



COMPARISON OF INDONESIAN CRIMINAL LAW WITH THE UK

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ABSTRACT

Comparative criminal law is the activity of comparing legal systems with each other, both between nations, states, and even religions, to find and signal differences and similarities with the members of the explanation and researching how the law functions and how its juridical solution is in practice and any non-legal factors that affect it. So a scientific comparison of law requires a comparison of legal history. The benefits of Comparative Law are: Useful for national, regional, and international unification and codification. For legal harmonization, between international conventions and national regulations. Legal reform, can deepen knowledge of national law and be able to objectively see the advantages and disadvantages of national law. To determine the general principles of law (especially for judges of international courts). It is important to determine the general principles of law which are an important source of the international public. The object of legal comparison is the legal system (system or field) in a country that has more than one legal system (e.g. civil law can be compared with written civil law) or the fields of law in a country that has one legal system (e.g. causality requirements in criminal and civil law, representative construction in civil and criminal law or foreign legal systems (fields) compared with joint legal systems (fields) (e.g. law of contract compared to the law of the agreement).

Keywords: Comparative, Criminal, Indonesia, UK

INTRODUCTION

A comparative study of criminal law compares various existing legal systems. In the Black's Law Dictionary, it is defined as:¹

"Comparative Jurisprudence is the study of the principles of legal science by the comparison of various systems of law" In this case what is compared is two or more different legal systems.

Indonesia's positive criminal law comes from the CivilLaw System legal family which attaches importance to the legal source of existing and applicable laws and regulations in Indonesia. Meanwhile, the United Kingdom adheres to the Common Law System which

¹ M Marwan and Jimmy P, *Kamus Hukum (Dictionary of Law Complete Edition)* (Surabaya: Reality Publisher, 2009).

prioritizes the customs that apply there. These habits can be in the form of norms or previous judges' decisions. In addition to the differences as mentioned above, the two criminal law systems of the two countries have similarities. In Indonesia, customary criminal law is known which is still recognized and used in society to this day.²

Judging from the source of the law the customary criminal law comes from the customs that apply in the community. This is the same as the source of common law law which comes from the habits that exist in society. Every legal system must have principles that are then described in its legal rules. One of the legal principles that is very important and owned by every legal system is the principle of legality also known as the principle of “Nullum delictum, nulla poena, sine praevia lege poenali”. The branch of legal science, as is often the temporary assumption of people comparing laws has been used by people for a long time, but it has only been incidentally. Comparative law only developed in the late 19th century or the beginning of the 20th century. Especially at this time when countries in the world interact with each other and need close relationships with each other.³

A comparison of criminal law is necessary because, with a comparison of criminal law, we can know the soul and outlook on the life of other nations, including the law. By knowing each other's laws of a country, disputes and misunderstandings can be avoided so that world peace is achieved. Comparative criminal law has an important role in the field of criminal law nationally and internationally. Especially in the comparison of Indonesia and the United Kingdom's criminal law, the material in the English criminal law that can be implemented and applied in Indonesia can be applied in Indonesia. Legal comparison is the activity of comparing legal systems with each other, both between nations, states, and even religions, to find and signal differences and similarities by explaining and researching how the law functions and how its juridical solutions are in practice and non-legal factors which affect its explanation can only be known in the history of law So that a scientific comparison of law requires a comparison of legal history.⁴

So, comparing laws is not just about blunting laws and regulations and looking for differences and similarities. attention to comparing laws and regulations is directed to the question of how far laws and regulations of an unwritten method are implemented in society,

² Andi Hamzah, “Criminal Code & Criminal Code of Indonesia Wikipedia, the Free Encyclopedia, Legal Systems in the World,” n.d.

³ S.H. Prof. Nawawi Arief, Barda, *Comparative Criminal Law* (Jakarta: PT Raja Grafindo Persada, 2010).

⁴ Muhammad Nur, “An Overview of Drug-Related Criminal Acts as Extraordinary Crimes in Indonesia Abstract :,” 2024, 38–49.

therefore similarities and differences are sought.⁵ From this comparison of laws, it can be seen that in addition to the many differences, there are also similarities. Therefore, it needs to be known or studied because it has various benefits, among others, it can help in the formation of national criminal law in addition to having an important role in the context of relations between nations and so on. In short, comparative criminal law has an important role in all fields of legal studies. The above statement is the background to the importance of comparative criminal law in the legal order in Indonesia.

METHOD

The method used in this study is a macro comparison method that compares the criminal law system in Indonesia and the United Kingdom. The sources of legal materials used are primary and secondary legal materials, as well as jurisprudence. The data collection technique with literature study and data analysis used is a syllogism method with a deductive approach.⁶

RESULTS AND DISCUSSION

A. Comparison and Difference between Indonesia's Legality Principle and with United Kingdom's Legality Principle

The Principle of Legality is a basic guarantee for individual freedom by giving precise and clear limits on what activities are prohibited. This principle also protects against abuse of the authority of judges, guaranteeing the safety of individuals with information that is allowed and prohibited. Everyone should be warned of illegal acts and their punishments. So based on this principle, no act can be considered unlawful by a judge if it has not been clearly stated by a criminal law and as long as the act has not been committed.⁷

a. Principles of Legality in Indonesia

The principle of legality in Indonesia is contained in Article 1 paragraph 1 of the Criminal Code which reads: “No act can be punished except on the strength of criminal rules in the legislation that existed before the act was committed”. The consequence of the article is

⁵ and Rengat Indragiri Hulu Adib, Mochamad, Zain Hakim at the Court, Rengat State, Class II, Jl Raya Belilas, Pamatang Reba, “THE ROLE OF CUSTOMARY VILLAGE IN FORMULATING AND IMPLEMENTING CRIMINAL PROVISIONS DERIVED FROM THE LIVING LAW OF THE COMMUNITY AS STIPULATED IN THE NEW CRIMINAL LAW CODE” 12 (2023).

⁶ Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020).

⁷ Tolkah Tolkah, “Customary Law Existency in The Modernization of Criminal Law in Indonesia,” *Varia Justicia* 17, no. 1 (2021): 72–89, <https://doi.org/10.31603/variajusticia.v17i1.5024>.

that a person's actions that are not listed in the law as a criminal act are also not punishable; So with this principle, unwritten laws have no legal force to apply. However, for this reason, it is excluded for areas that used to include the power of the swapraja court and customary courts with certain restrictions. In addition, the Indonesian Criminal Code also prohibits analogies to a concrete act that is not regulated by law.⁸

b. Principles of Legality in the United Kingdom

The Principle of Legality in the United Kingdom Although this principle has never been formally formulated in legislation, this principle animates court decisions. Because it was sourced from case law, initially the courts in England felt that they had the right to create a delix. However, in 1972 the House of Lords unanimously rejected the power of the courts to create new delicacies or expand existing delicacies.⁹ So there seems to be a shift from the principle of legality in the material sense to the principle of legality in the sense of formality. That is, a deliberation by a judge is based on common law (customary law developed through court decisions), but in its development, it can only be determined based on law (statute law). So in the United Kingdom Legal System, namely Common Law where the principle of law is not written (which is the benchmark of values that exist in society. The role of judges creates legal rules that govern the life of the community. Judges are bound by legal principles in existing court decisions from similar cases (doctrine of precedent). The main source of law is the judge's decision (jurisprudence).¹⁰

So that from the two Principles above, the difference can be known, namely:¹¹

1. The principle of legality in the United Kingdom's legal system is that no act can be punished if there are no rules governing it where the rules are sourced from the judge's decision (jurisprudence). So in deciding a criminal act in the UK, it usually comes from the judge's jurisprudence.
2. The principle of legality in the Indonesia Legal System is that no act can be punished if there are no rules governing it where the rules are sourced from the applicable laws and regulations. And in the termination of a criminal act, Indonesia still sources according to the applicable laws and regulations.

⁸ Tolkah.

⁹ T. R.S. Allan, "Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism," *International Journal of Constitutional Law* 9, no. 1 (2011): 155–62, <https://doi.org/10.1093/icon/mor017>.

¹⁰ Lung-Jui PAN, "Https://Theses.Gla.Ac.Uk/ Theses Digitisation:," 1999, 284.

¹¹ B Original Justification, "THE NORMATIVIT Y OF THE PRINCIPLE OF LEGALIT Y," 2011, 372–414.

B. Comparison of the Principle of Strict Liability of Indonesia's Criminal Law with the United Kingdom's Criminal Law

a. Asas Strict Liability Indonesia

In the development of criminal law that occurred later, criminal acts were also introduced whose criminal liability could be imposed on the perpetrator even if the perpetrator did not have the required mens rea. It is enough to prove that the perpetrator of the criminal act has committed actus reus, namely committing an act prohibited by criminal provisions or not committing an act required by criminal provisions. Such criminal acts are called offences of strict liability often known as *offences of absolute prohibition*.¹² Strict liability is also called absolute liability. The term in Indonesian that I use is "absolute responsibility". Mardjono Reksodiputro in one of his writings applied the principle of strict liability in Indonesia which adheres to the Continental European system, namely "Since we do not know the Strict liability doctrine that comes from the Anglo-American legal system, as a justification the doctrine of material liability derived from the Continental European legal system can be used. In these two teachings, there doesn't have to be an element of error. The doctrine of strict liability is only used for minor crimes."¹³

In practice in Indonesia, the doctrine of strict liability has been applied, among others, for Ialu crossing violations. Drivers of motor vehicles who violate traffic lights, for example not stopping when the traffic light shows a red light, will be ticketed by the police and then will be tried in court.¹⁴ The judge in deciding the penalty for the violation will not question whether there is no fault on the driver who violated the traffic rules. In Article 211 of the Criminal Code, the proof of these types of road traffic violations can be done easily and immediately, because it is impossible to deny it by violators. The minutes that were abolished were replaced with evidence of certain traffic violations abbreviated as TILANG which was filled by law enforcement (POLRI Traffic Unit). Therefore, it does not apply to all criminal acts, but only to certain criminal acts stipulated by law. For certain criminal acts, the perpetrator of the criminal act can be punished only because the elements of the criminal act have been fulfilled by his act.

¹² Margit Cohn, "Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom," *American Journal of Comparative Law* 58, no. 3 (2010): 583–630, <https://doi.org/10.5131/ajcl.2009.0048>.

¹³ Gusrinaldy Sani Catur Putra Husain, Azwad Rachmat Hambali, and Nur Fadhillah Mappaseleng, "Indonesia Journal of Criminal Law (IJoCL)," *Indonesia Journal of Criminal Law* 2, no. 2 (2020): 93–104.

¹⁴ Maria Lubomira Kubica, "Origins of Strict Liability for Abnormally Dangerous Activities in the United States, Rylands v. Fletcher and a General Clause of Strict Liability in the UK," *Internasional Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering* 10, no. 3 (2016): 870–81.

Here, the mistake of the perpetrator of the crime in committing the act is no longer considered. This principle is known as the “strict liability” principle.¹⁵

b. The United Kingdom Strict Liability Principle

Although in principle the principle of Mens Rea applies, in the United Kingdom some delicacies do not require Mens Rea (in the form of intention, recklessness, or negligence). The maker can be punished if he has committed the act as formulated in the law without looking at his inner attitude. Here applies what is called strict liability which is often briefly interpreted as liability without fault. According to common law, Strict Liability applies to 3 types of delicacies:¹⁶

1. Public nuisance (disturbance of public order, obstruction of highways, emitting unpleasant odors that disturb the environment).
2. Criminal libel (insult/slander, defamation)
3. Contempt of Court (violation of court order) For example: threatening the prosecutor, judge, and witness.

The principle of strict liability is a principle of legal responsibility (liability) that has developed for a long time which began with a case in the United Kingdom, namely *Rylands v. Fletcher* in 1868. In this case, the Court of Cassation in the United Kingdom gave birth to a criterion that determines that an activity or use of resources can be subject to strict liability if the use is unnatural unusual, or unusual. This type of liability arises as a reaction to all the shortcomings of the system or a type of fault-based liability.¹⁷ Conventional legal liability has been adhering to the principle of liability based on fault, meaning that no one can be held liable if there are no elements of fault in him. In the case of the environmental doctrine, it will create obstacles for law enforcement in court because this doctrine is not able to effectively anticipate the impact of modern industrial activities that contain potential risks.¹⁸ Absolute responsibility initially developed in countries that adhered to the Anglo-Saxon legal system or common law, although later it underwent developmental changes in some countries to adopt it. Some

¹⁵ Ahmad Rofiq, “Asas Strict Liability Sebagai Penyeimbang Asas Kesalahan Dalam Hukum Pidana Indonesia (Strict Liability as a Counterbalance to the Principle of Error in Indonesian Criminal Law),” *Journal of Judicial Review* 24, no. December (2022): 319–32, <http://dx.doi.org/10.37253/jjr.v>.

¹⁶ Alexandre Kiss and Dinah Shelton, “Strict Liability in International Environmental Law,” *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, 2007, 1131–51, <https://doi.org/10.1163/ej.9789004161566.i-1188.183>.

¹⁷ Jules L. Coleman and Richard A. Epstein, “A Theory of Strict Liability,” *The Philosophical Review* 92, no. 4 (1983): 613, <https://doi.org/10.2307/2184887>.

¹⁸ Andhy Hermawan Bolifaar et al., “Authority of Indonesian Attorney in Handling the Corruption Crimes: A Perspective of Integrated Criminal Justice System,” *Journal of Legal, Ethical and Regulatory Issues* 22, no. 5 (2019): 1–8.

countries that adhere to this principle include the United Kingdom, the United States, the Netherlands, and Thailand.¹⁹

C. Differences between the United Kingdom Criminal Justice System and Indonesia's Criminal System

a. *United Kingdom Criminal Justice System at a Glance*

Until the end of 1986, the prosecution process for minor cases in the United Kingdom was carried out by the Police Prosecutor itself. Meanwhile, a rather heavy case is carried out by a lawyer called the Solicitor. Heavy cases are heard in high courts (appellate level) with the Public Prosecutor's Office called Barrister. However, since 1986, the one who determines whether the case investigated by the Police can be submitted to the court or not is the Prosecutor who is a member of the Crown Prosecution Service (CPS). In the United Kingdom, there are 31 prosecutor's offices or CPS consisting of Crown Prosecutors, senior Crown Prosecutors, Assistant branch CPS, and Branch prosecutors (in Indonesia at the level of the Chief District Attorney).²⁰ The sources of law in the criminal justice system in the United Kingdom consist of:²¹

- 1) Custom, which is the oldest source of law. It grew and developed from the Anglo-Saxon customs in the Middle Ages that gave birth to the Common Law. So the United Kingdom legal system is also called the axon braking system.
- 2) Legislation/statute, in the form of a law made through parliament.
- 3) Case law/judge-made law, customary law that develops in society through judges' decisions which are then followed by the next judge gives birth to the principle of precedent.

In the Common Law system such as in the United Kingdom, customs or customs developed based on Court decisions have a very strong position because the principle of STARE DECISIS or the PRINCIPLE OF BINDING FORCE OF PRECEDENTS applies.²² This principle requires judges to follow the previous judge's decision. The part of the judge's decision that must be

¹⁹ Coleman and Epstein, "A Theory of Strict Liability."

²⁰ Ahmad Rofiq, Hari Sutra Disemadi, and Nyoman Serikat Putra Jaya, "Criminal Objectives Integrality in the Indonesian Criminal Justice System," *Al-Risalah* 19, no. 2 (2019): 179, <https://doi.org/10.30631/al-risalah.v19i2.458>.

²¹ Lubomira Kubica, "Origins of Strict Liability for Abnormally Dangerous Activities in the United States, Rylands v. Fletcher and a General Clause of Strict Liability in the UK."

²² Setia Untung Arimuladi, "Access to Justice Based on Expert Testimony in Tax Crimes: An Integrated Criminal Justice System Perspective in Indonesia," *Pandecta Research Law Journal* 17, no. 1 (2022): 29–36, <https://doi.org/10.15294/pandecta.v17i1.32622>.

followed and binding is the part of legal considerations called ratio decidendi while the rest of the things called obiter dicta are not binding. In the United Kingdom justice system, the right or wrong of the defendant is determined by a jury recruited from ordinary people. The judge's job is only to ensure that the trial runs according to procedures and impose punishments according to the law. Therefore, the task of the prosecutor and lawyer in the trial is to convince the jury that the defendant is guilty or not. In contrast to the civil law system adopted in Indonesia as a continuation of the legal system adopted by the Netherlands, the task of judges in court is more difficult because, in addition to having to determine the right and wrong of the defendant, they also determine the sentence (verdict).²³

In 1994 there was a shift from the accumulator system to the inquisitor system in the United Kingdom's Criminal procedure law. This is motivated by the difficulty of the Police in the United Kingdom to uncover or solve various cases that pose a serious threat to society, especially terrorism. Because the suspect takes refuge behind the legal immunity granted by the law, including the right to remain silent. These changes are seen from the context of the existence of legal systems in the world (civil law and common law), it turns out that now is no longer the time to debate sharply the differences between the two legal systems.²⁴

b. Integrated Criminal Justice System in Indonesia

The criminal justice system in Indonesia as regulated in the Criminal Procedure Code (Criminal Procedure Code) of Law No. 8 of 1981, is identical to criminal law enforcement which is a system of power/authority in enforcing criminal law. This criminal law enforcement system by the provisions of the Criminal Code is implemented by 4 sub-systems, namely:²⁵

1. Investigative Power by the Police Agency.
2. Prosecution Power by the Public Prosecution Institution or the Prosecutor's Office.
3. The power to adjudicate is by the Judiciary or Judge.
4. power to execute sentences by the execution apparatus (Prosecutors and Correctional Institutions)

²³ Azizan Syah, "Analisis Yuridis Keputusan Menteri Hukum Dan HAM Tahun 2020 Tentang Pengeluaran Dan Pembebasan Narapidana Dan Anak Melalui Asimilasi Dan Integrasi Dalam Rangka Pencegahan Dan Penanggulangan Penyebaran Covid-19" (2020).

²⁴ Lubomira Kubica, "Origins of Strict Liability for Abnormally Dangerous Activities in the United States, Rylands v. Fletcher and a General Clause of Strict Liability in the UK."

²⁵ Andhy Hermawan Bolifaar, Henry Dianto, and Pardamean Sinaga, "Managing Evidence of Tax Crime in Indonesia : An Artificial Intelligence Approach in Integrated Criminal Justice System Of" 27, no. 1 (2020): 143–59.

The four subsystems are an integral criminal law enforcement system often referred to as the integrated criminal justice system. Looking at the integrated criminal justice system regulated in the Criminal Procedure Code, the four components of law enforcement: the Police, the Prosecutor's Office, the Courts, and Correctional Institutions should be consistent in keeping the system running in an integrated manner. By carrying out their respective duties and authorities as given by the Law. Because in the Civil Law system that we adopt, Law is the highest source of law. Because there (in the Criminal Procedure Law) the rights and obligations of each law enforcer in the integrated criminal justice subsystem as well as the rights and obligations of suspects/defendants have been regulated.

Differences between Indonesia and United Kingdom Courts

It	Variable	Indonesian	English
1.	Superior and inferior courts (the tier of courts from the highest)	a. Supreme Court; b. High Court; c. District Court.	a. <i>House of Lords</i> ; b. Supreme Court; c. Court of Appeal; d. High Court; e. Royal courts; f. Magistrate's Court.
2.	Division of courts based on specific jurisdiction	a. General court; b. Religious courts; c. State administrative courts; d. Military courts	a. Coroner's court; b. Military courts; c. Employment court; d. Immigration court; e. dll
3.	Division of jurisdictions	There is a division of jurisdictions based on regional administration	There is no division of jurisdictions
4.	Number of judges examining cases	Hakim majlis	Generally, a single judge is used
5.	Proof system	Proof based on the law negatively	Based on mere conviction (conviction in time)

CONCLUSION

From the description of the discussion above, it can be concluded that the very striking difference that can be seen between Indonesia's criminal law and the United Kingdom is that we can see through the principle of legality of each where the principle of legality of the United Kingdom is sourced from the jurisprudence of judges, while in Indonesia it is sourced from the

applicable law. And also the principle of strict liability in both countries where in the United Kingdom the element of fault cannot be given if it is not there, while in Indonesia the element of fault has been given if it has been proven to have committed a mistake. The last in Indonesia's criminal justice system is synonymous with criminal law enforcement which has the power and authority in enforcing criminal law. There are 4 subsystems, namely, the power of investigation, the power of prosecution, the power of adjudicating, and the power of executing sentences. Meanwhile, in the criminal justice system in the UK, court decisions have a very strong position. The judge's decision is binding for the next judge.

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