“…..Comparative law without the history of law is an impossible task!..”

F. Pringsheim (1961)
“The Inner Relationship between English Law and Roman Law”, in Gesammelte Schriften. Heidelberg, p. 76ff.
“Comparative Law is unthinkable without history, even if only very modern history”

Watson 1995: 103
Pembahasan

• Hubungan perbandingan hukum dan sejarah hukum
• Analisis perbandingan hukum dalam tinjauan sejarah
• The birth of modern comparative law is generally attributed to Europe in the 18th century. However, prior to that, legal scholars (forerunners of today's comparativists and international lawyers) practiced comparative method.

• Russian legal history ➔ comparative method dates back to the sixteenth century.

• Indonesian legal history
Montesquieu's comparative law

- "[The political and civil laws of each nation] should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another.

- They should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions.

- They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs."

Chapter III of Book I of De l’esprit des lois
• "to determine which of those systems [i.e. the French and English systems for the punishment of false witnesses] is most agreeable to reason, we must take them each as a whole and compare them in their entirety."

Chapter XI (entitled 'How to compare two different Systems of Laws') of Book XXIX

• "As the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law."

‘Approach’ - Chapter XIII of Book XXIX
• As Moccia points out, between the 16th to the 19th centuries comparative legal history, the comparative law of the time, was interested in the similarities and not the differences and it is only with rising nationalism and positivism that comparative law discourse started stressing the differences, especially between the civil law and the common law.


• History tells us that when there is a mismatch between model and recipient, the result is usually a 'mixed jurisdiction', a 'mixed jurisdiction' in the classical sense being the outcome of an encounter between legal systems of diverse socio- and/or legal cultures.

  (E. Örücü, 'Mixed and Mixing Systems: A Conceptual Search')
Gessner says: 'Empirical evidence in history and from contemporary reception processes [shows] that a legal culture is rooted very deeply in society and cannot easily and quickly be changed by top-down measures.

Koopmans’ observation

- In the 19th century, history was very much the fashion: in particular on the Continent, history of the codes, pre-existing Roman law tradition, Poitier on obligations etc. Our own century discovered society; it wondered how the law works, what its economic context is and how legal decisions can be adjusted to social needs; and it saw the judge as a kind of decision maker, or even a 'social engineer'. The 21st century may become the era of comparative methods. ... Our problems in society increase as our certainties in religious, moral and political matters dwindle (berkurang); and more and more problems are common problems. The search for common solutions is only slowly beginning.

T. Koopmans, 'Comparative Law and the Courts'
(1996) 45 ICLQ, 555
The comparative law’s influence to legal history?

• First, the comparative study of different historical facts may help to define the various factors that cause a certain historical outcome. Sometimes this is perceived as the only proper exercise in comparative legal history. It is easy to agree with this view, but there are reasons to believe that such a use of the comparative method is just one of the possible uses of the comparative law approach to legal history.

• Second, comparative law can help legal historians to appreciate the extent to which the history of law is a story of give and take, of trade in legal rules, institutions and doctrines, across frontiers.

• Third, comparative law may shape historiography by providing a critical assessment of each historiographical tradition.

Michele Graziadei

Comparative Law, Legal History and the Holistic Approach to Legal Cultures.
Historisitas Hukum

Apakah hukum sebagai gejala sejarah?

- Visi Idealistis – Spritualitas
  
Hukum sebagai wujud gagasan absolut, statis.
(Plato, Aristoteles, Cicero)

- Visi Materialistis – Sosiologis

Hukum sebagai produk kenyataan kemasyarakatan (realitas sosial)
(Mahzab Historis – von Savigny, Marxisme, dan Comte)
Resepsi (1)

- Pengambilalihan oleh suatu kelompok masyarakat dari hasil perolehan budaya kelompok lain.
- Resepsi hukum Romawi di Kerajaan Romawi sebagai akibat Constitutio Antoniniana di Civitate pada 212, yang memberikan kewarganegaraan Romawi kepada semua penduduk bebas di dalam kerajaan.
- Resepsi Hukum Romawi di Benua Eropa Barat pada bagian abad pertengahan
- Penyebaran Code Napoleon setelah tahun 1804, beserta daerah-daerah yang ditaklukannya
- Resepsi Common Law Inggeris di Amerika Serikat dalam abad XIX.
Ada pula resepsi berbasis pada kematangan evolusi kemasyarakatan, atau berjalan sukarela, bukan paksaan.

Pengambilalihan Hukum Uni Soviet oleh negara-negara sosialis di Eropa Tengah dan Timur.

Kitab UU Hukum Perdata Swiss di Turki yang dipakai sebagai sarana modernisasi masyarakat oleh Kemal Attaturk.

Peresepsian Hukum Romawi di Jepang lewat Burgerliche Gezetzbuch Jerman tahun 1900.
Bagaimana dengan Indonesia?

- Penundukan ataukah sukarela?
- Mengapa Indonesia menentukan pilihannya lebih mengikuti civil law system, daripada common law system?
- Bagaimana perkembangan civil law system Indonesia hari ini?