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Seksjon 1

Oppgave	Tittel	Oppgavetype
ℹ	Information	Informasjon eller ressurser
1	Question 1	Langsvar
2	Question 2	Langsvar

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

This essay aims to describe the concept of legal cultures. The Legal culture model (LCM) will also be described, as it provide a good example of how to get around the concept of legal cultures. Last, the Legal Culture Model will be compared to other classifications, and both advantages and disadvantages will be discussed.

2 Legal Cultures

Every country has a different legal system, and all countries have different backgrounds. Legal systems are shaped by factors such as history, religion, politics and much more. Thus, it is fare to say that all legal systems share different cultures, and in the litteratur this can thus be described as "legal cultures". In the litteratur legal cultures are described as "ideas and expectations of law made operational by institutions (like) practices". The fundamental point is that all legal systems share different values and has different views on what law is. Consequently, it is important to look beyond the written laws when the goal is to fully understand a legal system.

Legal cultures can be seen as a "legal sea" with different layers that are in constant interactions. The surface level change often, middle level not so often, and the bottom change very rarely. The legal sea shows us that while some countries may look similar at the surface, they can be very different if one dive deeper into each cultures.

2.1 Legal Culture Model

The Legal Culture Model (LCM) was developed by Jørn Sundehagen and it is a tool to get around the different legal cultures. Since the term "legal cultures" is broad Sundehagen developed the model as a analytic tool that can be used to compare different legal cultures in a good and logical way. The model is divided into two structures: an institutional structure and a intellectual structure. In addition, there is 6 element in the model that can be used when comparing two different cultures. The institutional elements are conflict resolution and norm production. In the intellectual structure we find ideal of justice, legal method, professionalization and internationalization.

These elements is used to get a better understanding of a legal culture, and it is used to pinpoint both similarities and differences between two cultures.

An example of the LCM in action can be provided by using the element norm production. Norm production refers to how a legal system produce legal norms. By looking at this the comparattist will get a better understanding of the whole legal culture and the systems roots can more easily be tracked down. In France, for example, norm production is mainly made by the parliament and the country has large and systematic codes. On the other hand they do not have precedents, meaning that the there is no case law. This is in big contras to the English legal system, where precedent (stare decisis) is a big producer of norms, in addition to the parliament. This reflect that France is heavily influenced by the civil law tradition, in contrast to England as a common law country.

Furthermore, by looking at the term ideal of justice, the comparatist can get a broader understanding of the fundamental values in a given country, and thus get a better understanding about why they look and practice the law the way it does. Ideal of justice often reflect a systems history, and it consequently provides a better understanding of the country. All six element can be used this way.

2.2 Other classifications

2.2.1 Legal familes

Legal families is a form of classification of different legal systems. Thus, taxonomies are used to get an overview of different legal systems. The distinction between common law and civil law provides as a good example. The civil law tradition is influenced by roman law, while the common law has their roots in England. By dividing countrys into these categories the comparatist can get an overview of what the system is build upon.

Some characteristics of civil law families is that written law is heavily used, often in codes. This ensures predictability, but at the same time one can argue that it lack flexebility. Judges are often active, and lawyers are more passive in the court room - inquistorial system. Judges should only apply law, not develop it.

On the other hand, a core characteristic of the common law tradition is precedent (stare decisis). Thus, they have case law - law made by the courts. In addition these systems often have a adversary system, meaning that lawyers are active in the court room, with a passive judge. Precedents secure predictability, as court must follow their previous decisisons. But it also provides flexebility, because a new "law" do not have to go through the parliament.

Examples of civil law families are France, Germany and Colombia. Examples of common law systems are England and USA. Thus, by knowing that USA is a common law state, it is easier to get an understand of how their legal system works. Since a core characteristic of the common law tradition is precedents, the comparatist can assume that U.S practice common law. Consequently, legal families can be a good starting point for a comparatist and other that tries to get a better understanding of a legal culture.

2.2.2 Mixed legal systems

Norway is an example of a "mixed legal system", since it is influenced by both common law and civil law traditions. For example do Norway practice precedent through the Supreme Court, but not as heavily as England. Norway also have a fragmatic legislation, in contrast to civil law countries such as France and Germany. In addtion, Norway do not have a complete adversary system, such as the U.S, but at the same time the system is not as inquistorial as the french legal culture.

3 Comparison

3.1 Advantages of the LCM

The legal culture model is excellent if the goal is to dive deep into a specific legal culture. By applying the model, the comparatist will instantly get a better understanding of why the law is practiced and applied the way it is in the given country. Thus, the model is also good for pinpointing similarities and differences between different legal cultures. In contrast, a comparatist may not get such a good understanding by just comparing different legal families, such as common law and civil law. This because two common law countries can be quite different at the "bottom layer". A good example is U.S and England. While both practice precedents, the latter balance this with equity, while the former balance it with strong constitutional protection. The reason is because both have different background. Thus, this reflect that two different cultures within the same "legal families" ca be quite different if you dive deeper. Consequently, the LCM would add a deeper understanding.

Norway, as a mixed legal system, is also a clear example of why it can be dangerous to compare different legal families. By applying the LCM, the comparatist would get a better understanding of the history and tradition of Norway, and thus it would be easier to pinpoint why Norway reily both on precedents and written law.

In the litteratur the concept of putting countries into different legal families has also been criticised, for overlooking differences and similaraties. By forcing a country into either a common law family or civil law family, naunces may be overlooked. Furthermore, in order to categorize, different criterion is needed. For example: if one criteria for beeing a common law country is having precedents, shouldn't Norway be a common law state? What if a country is traditionally was influenced by Roman law, but have a adversary system - should it be a common law or civil law system then? The point is: Different people can but the same country in to different legal families, by emphasising differnet elements. Thus, it may be problematic to to put countries into different legal families, and the LCM may therefore be a better starting point.

3.2 Disadvantages

A disadvantage with the LCM, compared to legal families, is that the LCM can sometimes be to complex. For example a student that do comparative law, may find it more easily to grasp the understanding of common law vs civil law.

A other disadvantages of the model is that it lack the ability to compare how law can be used similar to achieve equal outcomes. Here, the functional method is better. The starting point of the functional method is a similar socio economic problem - for example car crashes. Then the comparatist look at how different countries deals with car crashes, and last, they compare the outcomes. Thus, the compartist can find functional equialences; countries solve the same problem, but in a different way. Thus, this model is good if the goal is to find out how similar problems are solved within different states, which then again can be used as inspiration to improve the solving of that specific problem within the home country. Since the legal culture model do not compare such problems, the model lack the ability to improve specific areas such as how to deal with car crashes.

3.2.1 Postmodernism

Postmodernism can also provides as an example of disadvantages of the legal cultural model. They believe that it is impossible to "have a view from nowhere". Each individual is influenced by their own history and roots. Therefore they argue that it is impossible to get an objective standpoint, and thus a comparison will never be 100 % neutral. Hence, applying the LCM comes with problems of lack of a objective viewpoint, and therefore the comparison may not be so good. The same can be said about comparing different legal families.

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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 Introduction

The topic of this assessment is to compare the legal culture of Colombia with Germany. The purpose of a comparative analysis is to get a better understanding of two countries and reflect on similarities and differences between two cultures. Furthermore, disadvantages and strengths of both systems will be discussed. Legal cultures can be defines as "ideas and expectations of law made operational by institutions (like) practices".

In the comparison the Legal Culture Model will be applied, and the core elements in this essay are ideal of justice, norm production and legal method. By applying this model I will analyse how the Ideal of Justice within each country influence their legal method and norm produciton, aswell as looking at similarities and differences.

2. Ideal of Justice

The element "ideal of justice" can be described as the fundamental values and belivies within a given legal system. A countrys Ideal of Justice form how the whole system work. Hence, it is a good starting point for getting around a specific legal system.

3. Colombia

3.1 General

Colombia is in the litteratur described as a civil law country. Colombia was earlier under spanish colonisation, and 90 % of the population is Christians. The country has suffer from a lot of violence, and to this day the citizens in generally have little trust in the institutions. In 1991 Colombia got a new Constitution, marking a shift in the system. This background, is important to keep in mind in the following.

3.2 Ideal of Justice in Colombia

Protection of minorities and constitutional rights is a big part of the Colombian Ideal of Justice. For a long time minorities such as woomen and indigenous people suffered a lot in Colombia. Therefore, protection of fundamental values plays a huge part in the country. The article 13 of the Constitution therefore says that law can not just be formal but must be practiced in reality. In addition, predictability through written legislation is a big part of the ideal of justice in Colombia. As we will se, Colombia do not have precedents, with an exception of the Constitutional court which in some cases are binding.

3.2.1 Direct and structural justice

The distinction between direct and structural justice is important in Colombia. Direct justice refers to fairnes in each individual case. This is achives through equality before the law, a fair trail, access to the court etc. The point here is to achive fairnes in each individual case. In addition, Tutela cases can be used to achive direct justice. I will come back to the term "tutela".

On the other hand, structural justice, is broader. The goal is not fairness in the specific case, but to use the law to get social change in the society. This reflects Colombias history as discussed earlier. Structural justice can for example be achived through instructions by the

constitutional court - which can instruct the government to fix a specific problem - for instance to give water to a big group of people. This is unique in Colombias legal system.

3.2.2 Connection to norm production

Colombia is characterized as a civil law country. The constitution sits at top, followed by statutes and and regulations.

The main norm producer in Colombia is the congress, which have general competence to produce norms. In addition, the executive can sometimes get competence to give out legally binding regulations. Colombia also have a president, which in limited areas can give out executive orders. The 1991 Constitution sits at top and protects fundamental right from being broken by the state. Furthermore, international law is also a part of colombian law. Colombia do not have precdents (stare decisis) with one big exception which will be discussed in the following.

3.2.3 "Tutela" and the Constitutional court as a "negative norm producer"

To achieve equal treatment of the law, and to protect exposed groups Colombia has a concept called "Tutela", which is quite unique. If a citizen belives that a constitutional right as been violated he or she can then get this tried through a "Tutela" case. Tutela cases is a quick way to get a courts to evaluate if a fundamental right is broken. It is cheap, and the judges must handle the case within 10-20 days. The most important cases can then be appealed to the Constitutional court. This concept is a big reflection of Colombias history, and their ideal of justice to this day - where protection of fundamental rights stand in the middle.

In the litteratur the Constitutional court is described as a "negative norm producer". This because the court can give out instructions. If the court finds that a law violate the constitution they can instruct the congress to remove or change the law. In addition, if the court finds out that a big group is being violated, the court can instruct the government to fix this problem. This is unique in Colombia, and reflect that the country is trying to "give back" to all the suffering that has been in the country.

3.3 Impact on the legal method

Legal method is how a judge or someone who practice law resonate to solve a legal question. In Colombia the Constitution sits at top, followed by legislations and regulations. Case law and legal scholars are not formal sources but act as a supplement to the formal law. In addition, international treaties are important in the legal method, ensuring that Colombias law is intact with international treaties.

One interesting thing is that human rights treaties get constitutional power, and therefore these are especially important in the legal method. This reflects the ideal of justice in Colombia, where constitutional rights and predictability is important.

In Colombia they use different interpretations styles:

1. Literal meaning is starting point.
2. Systematic
3. Teological interpretation
4. History - such as looking at how law is practiced earilier and preparatory works
5. Purpose
6. Analogy

4 Germany

4.1 General

Germany is a civil law country, aswell as a federal state. Similar to Colombia the country has sufferred a lot, especially through the WWII. As we will se this is heavily reflected in the

countrys ideal of justice, aswell as their norm production and legal method.

4.2 Ideal of justice

In Germany the core ideal of justice as described in the litteratur is predictability through coherence codes, and safeguaring of human dignity. The latter reflects Germanys war history, where human dignity was violated a lot. Predictability is secured through systematic codes. Judges should only apply the law - not make it. Germany also has a constitutional court with huge influence, safegurading constititutional rights, and especially human dignity.

The Constitutional court use proportionality to evaluate if a law is violating a constitutional rights. They ask: Purpose? Suited to acchive the purpose? Necessary? And lastly, isolted proportinality? This reflects that constitutional rights is very important, and it should be heaviliy protected.

4.2.1 Connection to norm production

To understand the norm production in Germany it is important to notice that Germany is a federal state, meaning that the power is divided between the federal level and state level. This means that norm production both happended at the federal level and the state level. However, in contrast to the federal state U.S the federal level in Germany is the producer of most of the norm is Germany. The states produce norm at fields like schoool, but the federal level stands for most.

The parliament is the main norm producer, and the government can give out regulations. In Germany they do not have precedent. Therefore, one can argue that predictability is more important than flexebility in the German legal system. Consequently judges should just apply the law, not make it. This reflects Germanys ideal of justice, where predictability and human dignity is important. One can argue that this model is more democratic than a typical common law country. This is because the parliament is chosen by the people, in contrast to the judges.

However, judges still interpret and "fill in gaps" where it is needed. Thus, one can say that judges in reality have some impact on norm production.

It is also important to notice that legal scholars plays a huge part in Germanys legal system. Law is seen as scientific and as a machine: if you apply A the result should be B. Since legal scholars is Germany are heavlu proffesionalised, they plays a huge when it comes to propose new legislations, as well as interpret it. Thus, judges often refers to legal scholars in their judgments.

In addition it must be mentioned that Germany is heavily influenced by international law, especially through EU and ECHR. EU-law has direct effect in Germany. This reflects their history after war - they wanted to cooperate with other countries.

4.2.2 Connection to legal method

Germanys ideal of justice is also reflected in their legal method. In Germany they have a scientific approach to the law. As said earlier they belive that there is only one answer. Therefore, if one just apply the law, a fair result will come. Thus, judicial discretion is not valued in Germany, reflecting predictability as a core value of their ideal of justice. In Germany they have four interpretations styles: literal meaning, theological, history and purpose interpretation.

In the legal method the Constitution sits at top, followed by codes and legislation. Legal scholars are actively used and case law is not a formal source to law.

5. Comparative analysis

5.1 Similarities

Both Colombia and Germany has their roots in their civil law traditions. Both countrys aims to protect constitutional rights. This reflect that both have suffered earlier, as discussed earlier. As a consequence, both values predictability, and this is reflected each countrys norm production. Both have codes, and judges should apply the law - not make it. Furthermore, both have strong constitutional court that safeguard constitutional protection. In addition to the legal method, judges in both systems should only apply the law. Furthermore, the Constitution sits at top, followed by legislation made by the parliament/congress. Both are in addition influenced by international law. Last i will mention that both systems are specialized, with different court for different fields.

5.2 Differences

Although both systems share similarities they also have differences. Colombia has Tutela, which set them apart from Germany. Colombia is not part of EU, making international norm production quite different in these countries. Furthermore, the use of legal scholarship is much more used in Germany, in big contrast to Colombia. The latter can also been seen in light of the legal method: In Germany legal scholars has developed the legal method, which is not the case in Colombia. In Germany they have a inquistorial court system, but in Colombia they are more of a mix between active and passive judges. In a

6 Critical reflections

Although Colombia values high protection of constitutional rights, one can argue that protection in reality in not so good as it seems. Tutela, for example, is often heavily overused, making it difficult to get a tutela case tried as fast as it should. Furthermore, the handbook pinpoints that it is difficult to get access to court for people living outside the cities. In addition , the country still suffer from low trust in the institutions, which can lead to distrust in judgments and law made by the parliament.

In Germany codes should secure predictability. However, a critic, is that it may lack room for flexibility. Codes are often difficult to change, and it can therefore be difficult to adapt law to social change. Furthermore, the divide between norm production at federal and state level can make it unpredictable for citizens, since the law in specific fields may be different within each state. One can also argue that to rely so much on legal scholars is un democratic - legal scholars are not chosen by the people, which can be seen as problematic.

Last, one can argue that comparing Colombia and Germany is not fruitable. Altough both are seen as civil law countries, they have quite different backround. In addition they are heavily seperated geographically, which make the comparison little complicated. For example are Colombia a christian country, which means that religion has influenced their values more than in Germany.

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