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## Comparison of Civil Law and Common Law Legal Systems in the Application of Jurisprudence

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**Abstract:** Civil law system (Continental European legal system) and Common law system (Anglo-Saxon legal system). Civil law system is a different legal system. The civil law system has a legal source that comes from the codification of written law or legislation, therefore judges are not bound by the principle of precedent or the doctrine of stare decisis, so that the law becomes the main legal reference, while the common law system has a history. The United Kingdom which makes court decisions as its legal basis when there is a case decided by a judge, the Judge's Decision is not only binding on the litigants but applies generally to similar cases. The common law system adheres to the principle of precedent or the doctrine of stare decisis (the obligation of judges to follow previous decisions in similar cases). In connection with the comparison of legal systems in Indonesia and in other countries in the application of Jurisprudence, there are two problem formulations, namely First, Comparison of law between civil law system and common law system. Second, the position of jurisprudence in the civil law system and the common law system.

**Keyword:** Civil Law System, Common Law System, Jurisprudence

### INTRODUCTION

In the world of justice, the legal system has a major influence on the application of law, especially for judges in examining and deciding a case. The court is a place where justice seekers can obtain the expected justice. “Justitia est constans et perpetua voluntas jus suum cuique tribuendi” (meaning: justice is a permanent and eternal will to give everyone what is due).

Based on the legal system that exists in countries, there are two legal systems, namely the Continental European legal system (civil lawsystem) and the Anglo-Saxon Legal System (common lawsystem). Both legal systems have their own characteristics and differences The difference between the civil law system and the common law system is in the judge applying the law in a judge's decision or jurisprudence.

Indonesia was colonized by the Netherlands for more than three centuries, which has influenced the Indonesian legal system to this day. In the colonial era, the Netherlands was also influenced by French law which in Rene David's classification as the Romano Germanic

Legal Family (David, 1968). This legal system is identical to some Continental European countries so it is often referred to as the Continental European Legal System (Civil Law System). The Civil Law System is also commonly known to have a legal source that comes from the codification of written law (written code) (Alinn, 2010). John Henry Merryman stated that there are three sources of law in a country with a civil law legal system, civil law, namely laws (statutes), derivative regulations (regulations), and customs that do not conflict with the law (custom) (Merryman, 1985). Judges' decisions in civil law legal systems are often considered not a law (Merryman, 1985).

Indonesia is one of the countries that adheres to the Continental European legal system, therefore in Indonesia it follows the civil law system so that judges influence in their judicial decisions. Judges' decisions are not bound by court decisions that have been handed down in the same case, because Indonesia does not adhere to the principle of “precedent”.

In the Anglo-Saxon legal system (common law system), which has historical roots in the British Empire, court decisions are the basis of law (Ramadhan, 2018). It's because in the history of the original British Empire there was no strong parliament but only the king's orders that were used as the rule of law. Therefore, if there is a case decided by a judge, the decision is not only binding on the litigants but also generally applicable to similar cases. The judge's decision became important because of the absence of laws passed by parliament or the difficulty of making regulations that kept pace with society. Thus, judges and courts play a major role in shaping the law in countries such as the United States and the United Kingdom.

The common law system (Anglo-Saxon) has historical roots in the United Kingdom which makes court decisions the basis of its law. Therefore, when a case is decided by a judge, the decision is not only binding on the litigants but also generally applicable to similar cases. Therefore, the common law legal system bases on court decisions as its legal source.

In principle, the common law system adopted in Anglo Saxon countries is based on the doctrine of *stare decisis* / precedent or a principle that substantially means that the judge's obligation is bound by the essential contents of the court's decision, which can be considered to have a decisive nature or part that is “juridically relevant.”

Winterton argues that comparative law is a method, namely the comparison of a legal system and the comparison produces data on the legal system being compared. Gutteridge states that comparative law is a method of comparison that can be used in all branches of law (Gozali, 2018).

Gutteridge distinguishes between comparative law and foreign law, the first term is to compare two or more legal systems, while the second term is to study foreign law without actually comparing it with other legal systems (Astari & Djono, 2024).

Based on the above background, this article focuses on the legal comparison of the civil law system and the common law system because there are fundamental differences in these legal systems, especially in the application of jurisprudence or court decisions. In the world of justice, the legal system has an influence and an important role in the application of law, especially for judges in examining and deciding a case. The court is a place where justice seekers can obtain the expected justice. “*Justitia est constans et perpetua voluntas jus suum cuique tribuendi*” (Justice is the permanent and eternal will to give to each person what is due).

## **METHOD**

This research is legal research. Legal research is a process to find legal rules, legal principles, and legal doctrines in order to answer the legal issues at hand (Marzuki, 2019). The statute approach method is an approach to review and analyze all laws and regulations related to legal issues in this study (Marzuki, 2019). The conceptual approach is an approach from the views and / or doctrines that have developed in legal science that can help to find

legal understanding, along with legal concepts and principles to find answers to legal problems. Comparative Approach is a comparative approach, one of the methods used in normative research which is used to compare or compare one of the legal institutions of a legal system with another one or in another country.

## **RESULTS AND DISCUSSION**

### **Legal Comparison Between Civil Law System and Common Law System**

The legal system comes from two words, namely “system” and “law”. The system is an order consisting of several parts or elements that are interrelated into an inseparable unit, so that each of these parts has a different function to achieve the same goal. Meanwhile, law can be interpreted as a set of rules in the form of regulations governing human behavior in the life of society, nation and state that have a compelling and binding nature, containing prohibitions and / or orders that must be obeyed and there are strict sanctions for violators in order to realize security, order and justice (Anang, 2019).

The legal system that developed in mainland European countries is often referred to as the civil law system. It actually originated from the codification of the law that prevailed in the Roman empire during the reign of Emperor Justinus in the VI century BC. The rules of law are a collection of various legal rules that existed before the time of Justinus which was later called “Corpus Juris Civilis”.

The Netherlands is one of the countries that colonized Indonesia for a long time. The Dutch influence on the legal system in Indonesia is very strong and significant. Dutch law itself is based on the principles of individualization and liberalization as characteristic of Continental European law (civil law system) in general (Maroni, 2012). The Dutch legal system, like the Continental European legal system (civil law system) in general, prioritizes the form of a written legal system, while the national legal development policy prioritizes the use of legislation.

The main principle underlying the civil law legal system is that the law has binding force, which is realized in regulations in the form of laws and arranged systematically in codification. This basic principle is adopted considering that the main value which is the purpose of law is legal certainty. Therefore, legal certainty can only be realized if all the rules of human life are set forth in written form.

Common law system or Anglo Saxon originated in England in the 11th century using unwritten law, although it is referred to as unwritten law but it is not entirely true. The reason is that in this legal system there are also known sources of written law. The Anglo Saxon legal system in its development is followed in North American countries, such as Canada and several Asian countries that include British Commonwealth countries and Australia, in addition to the United States.

In the Anglo Saxon system (common law system), judges are bound by the principle of “precedent”. This is the obligation of judges to be bound by the essential contents of court decisions, namely those that can be considered to have a decisive nature or “juridically relevant” parts.

Esin Orucu, Comparative Law, states that there is no longer a country that purely adheres to civil law or common law.<sup>16</sup> The combination of the two legal systems is inevitable, or even with what Rene David describes as Residual Law (customary law or religious law) and Socialist Law.<sup>17</sup> In Indonesia, for example, religious law influenced the drafting and enactment of Law No. 1 of 1974 concerning Marriage which allows men to have more than one wife. Orucu's idea that several legal systems are mixed is therefore more practical and accurate because international relations create a significant influence on the legal system in each country.<sup>19</sup> The mixed legal system is a classic development and classification of a legal system. Orucu gives several examples of mixed legal systems and

mentions simple mixes between civil law and common law legal systems and complex mixes between these two legal systems and religious or customary law (Orucu, 2008).

Characteristics of Civil Law System and Common Law System. The characteristics of the Civil Law System are as follows: (1) there is a codification system; (2) Judges are not bound by the principle of precedent or the doctrine of stare decisis, so that the law becomes the main legal reference; and (3) the judicial system is inquisitorial. Meanwhile, the characteristics of the Common Law System are as follows: (1) Jurisprudence as the main source of law: (2). The doctrine of Stare Decisis / Precedent Principle; and (3) Adversary System, namely in the judicial process. Common Law System both parties to the dispute each use their lawyers to face in front of the judge. The parties each strategize in such a way and put forward as many arguments and evidence as possible in court (Qamar, 2010).

### **The Position of Jurisprudence in Civil Law System and Common Law System**

The term “jurisprudence” comes from the Latin “iuris prudential”, Dutch “jurisprudentie”, while English “jurisprudence” means, “the science of law” (Bryan A. Garner, 1999). In the common law system, jurisprudence is translated as “a science of positive law and its relationships with other laws”, while in the civil law system, it is translated as “previous decisions of judges that have permanent legal force and are followed by judges in deciding the same or similar cases or cases”. Decisions of judges that are of a higher level and that are followed so regularly that they become part of science are called “case law” or “judge made law.” Jurisprudence means judiciary in general (judicature, rechtpraak), namely the implementation of the law in the concrete case of a claim for rights carried out by a body that stands alone and is held by the state and is free from the influence of what or whoever by giving a decision that is binding and authoritative.

Sudikno Mertokusumo argues that jurisprudence or court decisions “are judicial products that contain rules or legal regulations that bind the parties concerned or punished”. So court decisions only bind certain people and do not bind everyone in general like laws. The decision contains legal rules from the time it is imposed until it is implemented. Since it was handed down, the court decision has binding force for the litigants, binding the parties to recognize the existence of the decision. Court decisions have the power to be implemented since the decision has obtained permanent legal force. After being implemented, the court decision is only a source of law (Mertokusumo, 2003).

Indonesia adheres to the civil law system, so based on Article 1917 BW, a judge's decision is only binding on the parties concerned and does not bind other judges who will decide on similar cases or events. Judges do not need to follow previous decisions on similar cases, because in Indonesia basically they are not bound by the principle of “precedent” or previous judges' decisions on cases or legal issues similar to those they will decide. So if a judge wants to decide a case, he is not obliged to follow or be bound by court decisions that have been handed down regarding the same or similar cases that he will decide, this is what applies in Indonesia.

In Indonesia, the basis for judges in deciding a case is the law, if a law is incomplete, unclear then the judge must seek and find his own law. Judges must conduct legal discovery (rechtsvinding). Law discovery is a process of law discovery by judges or other legal apparatus assigned to apply general legal rules to concrete legal events.

Based on Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power states that, “judges and constitutional judges are obliged to explore, follow and understand legal values and a sense of justice that lives in society”. In order to explore the sense of justice that lives in society there are times when judges in deciding a case apply customary law therefore, judges are expected to be able to explore new positive laws. Judges must have high intellectual acumen regarding existing laws in society which are unwritten laws but are obeyed and respected in society.



The existence of legal discovery is motivated by the difficulty of judges when trying to understand the intent of the legislator as a basis for adjudication, because first, the substance of the law is never complete in the midst of social dynamics; second, judges have difficulty understanding the intent and purpose of the legislator; third, in terms of language, sentences, terminology in the law are general technical, broad, abstract, normative and idiomatic; fourth, filling the legal vacuum and giving meaning and soul to the law; and fifth, the problems faced are real, concrete and contextual. So that judges may not refuse to examine an existing case submitted to the court on the pretext that the legal basis does not exist or is unclear, but judges are obliged to examine and try it, because judges are considered to know about the law (*Ius Curia Novit*). This is in accordance with Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power which states that “the court is prohibited from refusing to examine, hear and decide a case submitted on the pretext that the legal basis does not exist or is unclear, but must examine and try it”.

Furthermore, Article 50 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power emphasizes that “court decisions must not only contain the reasons and basis for the decision, but also contain certain articles of the relevant laws and regulations or unwritten sources of law that are used as the basis for adjudication”.

Based on the article above, judges in making decisions must be accompanied by existing reasons, in this case unwritten law which is an alternative source of law in addition to written law. The elements of jurisprudence are: (1) A judge's decision that has permanent legal force; (2) On a case where there is no legal rule or the law is unclear; (3) Has the content of truth/justice; (4) Has been repeatedly followed by subsequent judges in deciding similar cases; (5) Has gone through an examination test or notation from the Supreme Court; (6) Has been recommended as a decision that qualifies as permanent jurisprudence.

Quality jurisprudence:

1. Contains *ratio decidendi*: (a) Explains the legal basis used (actual) as the basis for consideration; (b) Explains the actual and rational legal reasons; and (c) Based on facts.
2. Contains *obiter dicta*: (a) Matters that are not essential but can explain more clearly the *ratio decidendi*; and (b) Complementary in nature

In the continental system (civil law system) which includes the judicial system in Indonesia, judges are not bound by court decisions that have been handed down in the same case. In the continental system, judges are bound by the law. This means that judges think deductively from general laws to specific events. Whereas in the Anglo Saxon system (common law system), judges are bound by the principle of “precedent” or called “*stare decisis et quia non movere*” or called the principle of “the binding force of precedent”. Judges are only bound by the essential contents of court decisions, namely those that can be considered to have a decisive nature or the “juridically relevant” part.

The term Common Law is derived from the French “*commune-ley*” which refers to the unwritten customs in England and which through judicial decisions are made legally binding. The Common Law legal system is the legal system that applies in countries that were once British colonies. This system is based on court decisions that have been taken previously and legal principles that have developed over time (Noho, 2020).

In principle, the common law system has several main characteristics, namely first, it is based on the principle of precedent, which means that previous court decisions become the basis for future court decisions. Courts must follow previous decisions in similar cases, unless there are compelling reasons to change them. This provides stability and consistency in the legal system. Secondly, the common law legal system is also based on the interpretation of the law by judges. Judges have a very important role in this system, as they have to interpret laws and make decisions based on legal principles that have evolved over time. This allows the law to evolve and adapt to social changes and the needs of society. Third, the Common Law legal system also values the principles of justice and individual

liberty. Judges have the freedom to make decisions that are fair and based on the facts of the case. They must also consider legal principles that have evolved over time, such as the principles of justice and freedom of speech. Fourth, the Common Law legal system also values the role of the jury in the legal process. A jury is a group of randomly selected citizens to hear the evidence in a case and make a decision based on the facts. This role of the jury provides a community perspective in the legal process and ensures that the decision made is a fair decision.

## CONCLUSION

Comparison of legal systems in the country consists of 2 (two) systems, namely civil law system (Continental European legal system) and common law system (Anglo-Saxon legal system). They have different legal systems. The main principle underlying the civil law system is that the law obtains binding force, which is realized in regulations in the form of laws and arranged systematically in certain codifications or compilations. This basic principle is adopted considering that the main value which is the purpose of law is legal certainty. Therefore, legal certainty can only be realized if all the rules of human life are poured in written form. Meanwhile, in the common law system, judges are bound by the principle of “precedent”, which is the obligation of judges to be bound by the contents of essential court decisions, which can be considered to have a decisive nature or a “juridically relevant” part. The position of civil law system jurisprudence, namely the Judge is not bound by the principle of precedent or the doctrine of stare decisis, so that the law becomes the main legal reference, whereas in the common law system the court's decision as the legal basis when there is a case decided by the judge, the decision is not only binding on the litigants but also generally applicable to similar cases. The common law system adheres to the principle of precedent or the doctrine of stare decisis (the obligation of judges to follow previous decisions in the same case). Therefore, the judge in examining and deciding a case will consider many things. Judges have the freedom to apply the law to an event that has been proven true according to the judge's own beliefs. It is not uncommon for judges to use the decisions of other or previous judges who decide cases whose substance is in principle similar to be used as a reference or consideration in deciding a case.

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