo-Saxon legal system, the previous judge's decisions regarding the same type of case must absolutely be followed.
8. In the Continental European legal system, the judge's view of law is more untechnical. They are not isolated from certain cases. Meanwhile, in the Anglo-Saxon legal system, the judge's view is more technical and focused on specific cases.
9. In the Continental European legal system, the legal building, legal system, and legal categorization are based on the law on liability. Meanwhile, in the Anglo-Saxon legal system, the fundamental categorization is unknown. In the continental European legal system, the structure is open to changes, while in the Anglo-Saxon legal system, it is based on very concrete principles.

With the inclusion of the system of Common Law in Indonesia's legal system institutions, the law requires adjustment because the law must provide legality to all changes that occur. This is so that the traffic of human association caused by the entry of foreign legal institutions does not collide with each other. For this reason, reformation in the legal field as a result of foreign legal institutions' entry into Indonesia is urgent and crucial to do. These legal changes include renewal in ways of thinking, behavior, and lifestyle following the demands of development. This difference in the legal system must be overcome by means of legal renewal as per Mochtar Kusumaatmaja's concept and opinion, which states that law is a means of renewal and creating community development, [16].

## 4 Discussion

The adoption of law resulting from the entry of foreign legal institutions with different legal systems refers to the transfer of certain legal norms or legal provisions from a certain country to another during the law-making process. Therefore, legal adoption refers to the process of making laws and regulations, where the legislature has two options, namely: (1) borrowing or taking over laws that have already existed and applying them to other countries, or (2) because each country has traditions, cultures, histories, and identities that differ from one another, they carry out their own process of searching for legal norms and rules that are considered suitable to the identity of the state, [17].

The entry of legal institutions originating from the Anglo-Saxon legal tradition and its system of Common Law provides reasons for adopting foreign legal institutions because:

- 1) Legal transplantation can easily and quickly be carried out. It is a potential new source of law;
- 2) Legal transplants often follow a colonial period (colonialism); and
- 3) Legal transplantation cannot be separated from the role of legal experts, who tend to imitate laws that are considered good and beneficial for them, [18].

However, the adoption of foreign legal institutions can be carried out depending on the strength and weaknesses of the relationship between the to-be-adopted laws and the political, social, and cultural conditions of the country where the laws are to be adopted. In this case, the implementation of the law that was adopted from one legal system to another is definitely different from the country of origin's law.

The tendency to include the system of Common Law legal in the Indonesian legal system is also a consequence of the USA's role as a superpower. There is a systematic introduction to American law. Apart from that, elite legal experts are generally alumni of American, British, and Australian universities. American policies are popular in the legal development of developing countries, as reviewed by Thomas Franck and quoted by Fullarton in the article "Can American Law and its Legal Institutions Help Developing Countries." This referred to the 1966 Foreign Assistance Act, where congress approved the International Development Aid, [18].

In the current era of globalization, to fulfill their needs, citizens are conditioned to interact with each other. This resulted in a meeting between the various existing legal systems to meet the legal needs of various parties. It is an unavoidable part of

the existing legal developments in society. So, the need for new legal provisions increases. At a certain point, this need can be covered by the Anglo-Saxon legal system, i.e., the common law system. Thus, some of its elements are accommodated in the Indonesian legal system, [19].

The Indonesian legal system can adapt to developments through the adoption of laws. Thus, it can simultaneously absorb the substance of the *rechtsstaat* and the rule of law. Regulations that accommodate legal developments are enacted to accommodate the common law. This concept is known as the prismatic concept. In addition to the formally-perceived law, the law is also materially perceived, where in deciding a case, the judge has the right to interpret and argue outside the provisions of the law. Therefore, the legal system requires the enforcement of substantial justice through formal legal rules. To achieve substantial justice, it also requires legal certainty based on formal legal rules, [20].

**Previous research was conducted by Al Habsyi, where he discussed the influence of Anglo-Saxons in the aspect of the Indonesian legal institution. Countries that adopted the Anglo-Saxon legal system have several types of courts, such as the US District Court and the Trial Court. Some other courts are also known, such as the US Claim Court that is specialized in federal or semi-judicial agencies. It handles lawsuits against the US government. There is also the Court of International Trade that handles cases on customs. Then, the Patent and Trademark Office handles cases on patents and trademarks.**

**Even with different authority sectors, after the Reformation, Indonesia adopted this system by creating several special courts in the civil sector, such as the Court of Trade, that handles cases of bankruptcy and lawsuits against intellectual property that includes copyright, trademark, patent, trade circuit, industrial design, and design of integrated circuit layout. The Court of Industrial Relationships handles cases on labor and other industry relationships. The Taxation Court handles cases on tax. Then, there is a special court called the Sharia Assembly in Aceh Province, Indonesia, that adjudicates familial cases. The formation of such courts indicates the influence of the Anglo-Saxon legal system in the Indonesian legal institution, [5].**

An effort to accommodate the common law is the issuance of regulations on the Formation of Statutory Regulations. It is an effort to maintain the consistency of legal products so that there are no

conflicts between lower and higher regulations. This is because they already have provisions and procedures for forming them through a legislation program. If such procedures are not followed, there will be a settlement of regulatory conflicts through judicial review and cancellation which is a sub-system of the legal system, [21].

We can see another example of the common law's influence in Law No. 23 of 1997 concerning the Environment, Law No. 41 of 1999 concerning Forestry, and Law No. 8 of 1999 concerning Consumer Protection. The Anglo-Saxon legal system offers group representation (class action), civil lawsuits, and organizational claims (legal standing). Some laws also offer mediation and arbitration as settlement processes.

Mahfud MD's prismatic law idea is known as legal convergence. Convergence was felt to be more appropriate by John Henry Merryman who stated that the civil law and common law systems are increasingly similar rather than significantly different. Merryman's statement is as follows, [22]:

*The root question is whether Civil Law and Common Law are getting to be more alike (converging) or less so (diverging). I shall suggest that there are significant tendencies in both directions but that convergence, as I use the term, is the more powerful one.*

Comparative law experts have even developed a legal system that does not only consist of these two legal systems. Since 1929, John Barker Waite has warned that to identify whether a country adheres to the common law or the civil law legal system, one cannot simply look at the existence of codified written law. At that time, the United States passed a patent law. In the United States, there have been fifteen efforts to draft a written law (statute law) since the 19<sup>th</sup> century, [22]. A comparative law expert, Esin Orucu, stated that not a single country purely adheres to civil law or common law. The combination of the two legal systems cannot be avoided, or even with what Rene David conveys as Residual Law, [23].

Orucu's notion that several legal systems mix with one another is more practical and accurate because international relations create a significant influence on the legal system in each country, [23]. The mixed legal system is a classic development and classification of a legal system. Orucu gives several examples of mixing legal systems and mentions simple and complex mixes between civil law and common law systems.

We can find an example of Orucu's opinion in Indonesia, where Indonesian judges or courts that use the civil law system currently have the

discretion to interpret a written law. This is so that they are able to create new laws. This is a precedent that is characteristic of common law. The next thing is the position of the decision as a source of law. There is the principle of precedent, where the judge is bound by a similar previous decision, which decides on the ambiguity of a law.

The doctrine of the judges' freedom in examining cases by interpreting law based on values that live in a society (unwritten laws) is always regulated in Indonesian positive law. Judges' obligation to "multiply, follow, and understand the legal values and sense of justice that live in a society" has been repeatedly maintained. This is still regulated in the amendments to the Law on Judicial Powers in 1970, 2004, and 2009. The reasons and basis for using unwritten laws must be included in the judge's decision, [24].

The judge is considered an official who understands the law. He cannot refuse a case due to a lack of written laws as he is obliged to seek and explore unwritten laws that live and develop in society, [25]. This method and practice are synonymous with the collection of judges' decisions that form law in the common law justice system. It is one of the well-known sources of law in the common law system, [26].

## 5 Conclusion

The common law legal system has a convergence or prismatic influence on the legal system in Indonesia. This influence is marked by the adoption of several mechanisms from the common law legal system into the Indonesian legal system such as class action, citizen lawsuits, and several concepts that were not originally recognized in the civil law legal system.

The influence of the Anglo-Saxon common law system can be seen in Indonesian judges' power to interpret written laws. This interpretation will be considered by future judges in making decisions. This is known as precedent, which is a hallmark of the common law system. The doctrine that judges can find the law and may not reject a case on the grounds that there is no law or the law is not clear has always been found in the laws on judicial power both before and after the Reformation era. Such things truly influence the Indonesian legal system.

The Indonesian legal system seeks to keep up with the dynamic legal developments in society when judges are faced with conditions where there are no written regulations or rules. These judges want the enforcement of substantial justice through formal legal rules as well as legal certainty based on

formal legal rules in order to achieve substantial justice.

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Budiono: Conceived the research, provided an original idea of the study, and provided materials and data for the research.

Bangsawan and Nurani: Designed the methods, selected research data, analyzed and interpreted the data, and wrote the paper.

Pradnyawan and Sari: Analyzed the data, provided a description, wrote the paper, and reviewed the paper.

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