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Western Legal Culture & Comparative History and Theory of Legal Methods

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Task 1:

***Content*:**

Comparison of the role of legal scholarship in the civil law and common law tradition and a discussion of the Norwegian position related to these traditions.

I. Introduction

In the area of comparative law, one distinguishes between two main legal traditions: civil law and common law.[1] The terminology indicates that there exist two different approaches to law within the legal world and point towards two different legal constructions and mentalities.[2] The terms are meant as labels given to groups of legal systems based on their similarities and differences. The labels are intended as broad outlines, and it must be noted that there are individual differences within specific legal systems. The aim of the following essay is, however, to look at the broad characteristic differences between the two traditions.

One of the main differences between the two traditions is the role of legal scholarship. In this paper, the first section will compare the role of legal scholarship in the civil law tradition and the common law tradition. The next section will use the comparison to discuss whether the role of legal scholarship in Norway is closer to the civil law tradition or the common law tradition. Legal scholarship is hence the keyword in the following essay. Legal scholarship is, however, a rather vague term. The term focuses primarily on the act of legal scholars, whose goal is to gain and share knowledge, such as legal academics, professors and authors. The term therefore encompasses the role of legal literature and writings, yet it excludes the acts of legal organs such as the courts and judges. [3]

II. Comparison of the role of legal scholarship in the civil law tradition and common law tradition

In order to understand the role of legal scholarship in the different legal traditions, and to illustrate the differences between them, the comparison will be divided into more concrete and manageable elements. The role of legal scholarship will be discussed through the following elements: norm production, conflict resolution, legal method, idea of justice and legal education. These elements (based on Sunde`s legal culture model jf. task 2) represent areas where the role of legal scholarship is particularly prominent and most significant. However, it should be noted that the elements are not

[1] Cornwell, 2019
[2] Müller Chen, Müller, Lüchinger, 2015 page 151
[3] Feldman, 1989, page 502

intended as an exhaustive list, and that the elements flow into each other. The reason that one element is the way it is, is often a consequence of another element. It must also be noted that the following comparison does not aim to see *why* the differences are as they are. In that case, it had to be done a more thorough and historical analysis, which the word boundary sets limits for.

Norm production:

The role of legal scholars and legal literature plays a major role in how norms are produced in the civil law countries, while the role of legal scholarship in the common law tradition is almost completely absent.[4] In the civil law tradition, legal scholars have an enthusiasm for generalizing, systemizing and rationalizing the law. A civil law scholar aims to construct legal concepts and dogmatic models and consumes a scientific treatment of the law.[5] These characteristics have given the legal scholars and legal literature an important influence in the shaping of law, since they always lay "one step further". The law professors and legal researchers consequently represents a major support for the legislative branch in the production of norms. As an example, one can see that all the major civil codes, such as the German Civil Code (BGB), is written by professors.[6]

In the common law tradition, however, the "judicial guild" develops the law, rather than scholars.[7] In the common law countries, legal scholars have not considered it their job to help develop the law. The main object of the legal literature is henceforth aimed at case law, and the method of distinguishing the cases[8]. The fundamental focus on legal practice, henceforth gives legal scholars a weak role in the norm production. There are, of course, some important scholarly works that have paved the way for legislation in the common law tradition, such as David Dudley Field's draft of the civil code of procedure in the US.[9], but in general legal literature and legal scholars is a lacking element in the norm production - the law is rather developed through judicial practice. This is a crucial difference compared with the civil law tradition.

Conflict resolution:

The role of legal scholarship in the two traditions have affected and impacted the element of conflict resolution differently. The comprehensive legal literature and systematization in the civil

[4] Sundberg, 1968 page.187
[5] Sundberg, 1968, page.191
[6] Leiss, Powerpoint WLC 2019, PP E
[7] Cromwell, 2019
[8] Sundberg, 1968 page.195
[9] Leiss, Powerpoint WLC 2019, PP C

law, has resulted in very specialized courts. On the other side, the lack of systematization in the common law tradition has resulted in more general courts.

Legal method:

The role of legal scholarship in the civil law and common law tradition is quite different when it comes to how the courts use legal literature in their legal methods. In the civil law tradition legal scholars assist the judiciary with the interpretation of the codes, by giving annotations and commentaries of the law. These commentaries are considered as a relevant source of law and as a factor of interpretation. The courts frequently refer to the judicial literature to legitimize their decisions. The legal literature does not enjoy the status as a primary source of law. However, the legal literature is considered as a particularly important source of interpretation and secondary source of law.[10] Under certain conditions, consensual theory might also be referred to as a primarily source of law. [11] On the other hand, in the common law tradition, the use of judicial literature as a source of law, is rarely recognized.[12] The courts do not even use unified theory as a legitimating source of law. Only in very few cases legal theory can be used as a supporting argument for the judiciary – in those cases, the authors of the theory tend to be dead.

Idea of justice:

When it comes to the role of legal scholarship in the element idea of justice, the two traditions have different approaches to the law. Civil law is characterized by a positivistic approach to law, while the common law tradition has a more realistic approach to the law. This feature must be seen on the basis of the scientific and abstract treatments of the law given by the legal scholars. It may also be explained by the fact that a major part of the legal literature in common law is written by practitioners and not legal scholars.

Legal education:

The role of legal scholarship in the two traditions is furthermore different when it comes to legal education and professionalization. In the civil law tradition, universities and the work of legal scholars stands strong in the education.[13] The law professors systematically teach the positive law and use legal literature as curriculum and starting point in their teaching method. The focus of the

[10] Müller Chen, Müller, Lüchinger, 2015 page 160
[11] Leiss, Powerpoint WLC 2019, PP C
[12] Müller Chen, Müller, Lüchinger, 2015 page 262
[13] Repgen, 2009, page 10

education is theoretical knowledge, consisting primarily of the systematic exposition of existing rules and principles. Civil law is therefore often referred to as "learned law".[14] In common law, on the other hand, education of legal scholars traditionally occurs through the teaching of practicing lawyers. No academic legal degree has traditionally been required. Judicial literature henceforth plays a minimal role in the education of legal scholars in the common law tradition.[15] Although the education of lawyers today is more academic, there is still a greater focus on practice. Experiential learning courses and the case method is applied at most common law schools.

III. The role of legal scholarship in Norway:

In the recent years, the role of legal scholarship in Norway has undergone a strong development. The focus of this paper is *not* to look at the role of legal scholarship in a historical perspective, but concentrates on the conditions today.

Norm production:

When it comes to the role of legal literature in norm production, the theoretical legal literature and science in Norway has an organized construction, similar to the civil law countries. In the legislative process legal scholars hence are of great importance. Legal professors and academics draft the legislation for the legislator and gives suggestions to the Parliament, which later statues the propositions.[16] Moreover, legal theory often points out weaknesses and shortcomings in current legislation, and therefore leads to the creation of new legislation. These perspectives of the legal scholarship in norm production indicates that Norway is pulled towards the civil law tradition.

On the other hand, the courts and judges represent an important legal source in Norway.[17] The courts are in many cases left with the important task of developing law through practice. As a result, the role of legal scholars is principally weaker in the production of norms than the civil law tradition. In addition, legal scholars and literature often refers to legal practice in their writings. Legal practice thus plays a vital role in the literature.[18] This indicates that Norway is closer to the common law tradition. However, the case-law in Norway is usually used in order to understand and interpret the other sources of law, which may again draw Norway towards the civil law tradition.

[14] Leiss, Powerpoint WLC 2019, PP C
[15] Caenegem, 1991 page 191
[16] Bernt, 2019
[17] Sunde, 2013, page.15
[18] Sunde, 2013, page 13

Conflict resolution:

In Norway the small amount of legal literature has resulted in general courts. The courts are, in principle, supposed to solve every legal area. This draw Norway to the common law tradition.

Legal method:

Within the legal method in Norway, legal literature is used extensively when lawyers argue for a specific point. Legal literature is used both to clarify the meaning of statutory rules and in uncodified areas of law. Legal literature is considered a valid argument in the legal method and is accepted, and followed, by the courts.[19] One of the most widely used sources of legal theory is for instance, the Norwegian Law Commentary, a work where 300 legal experts have written comments on Norway's laws.[20] The specific feature of legal writing as a relevant source of law pulls Norway closer to the civil law tradition.

Idea of justice:

In Norway the idea of justice can be defined as quite realistic. Eckhoffs legal source "reelle hensyn" plays a vital role in the Norwegian legal culture. The source is not solely a source of equity, since it also consists of an assessments of the case and possible results, and takes into consideration that they can be repeated in similar cases.[21] The feature of "relle hensyn" can be traced back to the small size of Norwegian literature. This realistic approach pulls Norway towards the common law tradition.

Legal education:

At the universities and colleges in Norway there are elements of both theoretical and practical elements in the education. The main focus is a theoretical approach. The education is often based on legal literature, and legal literature is used as the essential syllabus. This has been the case since the examination ordinance came in 1736.[22] The legal literature hence plays a fundamental role in legal education and is an essential part of the lawyers' intellectual universe in their formative period as students. This indicates that Norway is pulled towards the civil law tradition. On the other hand, the amount of legal literature is still smaller compared to other civil law countries. Even though the

[19] Falkanger, 2019
[20] Leiss, Powerpoint WLC 2019, PP
[21] Sunde, 2013, article 2, page 17
[22] Sunde, 2013, page 12

amount of literature has increased rapidly the last decades, the historical small amount of legal literature still forces students to read Supreme Court practice as a substitute.[23] This implies that Norway is closer to the common law tradition.

IV. Summary

To sum up one sees that the civil law tradition is characterized by a strong role of legal scholarship. Legal scholars represent one of the main driving forces behind the norm production in the civil law countries and plays a crucial role in the education. In the common law tradition, legal scholars and legal literature plays a much more withdrawn role. The main focus is primarily on court practice and the literature hence has a more practical approach.

When it comes to the position of legal scholarship in Norway, an overall assessment makes it most natural to consider the country as a mixed legal culture. The role of legal scholarship in norm production and education pulls Norway towards the civil law tradition. However, the strong role of judicial practice as a major source of legal knowledge, the idea of justice, and the following pragmatic character pulls Norway towards the common law tradition. These characteristics of Norway make it extremely difficult to put the country in one of the legal traditions, and as a digression this is neither desirable.

V. Bibliography

Bernt Jan, 2019, "Lovgivning", snl.no, read 15.10.10, https://snl.no/lovgivning

Cornwell Victoria, 2019, "Common law vs. civil law: an introduction of the two different legal systems", Head of QLTS Prep by Barbri, read 14.10.10, https://barbriqlts.com/common-law-vs-civil-law-an-introduction-to-the-different-legal-systems/

Caenegem R.c, 1991, "The English common law seen from the European continent", Legal history: a European perspective.

Falkanger Thor, 2019, "Rettskilder", snl.no, read 16.10.19, **https://snl.no/rettskilder**

Feldman David, 1989, "The nature of legal scholarship", The modern Law review

Müller Chen, Müller, Lüchinger, 2015, «Comparative private law", Die deutsche bibliothek, page 151

[23] Sunde, 2013, page 15

Leiss Ruben Johan, 2019, Powerpoints WLC, PP C and E.

Repgen Tilman, 2009, “Civil law” The Oxford international Encyclopedia of legal history.

Sundberg Jacob, 1968, “Civil law, Common law and the Scandinavians”, University of Stockholm.

Sunde Jørn, 2013 «An unexpected journey”, Revista Juridica

Sunde Jørn, 2013, “The legal cultural dependency of the Norwegian legal method – and its future”, To be published in: Contributions to the understaning of legal argumentation in Norway and Germany.

Task 2:

Content:

Consideration of the "Legal Culture model" created by J.Ø. Sunde.

I. Introduction

Over the last few decades, globalization has increased a major development in the studies of legal history and comparative law studies. In this respect, the concept of legal culture has become especially relevant and prominent. The concept of legal culture is, however, difficult to define and handle. In the following text I will use Jørn Øyrehagen Sunde`s definition of legal culture, respectively: "ideas and expectations to law (which are) made operational by institutional (like) practices".[24]

The definition reflects that the phenomenon of legal culture is very extensive and little tangible. It soon becomes clear that the definition is hardly suitable as a starting point for a comparative or legal historical analysis of a legal culture. In order to manage the unmanageable concept of legal culture, the Norwegian professor J.Ø. Sunde has developed what he refers to as the "Legal Culture model" as an analytical tool to compare different legal cultures.[25] In this paper I will examine this model and look at the strengths and weaknesses.

II. An overview of the "Legal Culture model"

[24] Sunde, 2017, page 15
[25] Sunde, 2017, page 15

On an overall level, Sunde divides the legal culture into an intellectual and institutional structure. The institutional structure points to the institutions that create and enforce norms, while the intellectual one deals with ideas and expectations that create the law. These two categories are again divided into two and four sub-categories, namely: norm production and conflict resolution, the ideal of justice, legal method, professionalization and internationalization.[26]

III. Strengths of the "Legal Culture model".

Identifies the central characteristics of a country`s legal culture:

The legal culture model represented by Sunde, embodies the central elements and aspects of a country's legal culture. The model can therefore give a concrete answer to a specific legal question by referring to a precise element (or elements) in the legal culture. For instance, one can examine the question why precedents are so important in the common law tradition by looking into the country`s norm production. Traditionally one often explained a legal question by saying it is due to the country`s legal culture. This, however, is just putting a label on the unknown and does not give a comparative lawyer or historian any good or useful answer.[27] The term legal culture can hence be used in a revealing manner instead of a concealing manner. The model helps to identify a country`s legal culture more clearly and is thus crucial in order to acquire knowledge about a specific legal culture.

Furthermore, the elements in the model makes the concept of legal culture more manageable, which is important in order to use comparative law beyond the aim of acquiring knowledge. The legal cultural model makes it possible to identify the same parts in the different legal cultures so they can be compared by comparative analysis. The independent concept of legal culture does not provide sufficient guidance on how to compare the same elements in two legal cultures. The legal culture model thus clarifies the elements that ought to be compared and guides the analyst into further investigation. In this way, the comparative reflections become more precise and appropriate, which again raises the quality of the analysis. As a result of this, the comparative analysis can be used to pursue a more normative agenda – the investigation can be used as an important tool for the legislator, judiciary and practitioners in both national and international matters.

[26] Sunde, 2017, page 23
[27] Sunde, 2017 s.20

Generally applicable regardless of the aim of the comparison:

The legal culture model created by Sunde is furthermore applicable for both students, appliers of law, lawmakers and scholars. Over the decades there has been created varied methods for splitting the concept legal culture into more manageable elements. [28] Famous scholars as Zweigert and Kötz, Wieacker and van Hocke and Warrington can be mentioned. [29] However, the models created by these scholars had more specific aims, and Sunde`s model is more applicable in general.

A more generally applicable model is more desirable, since this can help the judiciary to maintain legitimacy and cause predictability. For instance, today, it is both necessary and desirable for the judiciary to use comparative law in the courtroom. The intensity of internationalisation of law has increased rapidly after the establishment and development of the European Union and the Universal Declaration of Human Rights. Together with fundamental changes in communication technology, law is no longer a national matter. The legal culture model created by Sunde gives the judiciary a concrete tool if they are supposed to use comparative law in their decisions. For instance, if a national judge is facing an unclear dispute and is considering citing foreign case-law, the judge is faced with the question whether foreign case-law is relevant or not. The idea is that the courts should only be able to use foreign case-law within the same legal culture. In order to uphold the judicial authority, the judiciary need some methodical guidelines in order to sort out the relevant foreign sources.[30] A model that is generally applicable will help maintain the legitimacy of the judicial branch and prevents the conception of "cherry-picking" the relevant legal sources.

Flexibility:

The legal culture model created by Sunde is moreover flexible when it comes to how thorough a legal cultural investigation can be made.[31] Additionally, the model can take into account the dynamic phenomenon of legal culture. The exchange of expectations and notions to the law will take place as long as there are people in the world, and as a result legal culture will always be developing. The flexibility of the elements makes it possible to follow a cultural element's historical development over time. For instance, one can use the norm-production element of the model to examine the role of binding practices on the local thing in the 9th century and see how this led to Stortinget's legislative authority today.

[28] Sunde, 2017 s.20
[29] Sunde, 2017 s.20
[30] Zweigert, Kötz, 1998, page 65
[31] Sunde, 2017, page 20

IV. Weaknesses of the "Legal Culture model"

Simplifies the reality:

It can be implied that the model created by Sunde (and perhaps all models in general) are false in the sense that it simplifies something that is rather complex.[32] The model seems to equate all the elements of the legal culture, and this is perhaps not the case in reality. The point is that the six main cultural components are not separated, but on the contrary are in a reciprocal relationship with each other. Changes in one component often produce "ring- effects" in the others. In addition, there are some ideas and notions about the legal culture that are perceived as more basic than others. Legal culture can be said to have several layers, where the content of the elements at the deeper levels is more resistant to change. This observation is called the judicial sea.[33] When the legal culture model equates all the elements, it fails to capture this phenomenon. The model hence might have to be supplemented with the model on the legal sea in order to explain a legal change.

Distinguishes between legal culture in a broad and narrow sense:

Furthermore, Sunde`s model is based on a narrow description of legal culture. When we talk about legal culture, it is possible to distinguish between legal culture in a narrow and broad sense.[34] The narrow legal culture is the one defined by lawyers in common. The broad legal culture, on the other hand, is defined by all individuals in society.[35] These opinions may be non-judicial, but they still affect the notions of right and wrong. For instance, there is a number of ethical or religious attitudes that can influence the ideas and conceptions of justice. Other elements, such as the state's form of government, religion, socio-economic governance and legal ideologies is also relevant in a broad sense. However, such elements fall outside of Sunde's model. Although it is possible to distinguish between the two terms, it is important to point out that they are inextricably linked, and to a large extent affect each other. The model's rough division of the legal culture concept thus may be less suitable to say something about the content of the legal culture.

Aimed at national legal culture:

[32] Sunde, 2010, page 20
[33] Sunde, 2017 page 17
[34] Sunde, 2017 page 18
[35] Sunde, 2017 page 20

The last element in the model, namely “internationalisation”, indicates that Sunde's legal cultural model is constructed for an analysis of a national legal culture. However, today, continental Europe is more connected than ever. The European Court of Justice and the EMD have become of great importance to European countries and require ever-increasing jurisdiction. Europa have gained a stronger institutional community. Ideas and thoughts about justice flows freely and has created a stronger intellectual community in Europe. Therefore, there may be reason to believe that the model should be modified, so one can talk about a European or western legal culture.

V. Summary:

To summarize, Sunde`s model represents a very useful tool in comparative and historical analysis of a legal culture (which actually can be illustrated by looking at task 1). The model breaks down the concept into manageable elements that capture both institutional and intellectual aspects of the law. The model is of general relevance and can thus help maintain stability in the justice system, which is desirable from a predictability and legitimacy point of view. On the other hand, it must be pointed out that the model also has clear limitations. The model simplifies the realty and might have to be supplemented with the model of the legal sea in order to explain a legal change. Moreover, the model does not capture perceptions from anyone other than the legal professions. As a result of this, the model has to be used with carefulness. One has to be willing to let go of the model's clear structures, rather than pushing legal cultural phenomena into elements where they do not belong. Henceforth, the model serves best as a starting point for the analysis of legal culture, and as a last digression it must be pointed out that the aim of model is nothing else.

VI. Bibliography:

Sunde Jørn, 2017 “Managing the unmanageable – an essay concerning legal culture as a analytic tool”, Comparing legal cultures, Bergen 2017

Zweigert and Kötz, 1998, “Introduction to comparative law”, Oxford