



## The Impact of the Common Law Legal System on Legal Development in Indonesia

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**Abstract:** This article examines the impact of the common law legal system on the development of law in Indonesia, focusing on how elements of the system have influenced national legal practice and theory. This study uses a qualitative approach through document analysis and literature studies related to the history of Indonesian law and legal practice in common law countries. The results of the study indicate that although Indonesia adheres to a civil law legal system, the influence of common law is visible in certain aspects, such as the principle of precedent, legal interpretation, and the application of customary law. In addition, this study also explores how the integration of common law elements can enrich the dynamics of Indonesian law, especially in the context of legal reform and the achievement of substantive justice. With a better understanding of this influence, it is hoped that recommendations can be produced for the development of a legal system that is more responsive and adaptive to the needs of society.

**Keywords:** legal system, common law, Indonesian law, precedent, legal reform.

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### 1. INTRODUCTION

Indonesia is a country that adheres to the Continental European legal system (civil law). In this context, the role of judges is limited in creating laws, a policy that is based on certain social and political reasons and goals. In the civil law system, the courts do not use juries, and this also applies in Indonesia. Although Indonesia is influenced by the legal system brought by the Dutch colonialists, who adhered to civil law, recent developments show that the legal system in Indonesia is starting to receive influences from the common law system. In the civil law system, judges function as interpreters of the law and do not have the authority to create new laws. This limitation aims to maintain consistency and stability in the application of the law, as well as to ensure that the law remains sourced from clear laws. This reflects the principle

that the law must be accessible and understandable to the public, thereby reducing the possibility of subjective interpretation [1].

However, over time, the dynamics of law in Indonesia began to show signs of influence from the common law system. This can be seen in several aspects, such as the application of the principle of precedent, where previous court decisions began to be recognized as references in similar cases. This influence provides space for judges to be more active in determining how the law is applied, although still within the framework set by the law. This transformation not only contributes to the development of law in Indonesia, but also reflects the needs of an increasingly complex and diverse society. With the increasing demand for justice and transparency in the legal process, there is a push to adopt some elements of the common law system that are more responsive to social change.

This has become an unavoidable reality, especially with the dynamics of globalization that erases boundaries and barriers between countries in the world. This condition facilitates and enhances interaction between various legal systems. One real example of this phenomenon is the many international conventions held and attended by various countries with different legal systems. These conventions, once signed, must be ratified by the countries involved as a form of commitment and good faith. This ratification process is then followed by the preparation of laws and regulations in each country based on the results of the convention and their national interests. This action will clearly affect the interaction between the legal system of one country and the legal system of another country, creating a network of interconnected laws. In addition, legal relations between countries are also further strengthened through the signing of bilateral and multilateral agreements. These agreements serve as a bridge to mutual understanding and accommodation of existing legal differences, as well as building closer cooperation between countries. With this cooperation, each country will not only enrich its own legal system, but also contribute to the development of a more harmonious and mutually beneficial global law.

The legal system known as "Anglo-Saxon" is also called "Anglo-American" or "Common Law." This system originated in England and then spread to the United States and countries that were once its colonies. The term "Anglo-Saxon" itself is taken from the name of a tribe known as the Angel-Saxons, who once attacked and colonized England. After that, England was conquered by the Hertog of Normandy, William, who played an important role in the development of law in the region. William, as a leader, decided to maintain the customary law that applied in the local community. He also integrated elements of the Continental European legal system into the English legal framework [2]. This step created a unique legal

system, combining local traditions with European legal principles. This merger formed the basis for the development of Common Law which later became the hallmark of the legal system in many English-speaking countries. In the Common Law system, precedent or previous court decisions play an important role in determining future decisions.

The Anglo-Saxon legal system is a system based on jurisprudence, which means that previous decisions of judges serve as guidelines for subsequent decisions of judges. In this system, customary law plays an important role, where the law develops dynamically following changes in society. The formation of law through judicial institutions is considered more effective because it can create laws that are in line with the sense of justice and benefits felt directly by society. This legal system is adopted in various countries, including Ireland, England, Australia, New Zealand, South Africa, and Canada, with the exception of the Province of Quebec. In the United States, this legal system is also applied, although the state of Louisiana uses a combination of this system with the Continental European legal system influenced by Napoleon. In addition to the countries mentioned, there are several other countries that apply a mixed form of the Anglo-Saxon legal system. Examples are Pakistan, India, and Nigeria, where they adopt most of the principles of the Anglo-Saxon legal system but also maintain customary law and religious law. This shows that although the Anglo-Saxon legal system has a wide influence, each country tries to adapt its application to the social context, culture, and local legal traditions [3].

In the Anglo-Saxon legal system, the decision of a judge or court is recognized as an important source of law. In this context, the role of a judge is very broad and significant. A judge is not only tasked with determining and interpreting existing legal regulations, but also has a crucial role in shaping the structure and order of society as a whole. Thus, judges function as agents of change who can influence social dynamics through the legal decisions they make. Judges in this system have great authority to interpret applicable laws, which provides flexibility in the application of the law. They not only follow existing laws, but also have the capacity to create new norms that will serve as references for other judges in handling similar cases in the future. This shows that decisions made by judges can have a long-term impact on the development of the legal system.

The Anglo-Saxon legal system also adheres to a doctrine known as "the doctrine of precedent" or *Stare Decisis*. This doctrine stipulates that in making a decision, a judge must refer to the legal principles that have been established in previous decisions of judges in similar cases. Thus, this principle maintains consistency and legal certainty, because the decision taken by a judge in a case will become a precedent that must be followed in similar cases in the future.

This not only strengthens the integrity of the legal system, but also increases public confidence in the justice provided by the judicial institution [4].

In its development, the Anglo-Saxon legal system recognizes the division between public law and private law. Private law focuses on the rules governing property rights, personal law, contracts, and unlawful acts. On the other hand, public law includes regulations governing the power and authority of government and the interaction between society and the state. This division is important for understanding how each category of law functions in a broader social and political context. This legal system has a number of advantages and disadvantages. One of the main advantages of Anglo-Saxon law, which is not entirely written, is its flexibility. This law is able to adapt quickly to changes in the times and dynamics of society because many of the laws applied are unwritten laws, or known as Common Law. This allows the legal system to be more responsive to the needs and demands of the ever-evolving community. However, behind these advantages, there are also significant weaknesses. Legal uncertainty is one of the main issues, where legal certainty is often less guaranteed. This is due to the fact that the legal basis for resolving disputes often comes from the customary law of society or unwritten customary law. As a result, law enforcement can be inconsistent and raise doubts in resolving cases, because decisions can be influenced by judges' subjective interpretations of prevailing norms in society.

## **2. METHOD**

This study uses a qualitative approach that focuses on document analysis and literature study to explore the impact of the common law legal system on the development of law in Indonesia. By examining various sources, including historical documents of Indonesian law and legal practices in countries that adopt the common law system, this study seeks to identify significant influences that may occur due to the interaction between different legal systems. This analysis includes a study of how common law principles, such as precedent and jurisprudence, can influence the way judges in Indonesia interpret laws and resolve disputes. In addition, this study also considers the social, political, and cultural contexts in Indonesia, as well as how the process of globalization has strengthened legal relations between countries.

### **3. RESULTS AND DISCUSSION**

#### **The Influence of the Common Law Legal System in the Indonesian Legal System**

The legal system is a discipline that has unique characteristics, because it functions as a foundation in the formation of the state and the legal rules that apply in it. One type of legal system that is known is Common Law, which emerged from the English legal tradition. This system developed in a historical context marked by an adversarial process, where court decisions were heavily influenced by previously existing traditions, customs, and precedents. Thus, Common Law functions as a legal system based on judicial decisions that refer to legal practices that have been formed over the years. The Common Law legal system uses an inductive logical thinking approach and analogy in its legal analysis. This means that law is not only determined by written regulations, but also by how legal principles are applied in concrete situations faced by society.

The concept of the Rule of Law is at the heart of this system, emphasizing three important aspects: the supremacy of law, equality before the law, and a constitution that respects individual rights. The supremacy of law signifies that no one is above the law, while equality before the law ensures that everyone is treated equally in the legal process. In the Common Law legal system, the primary source of law is a court decision or a judge's decision. This means that every decision made by a judge not only serves to resolve a particular case, but also serves as a reference for future decisions. In addition, customs and written regulations, both in the form of laws and administrative regulations, also play an important role in forming the legal framework.

Indonesia implements a mixed legal system, which is a combination of customary law, Islamic law, and Continental European law (civil law). Although Indonesia does not adopt the Common Law legal system, its influence is still felt in the Indonesian legal system. This influence can be seen in various aspects, especially in the context of legal and economic developments in the country. The Civil Law legal system adopted by Indonesia often interacts with elements of the Common Law legal system, especially in the practice and application of law. One form of this influence is through the entry of foreign economic and legal institutions into the Indonesian legal system, which occurs as an impact of globalization and international trade relations. This interaction requires adjustments and adaptations of local laws to respond to the challenges and needs that arise from global relations. In the context of trade, for example, many rules and practices from the Common Law system have been adopted or adapted to improve the existing legal framework in Indonesia. This creates a new dynamic in the

application of law, where elements of the Common Law system contribute to the development of more flexible and responsive legal principles.

Common Law legal institutions in the field of investment and financing law that are included in our legal system which adheres to the Civil Law system include:

- a. A trust is an institution that operates on the basis of a fiduciary relationship, in which an individual serves as the holder of the rights to property who has an obligation based on equity to maintain or use the property for the benefit of others. In a trust system, ownership is divided between rights recognized by law and rights recognized by equity.
- b. Secondary Mortgage Facility (SMF) is a financing institution known as the Housing Finance System, which is popular in the United States and countries that adopt the Common Law or Anglo-Saxon legal system. This institution is also known as Mortgage Backed Securities.
- c. Securitization is a concept that emerged and first developed in the United States. This concept refers to the process of transforming illiquid assets (such as bills that are difficult to trade) into liquid assets (easily traded) by purchasing Financial Assets from the original creditor and issuing Asset-Backed Securities (ABS) in the form of: a) Debt Instruments (eg bonds) whose payment is guaranteed by a portfolio of bills against the debtor, which is equipped with a guarantee of Mortgage Rights; and b) Participation certificates sold to or owned by investors as proof of proportional ownership of a portfolio of bills, which is a collection of selected bills from the credit-giving bank (originator) against the debtor or home buyer.

The implementation of legal institutions originating from the Common Law system in Indonesia, which officially adopts the Civil Law system, creates a situation where there is a mixture of the two legal systems (mixed jurisdiction). The existence of foreign legal institutions in the investment and financing sectors, such as capital markets, trust institutions, secondary housing financing, and asset securitization, requires legal updates. This update is important so that Indonesia can adopt and apply these legal institutions in a manner that is in accordance with the framework of the Civil Law system adopted. The process of adopting and applying foreign legal institutions cannot be done carelessly. Deep adjustments and integration are needed so that the laws applied do not conflict with the legal traditions that exist in Indonesia. By carrying out legal updates, Indonesia can reduce or even eliminate possible conflicts between the principles of Common Law and Civil Law. This allows Indonesia to take advantage of the legal innovations brought by the Common Law system, without sacrificing the integrity and uniqueness of the existing legal system.

With the introduction of the Common Law legal system into the Indonesian economic system, legal adjustments are needed to provide legality to the various changes that occur. Therefore, legal reforms in response to the presence of foreign legal institutions in Indonesia are very important and urgent. The Common Law legal system in Indonesia currently functions as a "balancer," where its adoption is not absolute, but rather through a selective filtering process. This means that the adoption of elements of the Common Law legal system must be carried out while maintaining the existing legal foundations of Indonesia. Pancasila and the 1945 Constitution must remain the main guides in every step of legal reform taken. With this approach, Indonesia can not only integrate new elements of the Common Law system, but also ensure that local and traditional values are upheld. This adjustment process also includes an in-depth evaluation of how the principles of Common Law can be applied in the social, cultural, and economic context of Indonesia. This is important so that any proposed legal changes do not conflict with existing principles, but can contribute to the development of better and more inclusive law. In this way , Indonesia can create a responsive and adaptive legal system, which is able to accommodate global changes without losing its legal identity [5].

### **Characteristics of the Common Law Legal System**

Comparative law experts today no longer only distinguish between two legal systems in the world through a narrow "Western" perspective, namely the common law system (Anglo-American legal system) which emphasizes unwritten law and precedent, and the civil law system (Continental European legal system) which is more dominant with statutory law. Now, there is a broader understanding of the various types of legal systems that are more varied and complex [6]. The common law system, for example, has unique characteristics that distinguish it from other legal systems. In this system, the judge's decision from a previous case has significant weight, so that precedent becomes an important source of law. This creates a legal dynamic that is more flexible and responsive to the development of society. With an emphasis on legal practice and tradition, common law is able to adapt to changing social and economic conditions. In addition, the adversarial characteristics of the common law system are also prominent, where the parties to the dispute play an active role in presenting their arguments before the judge. This process allows for the creation of a forum where the law is interpreted and developed through practice. This is in contrast to civil law, which tends to be more structured and formal, relying on established codes and regulations.

H. Salim and Erlies Septiana Nurbani conducted an analysis of the views of Caslav Pejovic, James G. Apple, Robert P. Deyling, and Peter de Cruz regarding the characteristics of

the common law legal system [7]. From this analysis, they concluded that the common law legal system can be categorized into five main characteristics as follows:

- a. The sources of law in this system come from court decisions and statutory regulations;
- b. The thinking method used is inductive, starting from specific cases to draw general conclusions;
- c. Legal institutions in this system consist of institutions such as a) trusts for the management of property rights, b) the law of torts, c) estoppels which provide protection against inconsistencies, and d) agencies;
- d. The duties of a judge include a) court management, b) the ability to resolve issues relating to precedent, and c) the selection of judges as part of the political process;
- e. There is no separation between public law and private law.

Peter Mahmud Marzuki [8] identified three main characteristics of the common law legal system, namely:

- a. First, jurisprudence is seen as the main source of law. In this context, jurisprudence has a broader meaning compared to countries that implement a civil law system, such as Indonesia. In countries with a civil law system, jurisprudence only refers to court decisions, while in a common law system, jurisprudence covers the science of law as a whole.
- b. Second, the application of the doctrine of stare decisis is a characteristic of the common law system. This doctrine emphasizes that previous court decisions (precedents) must be respected and used as a basis for deciding similar cases in the future. This creates consistency and legal certainty, where the judge's decision does not only rely on the law, but also on relevant previous decisions.
- c. Third, the adversarial system is an integral part of the common law judicial process. In this system, two opposing parties—the plaintiff and the defendant—attempt to prove their arguments before a judge. The judge acts as a neutral party, who listens to the arguments of both parties and makes a decision based on the evidence and arguments presented. This process provides an opportunity for each party to actively pursue their interests, which is a characteristic of this legal system.

In countries that adopt the common law system, jurisprudence has a broader meaning, encompassing the entire science of law. This means that jurisprudence is not only limited to court decisions, but also includes the development of legal principles and more general legal practices. This shows that jurisprudence functions as a source of legal knowledge that can be used by judges, lawyers, and academics in understanding and applying the law. In contrast, in countries that follow the civil law system, including Indonesia, jurisprudence is more limited



to the meaning of court decisions. Here, jurisprudence is considered a concrete product of legal decisions taken by the court in resolving certain cases. Thus, jurisprudence in the context of civil law does not function as a general source of law, but rather as a more specific and limited reference. In the common law system, court decisions that are used as references are referred to as precedents [9]. These precedents play an important role in shaping the law, because judges are required to consider previous decisions in deciding new, similar cases. This creates continuity and stability in the legal system, where previously established principles remain relevant in the context of new cases.

From the perspective of the common law legal system, relying on statutes as the primary source of law is considered risky. This is due to the fact that statutes are the work of theorists, which may not always reflect the reality or needs of society. Over time, these statutes often become obsolete and irrelevant, requiring interpretation by the courts. Legal experts from countries that adopt the common law system argue that the court process in countries with a civil law system tends to be deductive, where the case at hand is analyzed based on existing statutes. However, there is currently the possibility for courts to adjust statutes to new situations, especially when existing rules are considered outdated. Courts can also provide interpretations of unclear statutes, or even create new laws as long as they do not conflict with existing legal principles. Nevertheless, statutes remain the primary reference for judges in civil law countries.

The doctrine of *stare decisis*, known in Indonesia as the doctrine of "precedent," requires judges to follow previous court decisions, whether made by themselves or by previous judges, when faced with similar cases. Although in the common law system judges are required to follow existing precedents, this does not mean that the solution to every case can be found only in those precedents. In such situations, the court has the freedom to determine whether to follow existing precedents or choose to make a new decision.

The third characteristic of the common law legal system is the "adversary system," in which both parties involved in a dispute are represented by lawyers who appear before a judge. In this process, if necessary, a jury will be involved in making a decision. The judge does not directly decide who wins or loses, or whether the defendant is guilty or innocent. Instead, the judge gives instructions to the jury to determine a decision, and the decision made by the jury must be accepted by the judge, regardless of whether or not the judge agrees with the result determined by the jury.

This system reflects a different approach to resolving disputes, where the focus is on the argumentative battle between two parties. Each party attempts to convince a judge or jury

through the presentation of evidence and legal arguments. The adversary system creates a situation where the judge acts more as a supervisor of the process, ensuring that both parties have a fair chance to present their case. The presence of a jury in this system also adds an element of community participation to the judicial process, giving a voice to individuals who are not part of the formal legal system. Thus, the final decision is not only derived from the judge's judgment, but also involves the views and considerations of the community. This is expected to increase the legitimacy of the resulting decision, although it also poses challenges related to how juries can understand and apply the law correctly.

#### **4. CONCLUSION**

In the era of globalization, the influence of the Common Law legal system on the development of law in Indonesia is becoming increasingly significant, even though Indonesia officially adopts the Civil Law legal system. The interaction between these two systems creates legal dynamics that require adjustment and adaptation to ensure that elements of the Common Law can be applied effectively without sacrificing the existing legal foundations, namely Pancasila and the 1945 Constitution. Through selective and planned legal reform, Indonesia can take advantage of the legal innovations offered by the Common Law system while still respecting local traditions and values. This process aims to create a legal system that is responsive, inclusive, and able to answer the challenges and needs of society amidst rapid global change.

Common law legal systems, characterized by characteristics such as jurisprudence as the primary source of law, the application of the doctrine of stare decisis, and the use of adversarial systems in the judicial process, offer flexibility and responsiveness to social and economic changes. The differences in the understanding of jurisprudence between common law and civil law create unique dynamics in the application of law, where precedent is a key element in the formation of law. Nevertheless, the existence of statutes as the primary reference in civil law systems remains important, although there is a need for adjustments to keep the law relevant. In this context, adversarial systems involving juries add to community participation and legitimacy in the judicial process, although they challenge the jury's understanding of the law.

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