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Western Legal Culture & Comparative History and Theory of Legal Methods

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Task 1:

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Comparison and discussion of the use of judicial decisions as source of law in Norway and in England in light of the legal culture model.

I. Introduction

In order to compare the use of judicial decisions as a source of law in Norway and England in light of the legal culture model, one must identify what *legal culture* is. Legal culture is a label we put on observations we make, which means that legal culture is a construct that can be helpful when analyzing and understanding a legal system use of judicial decisions.[1] One can define legal culture as "ideas of and expectations to law made operational by institutional(-like) practices".[2]

The Norwegian legal culture often appears as a "mixed legal system", which means it can be linked to the civil law traditions, as well as the common law traditions.[3] Looking at the English legal culture, the picture is a totally different one, as it is often referred to as "the founding father of the common law family".[4] One of the main differences between the civil law and the common law systems is the question of the authority when using judicial decisions as a source of law.[5]

The aim of the following essay is to look at the broad characteristic when comparing the use of judicial decisions in Norway and England, as well as to discuss the approaches to the use of judicial decisions as source of law in these two countries.

II. Comparison of the use of judicial decisions as the legal source in Norway and England

In order to understand and make a comparison of the use of the judicial decisions as a legal source in Norway and England, one must identify the central characteristics in both legal systems. The use of judicial decisions as sources of law will be discussed through the structural elements norm production, conflict resolution, legal method and

[1] Koch & Sunde, 2020, p. 26
[2] Ibid, p. 27
[3] Ibid, p. 142
[4] Ibid, p. 333
[5] Dainow, Joseph, 1974, p. 636, *The role of judicial decisions and doctrine in civil law and in mixed jurisdictions*, https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3094&context=ilj

idea of justice. These elements are based on the Legal Culture Model (LCM) presented by Koch & Sunde[6] to make the comparison more manageable. However, it is important to emphasize that these elements are not intended as an exhaustive list, but rather intended to provide an overall look at the comparison.

Norm production

In Norway the main source or basis of the law is legislation, and the vast majority of legal areas are codified in a systematic manner. There is no "stare decisis" principle in Norwegian Law, because precedent produced by the Norwegian Supreme Court is not formally binding.[7] Stare decisis means that the courts are obligated to follow historical cases when making a ruling on a similar case.[8] However, the decisions passed by the Supreme Court is regarded as precedent and the Supreme Court can use the judicial decision when deciding a case that has similarities to the precedent. In cases where the law is non-statutory the use of judicial decisions as source of law is crucial. The case law has an increasingly persuasive authority due to its major influence in the creation of non-statutory law.

In contrast, the use of judicial decisions as source of law in England, marks a deviation from Norway. When the English court decides a particular case, it become the law, as well as it has to be followed in the future cases of the same sort. Furthermore, new problems bring new cases, and these enriches the rules of the English law.[9] These rules will also apply to the decisions of courts at a lower level. In contrary to the Norwegian legal system, the principle of *stare decisis*, is a key part of the English legal system. The principle requires courts of lower rank to treat the decisions of higher-ranking courts as legally binding.[10]

Conflict resolution

In regards of how the use of judicial decisions as a source of law in Norway plays a role in the Norwegian system of conflict resolution, one must distinguish between the

[6] Koch & Sunde, 2020, p. 33
[7] Koch & Sunde, 2020, p. 120
[8] Ibid, p. 358
[9] Dainow, Joseph, 2013, p. 425, *The civil law and the common law: some points of comparison*, https://www.dphu.org/uploads/attachements/books/books_4037_0.pdf?fbclid=IwAR19fntqYtUil7uRSoq4gVIdoE6840PRrr38TEcWxgTRoXgxXMawM2dsOx4
[10] Koch & Sunde, 2020, p. 358

ordinary court hierarchy and quasi-judicial organs of conflict resolution. For the courts with lower ranking than the Supreme Court their judicial decisions can only be relevant as a legal argument base, and therefore not binding for the higher-ranking court. [11] Furthermore, regarding the principle of stare decisis, the lower ranking courts are deemed to use the Supreme Courts precedent, but not legally bound to do so. A decision of a quasi-judicial organ can give great argumentation value, but on the other hand, the decision cannot contribute as an independent legal argument base.

The English system of conflict resolution consists of several court hierarchies, and which court the case end up in depends on if the case is criminal or civil.[12] In contrast to Norway, the judicial decisions of higher-ranking courts are legally binding for lower courts, and due to the principle of stare decisis the lower courts are obligated to follow the precedent produced by the higher court.[13] On the other hand, the decisions of lower courts are generally deemed persuasive but not a legally binding source on higher courts, similar to the Norwegian system of conflict resolution.

Legal method

Legal method can be defined as the way one applies the law to solve legal problems.[14] The founder of the legal method in Norway, Torstein Eckhoff, has its origin from an extensive analysis of the Supreme Courts judicial decisions.[15] The system is based on the thought that the law cannot be found in one single source, but is constructed from a number of factors. The judicial decisions are therefore a key factor when deciding what the law is but is not considered as the primary source of law. However, in the absence of other higher ranked sources of law, judicial decisions may contribute as the primary source of law.[16]

Opposite to the Norwegian legal method regarding the use of judicial decisions, the judicial decisions are considered to be the primary legal source of law.[17] Although the judicial decisions is viewed upon as the most relevant source of law, this does not

[11] Koch & Sunde, 2020, p. 115
[12] Ibid, p. 386
[13] Ibid, p. 359
[14] Ibid, p. 126
[15] Ibid, p. 127
[16] Ibid, p. 130
[17] Ibid, p. 386

mean that everything that is said in a given decision will be attached equal weight by the other courts referring to it. Thus, it is important to distinguish between the *ratio decidendi* of a case, and statements which are made *obiter dicta*. Ratio decidendi refers to the reason for the decision and are binding for the other courts under the doctrine of precedent. Obiter dicta is statements that deals with matters beyond the material facts of the case, and are not necessary to settle the case, these statements are not legally binding in future cases, but contains great persuasive value.[18]

Similar to the English legal culture, according to general jurisprudence in Norway an obiter dictum does not have the same importance as ratio decidendi statements. However, in light of the use of judicial decisions as source of law in a common law country as England, an obiter dictum given in one case, can easily become a ratio decidendi in the next one due to the obiter dictums great relevance for new cases.

Idea of justice

In the Norwegian legal culture, the main ideal of justice of legal predictability, which reflects through the courts use of judicial decisions.[19] By producing precedent for cases yet to emerge it contributes to secure the legal predictability for similar cases in the future. Also, by creating precedent, the Supreme Court can influence the norm producer to make adjust the law into fairness.[20] Thus, the use of judicial decisions helps to secure the balance between predictability and the individual justice and fairness.

However, in the English legal culture the main ideal of justice is equity.[21] One can roughly define equity as the quality of being fair and impartial.[22] An additional definition of equity is that it can be perceived as a sub-system of the English legal system which secures justice and fairness.[23] In cases where the former judicial decision gives an unfair outcome, the concept of conscience and fairness would be enforced, by allowing the court to overrule the decision.

[18] Ibid, p. 359
[19] Koch & Sunde, 2020, p. 122
[20] Ibid, p. 123
[21] Ibid, p. 373
[22] Stewart, J.W, 2006, Equity, https://legal-dictionary.thefreedictionary.com/equity
[23] Stewart, J.W, 2006, Equity, https://legal-dictionary.thefreedictionary.com/equity

III. Summary of similarities and differences

A similarity between the Norwegian and English norm production in light of the use of judicial decisions, the judicial decisions can help to create norms in areas where there is a lack of statutes. New problems bring new cases that has not been decided before, which leads to new and clarifying norms.

Regarding any differences, the judicial decisions is not considered formally binding as a source of law in the Norwegian legal system. On the contrary, in England the decided cases become the law, which means that the decision also will apply to the courts at a lower level.

A similarity of the use of judicial decisions in light of conflict resolution in Norway and England, is that the decisions made by courts with lower ranking than the Supreme Court, will not be legally binding for the higher-ranking court.[24]

Concerning the differences of the two legal systems, the judicial decisions of higher-ranking courts in England are legally binding for lower courts, and the court at a lower level is obligated to follow the precedent from the higher court, unlike in Norway where the lower ranking courts are just strongly encouraged to follow the precedent.[25]

Regarding the use of judicial decisions as a source of law in light of the legal method, both the English and Norwegian legal system attaches less importance to the obiter dicta statements contra the ratio decidendi in the judicial decisions.

Nevertheless, the legal effect of using an obiter dictum as a source of law is quite different. In Norway the use of an obiter dictum from a former case law will not have the same legal weighting as a ratio decidendi, the impact on the next case will thus be low. On the contrary, in England the obiter dictum in one case can easily become a ratio decidendi in the next case, due to the great importance of judicial decisions in the common-law system.[26]

[24] Koch & Sunde, 2020, p. 359
[25] Ibid, p. 111
[26] Ibid, p. 359

Both the Norwegian, as well as the English legal system, provides solutions if their judicial decisions leads to unfair results. While the use of judicial decisions as a source of law in Norway contributes to make the law fairer and more flexible, the use of equity in England secure justice and fairness where the judicial decisions would give an unfair outcome.[27]

IV. Strengths and weaknesses to each approach

Pros and cons with the use of judicial decisions in England

A strength with the English legal systems use of judicial decisions, is that it secure certainty. By having the courts to follow cases that have been decided before, one can often easily predict the outcome of similar cases. This can also help to save public money and time by having to take less disputes to court.

Flexibility is also a strength followed by the use of judicial decisions as a source of law. The courts are able to depart from their own decisions and overrule other decisions to secure legal fairness and flexibility.

On the other hand, the systems rigidity can appear as a weakness. Avoidance of the judicial decisions, especially from precedent, is quite restricted.[28] Another weakness to the English legal systems use of judicial decisions is the lack of democratic legitimacy. By applying the judicial decisions as law, it undermine the legislators who are elected by the people. Finally, by allowing the courts to avoid following precedent, the court cases can easily become unpredictable.[29]

Pros and cons with the use of judicial decisions in Norway

A strength with the use of judicial decisions in Norway is that the precedent helps to clarify the law for cases yet to emerge. Secondly, by using the judicial

[27] Stewart, J.W, 2006, Equity, https://legal-dictionary.thefreedictionary.com/equity
[28] Koch & Sunde, 2020, p. 359
[29] Ibid, p. 358

decisions as a "secondary" source compared to the legislation, the norm producer's democratic legitimacy will be retained.[30]

By not having legally binding judicial decisions, which can be deviated from at any time, one can create uncertainty. Furthermore, on the positive the precedent can create clarity, but on the other hand one has to be careful with an uncritical use of yesterday's solution on today's problems.

V. Summary

In summary, although the Norwegian legal culture is as a hybrid of elements from both the civil law tradition and the common law tradition, while the English legal cultures whole foundation is based on the common-law system, each has made movements in the direction of the other.[31] This in spite of Norway's less stricter binding character of case law, in contrast to England's production of legal norms in form of precedent.[32]

The function of the judicial decisions in Norway, on one side, and in England, on the other, are not so strict as to be mutually exclusive. Both systems use of judicial decisions as source of law have maintained the balance between the elements of flexibility and adaption, on one hand, while assuring the essential attributes of stability and legal security, on the other.

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[30] Ibid, p. 119
[31] Dainow, p. 434
[32] Koch & Sunde, 2020, p. 799

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Task 2:

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An explanation on what Sacco mean by 'Legal Formants' and what the purpose of his approach to comparative law is.

I. Introduction

The primary aim of comparing legal cultures is to gain better knowledge of legal rules and institutes.[33] When comparing the legal systems in different cultures, one often uses a theoretical method to determine how we look at the law in the different legal systems. One approach to comparative law, called the *legal formant approach*, has been developed mainly by Rodolfo Sacco, and aims at revealing the formants who contributes in shaping what we call 'the Law.[34]

The theory of legal formants gives a list of reasons on why decisions made by the court is not the entire law, neither is the statutes nor the definitions or legal doctrines given by scholars.[35] In order to know what the law is, it is necessary to analyze the entire complex relationship between all the formative elements that Sacco calls the *legal formants* of a system.

The aim of the following text is to look at what the term 'Legal Formants' means, and what the purpose of Sacco's approach to comparative law is.

II. The meaning of the term 'Legal Formants'

A formant is known as a group, type of personnel or community, institutionally involved in the activity of creating the law.[36] In order to understand what the law is, it is necessary to analyze the entire complex system and its relationship between all the

[33] Sacco, Rodolfo (1991) *Legal Formants: A dynamic Approach to Comparative Law (Installment I of II), American Journal Of Comparative Law, p. 4*
[34] Monateri, P.G (2015) *ABC of Comparative Law: Legal Formants And Comparison* *https://www.researchgate.net/publication/290574779_ABC_of_Comparative_Law_Legal_Formants_and_Comparison*
[35] Bussani & Mattei (2005) *Common Core of European Private Law* http://www.jus.unitn.it/dsg/common-core/approach.html
[36] Monateri, P. G (2012) *Methods in Comparative Law: an intellectual overview, p. 7.*

formative elements that make any given rule of law among statutes, judicial decisions, principle, rules, former writings and so on.[37]

Furthermore, Sacco describes the three types of main personnel as the practicing lawyer, the legal policymaker – such as legislators and judges – and the legal scholar which includes law professors etc.[38] The courts, legislators and lawyers are all viewed as interacting and competing formants in the shaping of the law.[39] They are doing this by using former sources of law, like judicial decisions as an example, and combine this with a professional method developed over time, where they transform the 'old' source to produce new ones.[40]

Thus, instead of thinking the first step toward comparison is to identify "the legal rule" of the countries to be compared, one must rather speak of the rules of constitutions, legislators, courts and of the scholars who formulate the legal doctrine.[41]

III. General features, which emphasizes the meaning of the "Legal Formant Approach"

Sacco based his method on the idea to gain complete knowledge of a country's law we cannot trust entirely what the jurists say, due to the potentially wide gaps between the operative rule and the rule as commonly stated.[42] The 'Legal Formant Approach', also known as the dynamic approach to comparative law, therefore looks for differences of all kinds, both between and within the documents.[43]

In the standard legal approach, one look at a constitution as a unitary document interpreted by lawyers and applied by judges, while in the formant approach the constitution is considered a document derived from a number of sources. On the

[37] Bussani & Mattei, 2005
[38] Sacco, 1991, p. 22.
[39] Monateri, 2012, p. 8
[40] Ibid, p. 8
[41] Sacco, 1991, p. 21
[42] Bussani & Mattei, 2005
[43] Monateri, 2012, p. 8

contrary to the standard legal approach, every judicial decision which explain its meaning is simply just another interacting competing formant shaping the law.[44]

All of these formative elements might not always be coherent and are usually conflicting. As mentioned above, one can picture the formants in a competitive relationship to one another. In some cases, the formants that makes the given rule may have been affected by confidential circumstances. In that matter, the formant approach may also be considered a contextual approach. One must not only know how the courts have acted, but also put in consideration the influence of the formants to which the judges are subjected.[45]

To illustrate this one must distinguish between the Common and the Civil Law. The common law is marked by the preeminent role of the courts, while the civil law is characterized by prevalent relevance of legislation.[46] In the English legal system, as a common law system, judges can be appointed from an academic position, and can tend to put more stress on scholar opinions than judges who has always practiced law.[47] In contrary, a Norwegian judge tends to be more influenced by the text of a statute, even when previous judicial decisions have disregarded it.[48]

IV. The purpose of the Legal Formant Approach when comparing legal systems

The main purpose of the Legal Formant Approach when comparing legal systems is to reveal the formants who is shaping the law in order to understand the different rules and institutions that are compared.[49]

When comparing statutes or code provisions in a given system that can seem to be identical to the provisions enacted in other systems, the purpose with the formant approach is to unveil the true meaning by deconstructing the law to reach its working

[44] Monateri, 2012, p. 8
[45] Bussani & Mattei, 2005
[46] Ibid, 2012, p. 19
[47] Dainow, 431.
[48] Koch & Sunde, 2020, p. 120
[49] Sacco, 1991, p. 6

level, beyond the peculiar legal discourse of one tradition.[50] This deconstruction is necessary to make a meaningful analysis of the given law.

In light of the Legal Formant Approach's purpose, it can reveal how the formants have had influence on a judicial decision. For example, in cases where the judge has deviated from the legislation, it does not mean that the judicial decision is 'the law'. Due to the dynamic aspect of the Legal Formant Approach, it is clear that different formants can be asserted and shape new results.

V. Closing remarks

As the text has shown the main purpose of the Legal Formant Approach when comparing legal systems is to reveal what the law truly is by exposing the complex relationship between the legal formants.

The best example to illustrate the main purpose of the formant approach is our very own legal system in Norway. The Norwegian legal method is based on the idea that the applicable legal rule(s) in a concrete case often depends on a combination of different arguments that must be derived from specific legal argument bases in order to be accepted as legitimate.[51] This mean that the law cannot be found in one single source, but is constructed from a number of factors.

The importance of this approach becomes clear through common values in a legal system, like legal security and democracy. By basing the meaning of the law on just one legal formant, for example an elite, it would undermine the legal security, as well as the fundamental democratic principles. By doing so the elite can legitimate itself for giving opinions.

[50] Monateri, 2012, p. 23
[51] Koch & Sunde, 2020, p. 128

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