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JUS2012 1 Introduction to comparative law and legal cultures

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Seksjon 1

Oppgave	Tittel	Oppgavetype
ℹ	Information	Informasjon eller ressurser
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1 Question 1

Describe the concept of legal culture and the Legal culture model. Reflect on the advantages or disadvantages the Legal Culture Model offers compared to other classifications, such as legal families (civil law, common law), mixed legal systems based on civil and common law roots and provide examples to explain your arguments.

Write your answer in the box below. Changes are saved automatically.

1. Introduction

1.1 Initial remarks

A Legal culture can be described as the different norms and ideas made by institutional like practice. There can be many different reasons for comparing different legal cultures. One key aspect is to gain knowledge form others. There are several different ways of comparing, depending on which premises to base the comparison on. Examples of ways to compare are the functional method and the legal cultural method. In the following, key aspects of both *how* to compare, *advantages* and *disadvantages* of different classifications will be described and reflected on.

1.2 Legal culture

It can be hard to set a concrete definition of what legal culture is. There are many ways of defining it, but for a deeper understanding of the term, it can be clarifying to elaborate about different elements of the term. For instance, Koch describes that legal culture refers to more than just a *legal system.* The legal system often refers to the institutional aspect, and is clearly a part of a legal culture, but not solely. Furthermore a legal culture is more than *legal family,* because this is seen as to superficial and not detailed enough, to compare. Furthermore, the legal culture term aims to classify both the institutional part but also the intellectual parts. This can be described as not just reviewing core elements and ideas, but to review different social matters, religion, norm production and so forth. The whole point is to review a both broader, but also deeper aspect of a country's law, and the ideas behind it. This will ensure a more fair and precise overview of a country.

2. The Legal Cultural Model

2.1 General remarks

The legal cultural model, often referred to as LCM, is a model developed by Soren, Koch. This model aims to describe both *institutional* elements and *intellectual* elements of a country's legal system and aspects. The reason for the design of this model, is to get a more precise comparison, seen in light of what, for instance, the *functional method* is able to compare. Where the functional method is interested in *how* a law functions in a country, the LCM is interested in *why.* This will engage a broader comparison, where the focus from black-letter text will be broaden.

2.1 The different elements of LCM

As mention, the legal cultural method is divided in both intellectual and institutional elements. Additionally, these two are divided in 6 more elements, namely (i) conflict resolution, (ii) norm production, (iii) ideal of justice, (iv) legal method, (v) professionalization and (vi) internationalization. The two first ones are connected to the institutional elements, and the rest is connected to the intellectual elements of a legal culture.

(i) Conflict resolution

The conflict resolution in a country refers to the way different countries are solving different problems at hand. The essential part here is how the court system is built up. For example, the conflict resolution in Norway is based an a more unified system, with a lot of Quasi-judicical institutions. Meanwhile, the French court system is characterized by a high degree of

specialization and different branches. The understanding of this entails a broader understanding of how a country is handling disputes.

(ii) Norm production

The norm production in a country refers to the way different legal norms is produced. It is here essential to determine which norm producer is seen as primarily. For example, in England and Wales, the court is seen as an important norm producer. This is because if the common law tradition developed in the Middle Ages. Meanwhile, in France, following the French revolution and the strong idea of division of powers, the Parliament is the most important norm producer. France can also be classified as a civil law country. The way a country produces norms is essential to know about for a foreigner that is comparing different legal cultures, mainly to see where the norms are from, and in which hierarchy different norms are in. Legal pluralism, the idea of different parallel norm producers, can also be relevant to review here.

(iii) Ideal of justice

Moving on to the intellectual elements, the ideal of justice in a country refers to what a country sees as important for their legal system to accomplish, and how they accomplish it. This can be both different principles, such as equality before the law, division of power and the principle of people sovereignty, but also statuary norms, such as the Norwegian principle of legality embodied in their constitutions § 113. Different countries also have different history and problems, and this is also often reflected in a country's ideal of justice.

(iv) Legal method

The legal method in a country refers to how legal practitioners uses different norms and just in general how things within a legal culture works. An important aspect is the legal hierarchy in a country. For example, in England, it is important to notice that equity always prevails over common law. But at statue, always prevail over common law. This is important to clarify what is the current law in a country. Colombia, for instance, has its own law that describes what to do if two statues are in conflict with each other.

(v) Professionalization

This element refers to the the degree of professionalization and education in a country, but also the different requirements for the different legal practitioners within a legal culture. For example, the German legal culture has an extraordinary high degree of specialization, with both a long educations and several state exams, and periods of legal training. The difference between judges and lawyers within a legal system can also be emphasized.

(vi) Internationalization

This element refers to the degree of international influence a country has. For example, whether a country is seen as *monistic*, or *dualistic.* As a consequence of the extensive regional and international cooperation one see in todays world, it is essential to clarify the degree of internationalization. For example, several countries are part and member of the EU, and therefore experiences huge influence from them, both in terms of conflict resolution and norm production. France and Germany are examples of EU-members. Internationalization can therefore be relevant to emphasize under other elements of the legal cultural model.

3. Comparing the Legal Cultural Method with other methods

3.1 General advantages and disadvantages

There are several advantages of using LCM to compare different legal cultures. A main point for this model, is to ensure a broader baseline for comparison. To extract and include both intellectual and institutional elements will give a broader aspect of a country's legal culture. The model also works very well for a overview of many different legal cultures, especially for people learning about a new legal culture. This is yet what can be seen as a disadvantage as

well. In the aim of focusing on a broad aspect of the legal culture, it can be harder to go in depth, for example on specific areas of lar or different rules. Therefore the model works best in comparing different cultures on an general matter, but works less effective in comparing concrete problems at hand.

3.2 Functional method

The functional method is focused on the functioning of different laws. This is seen as more of a traditional way of comparing. This model is focused on finding *functional equivalents*, which means similar results achieved on issues, but with different approaches. The advantage of this model, compared to LCM, is the way it focuses in concrete problems, and how different countries are solving similar problems at hand. For example, every country has issues regarding execution of murders. The functional method can then be used to concrete compare different reactions different legal systems has on this issue. For example, USA are focused on the generally deterrent effect, and gives out long lasting sentences in prison. Meanwhile, Norway focuses on the individual preventive aspect, which entail shorter sentences and more humane treatment. This comparison would be less effective in an LCM perspective.

3.3 Legal families

3.3.1 General about legal families

Legal families is a way to divide different legal cultures in a regional matter. The idea behind this is *taxonomy,* which is common to find in different areas of study research. An abstract illustrative example, is the way handball and football, for instance, are categorized as "ball play". In a legal aspect, one can say that Norway and Sweden is part of a Scandinavian legal family. This can give a broader overview of differences and similarities in the world, across border lines. An issue about this classification, is that the result of division often must be very general, and takes little individual consideration. Therefore, it can be hard to use the information that the legal families categorization gives, in a concrete comparison, because each individual country has a certain degree of individuality and uniqueness. Which legal family one belongs to, can also depend on which premises one focuses on in the classification process. The legal cultural model will in this case give a more analytic and individual comparison.

3.3.2 Common law and civil law

A broader classification of the legal families can be found in the division between common law- and civil law-countries.

A common law country is a country where the use of precedent and court made law is essential and one of the main norm producers. *Stare decisis*, which is the rule of precedent as being legally binding, is often important in common law-countries. The common law tradition developed in England during the Middle Ages, and spread throughout the world during the colonization period of England. The reason behind this tradition was how the judges were viewed as protectors of the citizens rights. Therefore, it was important that the judges had powers to develop and decide legal norms. Common law countries, especially England, is often also focused on *equity* which is a reaction on common law giving too rigid results. This also secures flexibility.

Civil law countries is focused on written norms, often produced by a parliament or other insinuations with legislative powers, where the court's task is to evaluate and conclude based on the law, with little or no room for discretion. This tradition is heavily inspired by the roman law, with a strict tradition of codification. An illustrating example is Germany, which is a clear civil law country. They have an scientific-like approach to legal questions, and focuses on finding correct solution in written laws.

In comparison with the legal cultural model, the division of civil- and common law gives a very general division between countries. An advantage of this can be to quickly get an overview of which sources of law that is important and roughly how norms are produced. A disadvantage is the lack of precision, and the way the classification in some degree can be misleading. For example, USA is seen as as common law country. This can give the impression of the court as the main norm producer. Meanwhile, when taking a closer look, the constitution, statues and even regulations is superior in the legal hierarchy, on both a federal and a state level, compared to case law. Therefore, written statues always prevails over case law.

Another element of the discussion of the division of common law- and civil law-countries is the extent amount of internationalization. This entails that the distinction between the civil and common tradition is fading. For example, when England were part of EU, written legislation and the European courts role was essential in the areas of law regulated by EU, which is strongly civil law oriented. Even today, one can see remainders of the EU tradition and regulations, which entails another method then the English system traditionally operated with. The Legal cultural model can therefore function better to describe developments and differences that develops over time.

3.3.3 Mixed legal system

A mixed legal system is a categorization where elements form both the civil law and common law-traditions is found within a country. An illustrative example of this is Norway, which in some areas of law are very positive law oriented, such as labor and tax, while in others are precedence and court focused, such as tort and contract law. Compared to LCM, this categorization gives even less precision and solution when comparing different countries, and is seen as a middle classification of the already very general classification of civil- and common law. The creation of this middle category can maybe seen as a reaction of the original division of common- and civil law being to general, and the need of further classification. This can be seen as an advantage, as more classification can give more insight in a legal culture.

One interesting aspect of these classifications is how a country would be classified, without taking the history of the country into consideration. Again, one can see an advantage of the LCM, where the history and culture of the country can be seen as *part* of the classification.

3.4 Postmodern critique

The postmodern view is a critique of the traditional way of doing comparative law, but without eliminating or critiquing all of the traditional ways of comparing. The critique is focused on how the traditional method, such as functionalism and universalism, focuses on black-letter laws, and misses essential parts of a country's religion, history and social circumstances. Highlights of the critique is the idea of law as a requiring immersion, which means that one have to think as an insider to get a real understanding and view of the whole of a legal culture. Furthermore, the idea of legal pluralism, both strong- and weak pluralism is important. This entails the idea of multiple norms exciting in a parallel in a country, for example norms regarding indigenous people working alongside the written law. It will in this case be wrong to only evaluate the written laws, because this doesn't provide the whole picture. Compared to the LCM, postmodernism will go even further in both the analyzing the country and in the comparative stage. This way of thinking can therefore give a broader and deeper analysis of a legal culture, compared to the LCM.

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2 Question 2

Describe and compare the ideals of justice between Colombia and Germany. When comparing, highlight the connection of the ideal of justice with legal method and norm production; provide explanations for the identified differences/similarities, and offer critical reflections. Critical reflections can be about each legal culture or about their comparison.

Write your answer in the box below. Changes are saved automatically.

1. General remarks

The ideal of justice refers to how a legal culture views and uses different principles, to achieve what their legal culture views as fair and correct. Different countries can have different principles and focuses in the way of achieving this goal. This can be explained by both sociological and historical reasons. The following will illustrate a comparison of the ideal of justice in Colombia and Germany, highlighting the connection between ideal of justice, legal method and norm production. The two countries will be described individually, before a comparison will be done in the end.

2. Colombia

2.1 General remarks and history

Colombia is a country with a long and dramatic history, characterized by a lot of conflicts and social injustice. The country was former a Spanish colonization, but became independent in 1819. Colombia has a diverse nature, with focus on environmental rights. The main religion is Christianity. A challenge within the Colombian legal system, and general, is the lack of general trust in the authorities and powers. The country has bee through a lot of different constitution, but the present one is from 1991 and aimed to transform Colombia. The country is also viewed as a middle income nation. In the following, key aspects of the ideal of justice will be presented.

2.2 Ideal of justice

Important purposes in the Colombian legal culture, is to correct the consequences of war and violence, and to have social justice. The 1991 convention also contains human rights and environmental rights, which therefore is seen as important. The 1991 convention also came with a new focus on materializing right, and not just formalizing them. This aim is done trough many ways, but an important one is the "Tutela" cases. This is cases regarding questions and violations on the convention of Colombia. Whats unique about this case type, is that it is both free and fast, with a time limit of 20 days. This is important for the process of materializing the convention and making rights availably for more people.

2.2.1 Direct justice

Colombia is focused on direct justice within its country. This entails the importance of equality before the law and predictability. Colombia is categorized as a civil law country, and therefore legislation, through statues and codes, are an important source of law. Although, Colombia also has a focus on individual fairness, and promotes that a fair outcome is more important than to follow the precise wording of a legislation in each case. Tutela also shows the focus on direct justice, and that economy should not determine the availability of rights. Even though this is a clear basis, one can see that, for example, the rights of peoples living outside the cities often is as accessible as for those living in the city. This is often tied to economic and knowledge issues.

2.2.2 Structural justice

Structural justice entails a focus on discriminated groups of people, such as minorities, women, immigrant, refugees and so forth. That a case should achieve structural justice, can therefore be used as a element of the evaluation done by the court. This elements is also tied

to the extreme social injustice in Colombia, and the aim to equalize this injustice. Tutela is also here an important aspect of achieving structural justice, and give different groups of discriminated groups access to rights in a broader and more effective manner. It is also a fact that a consequence of the Tutela system, intensify to angle a question with a constitutional frame, so that the case is classified as a Tutela case, and therefore become free to solve. Tutela cases can be handled by every court, but the most important ones will be dealt with by the constitutional court.

3. Germany

3.1 General remarks and history

Germany is a country that can be defined as a civil law country, with strong roots to the Roman law tradition of codification and written statues. Germany's most important source of law is the "GG" or Basic Law, classified as their constitution. The constitutionality became a focus point as a consequence of the WW2, which also led to a higher degree of internationalization and influence from abroad the German borders. Germany is a federal state, and therefore has court systems on both federal and state level. Norm production is therefore happening in both state level and federal level, but the systems is more unified compared to, for instance, the USA federal system.

3.2 Ideal of justice

Germany has an almost scientific approach on legal matters. The focus for the courts is not on *creating* a right solution, but to *find* the already created solution. Therefore, the court system is highly specialized and focuses on principles such as legal certainty and predictability. This can also be demonstrated in how they use case law, namely not as a binding source of law, but because of the scientific approach and legal certainty, the results in two cases should be equally the same. The principle og legality is also seen as important in the German legal culture. The importance of constitutionality, which was highlighted in the times following the WW2, can be seen in the fact that Germany has their own federal constitutional court. Constitutionality can therefore be seen as an individual principle of importance within the German legal culture. One principle that is important, but in som cases must prevail, is the individual fairness. It is often seen as more important to find the right legal solution in that specific case, rather then conclude on whats seen as the most fair in that particular case. It is also important with a due process and the availability to appeal through different instances.

4. Comparison between Colombia and Germany

4.1 General remarks

As demonstrated, Colombia and Germany can be seen as two countries with both similarities and differences, and in the following it will also be highlighted how the norm production and legal method will affect the similarities and differences in terms of the ideal of justice.

4.2 The comparison

It can be a relevant starting point to pinpoint the reality of both country's being civil law-countries. This entails that both countries values statues and codes as a primary source of law. When comparing in detail, it must however be remarked that Germany is likely more focused on correctness and wording then Colombia. As a consequence of a history of social injustice an low trust, it is in some cases seen as more important with social- and direct justice, rather than just following the wording of the law. Germany does not struggle with the same degree of social injustice, and therefore does not consider this element in the same way when interpreting and concluding in the court.

With regards to interpretation and legal method, Germany has a rather fixed way of interpretation through a so called "canon of interpretation". This entail the wording of a law being the starting point, and if the wording is unclear, one will do systematic interpretation,

followed by a historical interpretation and then a teleological interpretation. A systematic interpretation entails to consider a provision in context of the law and other laws. A historic interpretation entail to consider a provision and its history and changes. A teleological interpretation entails considering purposes and aims behind the legislation and provisions.

In Colombia, they also have the elements of interpretation, and also starts with the ordinary meaning of a provision. This can therefore be seen as a similarity. Although, Colombia also has more elements and tools for interpreting, and these are also statutory. This can be seen as a difference in terms of legal method, which in Germany is mainly produced by legal scholars.

The German scientific approach is clearly a difference of the two countries, also in terms of norm production. Germany is focused on finding one already made answer to a dispute, where Colombia can also focus on the aspect of individual fairness. This can be explained in the two countries historical roots, with the social injustice and war Colombia, has and still is, experiencing.

An interesting aspect, and also a similarity between the two countries, is the importance of constitutionality. Both Colombia and Germany has their own constitutional courts, which is both very powerful. In Colombia, one can even view the constitutional court as a *negative legislative producer.* This is because the way the constitutional court can direct the Congress, which is the main norm producer, of regulating something that is not regulated, within a given time frame. For example, the constitution court can direct the Congress to allow same-sex marriage within 2 years. The congress must follow this direct, and therefore the constitutional court also is seen as indirect norm producer. The constitutional court in Colombia may also, as the only court branch in Colombia, decide for groups of people, based on an individual case. Therefore, a breach of a violation for a group of people, can be concluded in the terms of an individual case.

This importance of constitutionality can also be seen in the German legal culture, and their federal constitution court is completely separated and handles cases only in violation of the Basic Law and constitutional matters. An interesting aspect is that the German constitution court is the only court giving out dissenting votes. This can again be explained in the way German views the legal process in a more scientific way, so there should not be two different answers to problem.

Another interesting aspect of the two nations is the importance of legal practitioners. Meanwhile Germany appreciates legal scholarship very highly, especially in terms of interpreting, Colombia has an very high amount of educated lawyer, with around 560 per 100 000. For Colombia, this is a lot, especially taking the low trust into consideration.

More specifically in terms of norm production, and how this should achieve the ideal of justice, Germany has the parliament as its main legislator. This can be spotted as a difference, especially the institutional aspect of the countries. The parliament in Germany consists of both *Bundestag* and *Bundesrat*. The legal making process consists of debates and also the emolument of the government. Norms can also be produced at a state level. The importance of the parliament, as the peoples elected, making the laws, is important in Germany. This also reflects the principle of people sovereignty.

In Colombia, they have a strong multiparty presidential system, and a centralized structure of power. The president has a lot of power, and can also under giver circumstances give out executive orders, and therefore can be seen as a norm producer, in a limited degree. The principle of division of powers is therefore not as strong here, as one can see in Germany. This again can be rooted in the two countries different historical backgrounds. For example, Germany has seen the consequence of imbalance in the division of powers through WW2.

This can also explain the high degree of specialization and focus on constitutionality. In Colombia, it is more focus on letting go of a history of distrust and conflict, and therefore the possibility of, for example, the president going beyond his limits of power, is less likely and therefore the division of powers is not ass important, even though its clearly a principle that is followed in both countries.

A similarity to pinpoint is the constitution as the highest source of law. International influence is also affecting both Germany and Colombia in terms of legal method and norm production, but Germany as an EU member has although higher international influence, with the possibility of direct affect regulations from EU. One interesting aspect about Colombia and the legal hierarchy in terms of internationalization, is that treaties regarding human rights actually achieves the same level hierarchy as their convention. A consequence of this is that Colombia than will have the 1991 constitution, that already has a lot of human rights in it, and treaties regarding human rights at the same level, creating a "block" of human rights on a constitutional level. Treaties not regarding human rights, achieves same level of hierarchy as statues. In Germany, the constitution is, as mentioned, on top of the hierarchy, and no international treaty can archive the same level.

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