PERBANDINGAN HUKUM PIDANA

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Functions and Purpose of Comparative Law

• (1) Comparative law as an Academic Discipline
• (2) Comparative law as an Aid to Legislation and Law Reform
• (3) Comparative law as a Tool of Construction
• (4) Comparative law as a Means of Understanding Legal Rules
• (5) Comparative law as a Contribution to the Systematic Unification and Harmonisation of Law

• (Sumber MACL, p. 14-22)
Types of Comparative Studies (Hug, 1922)

• (a) Comparison of foreign systems with the domestic system in order to ascertain similarities and differences;
• (b) Studies which analyse objectively and systematically solutions which various systems offer for a given legal problem;
• (c) Studies which investigate the causal relationship between different systems of law;
• (d) Studies which compare the several stages of various legal systems;
• (e) Studies which attempt to discover or examine legal evolution generally according to periods and systems.

(Sumber, MACL, p. 5)
The Comparative Method (Rheinstein)

- **Macro-Comparison** → the study of two or more entire legal systems
- **Micro-Comparison** → the study of topics or aspects of two or more legal systems

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(i) the institutions or concepts peculiar to the system
(ii) the sources of law, judicial systems and judiciary, legal profession or even the structure of the legal system
(iii) the various branches of national or domestic law
(iv) the historical development of legal system;
(v) the ideological, socio-legal and economic bases of that system

THE PURPOSE OF THE COMPARISON will often determine the suitability of selection !!!

(Sumber MACL, p. 37 )
The test of Functionality (Zweigert and Kotz)

- The basic methodological principle of all comparative law is that of functionality.
- The legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar result.
- Although different societies have different specific problems, all societies have the same basic problems.
- They need to resolve their particular domestic / local problems and to consider how best ‘the law’ may deal with these problems.
- (Sumber : MACL, p. 37)
Stages in the Process of Comparison
(Kamba, 1974)

- (a) the descriptive phase
- (b) the identification phase
- (c) the explanatory phase
The Method of Comparison : A Blueprint (Peter de Cruz)

Step 1. identify the problem and state it as precisely as possible
Step 2. Assuming that the ‘home jurisdiction’ is one of the jurisdictions being compared, identify the foreign jurisdiction, and if possible, its legal family
Step 3. decide which primary sources are going to be needed
Step 4. gather and assemble the material relevant to the jurisdiction being examined
Step 5. organise material. (i) list the main sources of law (ii) list the hierarchy of sources (iii) socio-cultural material
Step 6. map out the possible answers to the problem, comparing the different approaches, noting possible cultural differences, different legal interpretation, socio-economic factors and any non-legal factors
Step 7. Criticaly analyse the legal principles
Step 8. Set out your conclusions in a balance manner

(Sumber MACL. P. 38-39)
Key Concepts in the Comparative Law Method (Sumber: MACL, p. 22-24)

• The Parent Legal Family and Legal Traditions: a set of ‘deeply rooted historically conditioned attitudes about the nature of law, the role of law in the society and the political ideology, the organisation and operation of a legal system’ (Merryman, 1977) → a legal tradition ≠ a legal system.

• Sources of Law → this can mean different things in different countries and, even in the same country; the popular meaning → (1) historical sources, (2) place where the law can be found, and (3) legal sources (Wu Min Aun, 1975), p. 17.
Classification of Legal Systems (1)

- Criteria used to Classify Legal System:
  1. Race and language (Sauser-Hall)
  2. Culture (Schnitzer)
  3. Substance /Substantive content of laws (Arminjon, Nolde and Wolff)
  4. Ideology, Philosophy, Conceptions of justice and legal technique (David)
  5. Historical origins (Glasson and Sarfatti)
  6. Juristic style (Zweigert and Kotz)
Classification of Legal Systems (2)
Juristic Style

• (i) the historical background and development of the system
• (ii) Its characteristic (typical) mode of thought
• (iii) Its distinctive institutions
• (iv) the types of legal sources it acknowledges and its treatment of these
• (v) Its ideology

Sumber MACL, p. 27-35.