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PRØVE

JUS2012 1 Introduction to comparative law and legal cultures

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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.

Legal culture and the legal culture model

What is "legal culture"

One can say that every state has their own unique legal culture. The concept of legal culture can, however, be received as somewhat vague. Jørn Sunde describes legal cultures as "ideas and expectations of law made operational by institutional(-like) practices". By this definition of legal culture, one has tried to put tangible criteria for how a countries legal culture can be described.

Kaario Tuori on the other hand has created a way of viewing legal cultures as an image of a three layered ocean. On the surface level there is the time specific pieces of legal norms, such as a single piece of legislation passed by the legislator. On the middle level we have more enduring aspects of law, such as how precedent is considered a legitimate part of the Norwegian legal method. An on the bottom level there are the fundamental ideas of law, such as the idea that justice shall be served when injustice occurs. This image illustrates how legal culture can be both static and dynamic at the same time. The aspects of the surface level may change at a rapid speed, while the deeper you dive into a legal culture the less changes happens over a long period of time, or ever at all in the bottom level.

Both Sunde and Tuori's definitions, or ways to look at legal culture, illustrates that it can be a difficult to concrete describe what a legal cultures actually is. There are however been developed tools and models that further help a comparativist to describe the content of legal cultures.

Legal Culture Model (LCM)

Jørn Sunde developed the Legal Culture Model (LCM form here of), this model has at purpose to look at some concrete aspects of a countries legal culture. The model is has two main categories; the institutional structure and the intellectual structure. The institutional structure described the main institutions of norm production and how they relate to each other. This category is further divided into the two sub-categories of conflict resolution, and norm production. While the intellectual structure captures the ideas of law and how the institutional structure is made operational. This category is further divided into four sub-categories of ideal of justice, legal method, professionalization and internationalization.

The model operates with seemingly clear cut divides between the categories, however in practice one can tell that many categories intertwine. For example one can discuss aspects of internationalization in the category of legal method since the aspect of international law in many, if not all, cases effect the legal method.

Legal families

The LCM offers one way to classify and organize a countries legal culture. However there are also other ways of classifications. Western comparativist might use the term "legal families" when describing ways to systemize and categorize legal cultures. Legal families can be

described as a way of classification based on similar traits across different legal cultures. The two main categories in western legal culture are the civil law family and the common law family. The civil law family is based on the commonalities found amongst the legal cultures in continental Europe, while the common law family have their origin from the legal culture in England and Wales which further spread due to the colonialism.

One can argue that the core difference between the two legal family is whether they consider case law and precedent as a formal source of law. For example France is considered a civil law family, due to the strong principle of the separation of powers only formally passed legislation from the legislator is considered a formal source of law. Legal arguments can only be deducted from codes, statutes or parliamentary acts. Precedents or other sources of law are only considered guiding and only has a argumentative value. In England on the other hand, which can take the credit as the founder country of the common law family, case law and precedents is viewed as the key developer of the law. In England common law is regarded as law developed from below, one can only make policies when a conflict is bought in for the courts.

Civil law countries tends to have highly specialized court structure, an inquisitorial style of proceedings and legal professions are seen as being gatekept. Common law countries have more generalized courts, adversial style of proceedings and there seem not to be many formal criterions to the legal profession. In England one can get a license to practice law without going to law school, assumed that they pass an exam, and in the US federal judges gets elected thorough vote in Congress legal education is not a formal requirement (but highly valued in practice). There are many further aspects of commonalities within a legal family and differences between the two different families, they will however not be further discussed here.

As illustrated above both methods are ways to tackle the assignment of mapping out one countries legal culture. In the following I will discuss the strength and weakness each of the models/ways of categorization. The following will further contain explanations for further illustrations.

The broader picture with LCM

Jørn Sunde argues that using categorization into legal families is a great tool for navigating unknown terrain. By this one can conduct that looking into which legal family a countries legal culture is in, is a good staring point when first getting to know a legal culture. However nuances tends to get over looked and by focusing on the commonalities the countries in the same legal family has, one tend to overlook the many differences. The LCM on the other hand looks at a broad specter of criteria, and looks more deeply intro the underlying structures and elements, and might be a little overwhelming to when first looking into a countries legal culture.

By using the LCM one looks more closely at the individual legal culture, where also the differences can get better emphasized. For example while comparing the legal culture in the US and in England, if one only looked at the commonalities both countries have as a common law countries.One could easily overlook the differences. For example such as the US having both state court structure and federal state court structure, due to the federalism, while England is no federal state. By using the LCM one gets a broader picture of the actual content in each individual country.

In addition to the point made above, while the categorization into legal families have a more black or white thinking (either you fit into here or into the other) the LCM are more open to accept the fact that some countries does not fit perfectly into those categories. The category of mixed legal systems can be described as legal systems that are both inspired by common law and civil law traditions. For example some might categorize Norway in both the common law

family and the civil law family. In Norway precedent is a recognized source of law, there is one generalized court structure and there are no codes, all of which are a typical common law trait. On the other side Norway put a lot of emphasis on statutory law passed by the Parliament. Case law can only conduct their own norm production where there might be a gap in legislation, based on other legal sources of law, and legal education is reserved for the few which has the best grades after high school, there are no separate path to become a licensed practitioner of law without legal education. These are criteria that better fit the civil law tradition.

For the cases of mixed legal systems the LCM has the advantage of looking at the different aspects of the countries legal culture without the expectation of what it should be according to a legal family. Furthermore, as illustrated with mixed legal systems, the LCM works beyond legal families. One can use the model without the concern if it will fit the legal system of a common law or a civil law family, or other legal families beyond Europe

Summary

Classifications such as categorization into legal families is great starting point when one wants to look into a new and unknown legal system. It shows what you typically can expect. However by conducting the LCM you get a better picture of what the reality of the legal system at hand looks like. By conducting the LCM one can focus just as much as the similarities a country have with other legal systems in the same legal family as the differences they have despite the commonalities. The LCM therefor unlocks a deeper understanding of the individual countries legal system.

Ord: 1447

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.

Ideal of justice in Colombia and Germany

Setting the scene

Both Colombia and Germany is by some theoretics considered civil law countries, due to the shared commonalities such as the shared commonalities in their legal method where statutory law is preferred over precedent or other sources of law. Furthermore both countries have som historical similarities with dark periods of war, corruption and violations of basic human rights, which has shaped how the countries now in modern times especially value the rule of law and are protective of human rights. On the basis of these one could assume that they also have many similarities in their legal culture, such as the aspect of ideal of justice in Jørn Sunde's legal cultural model.

In the following I will describe, compare and discuss the similarities and differences found when conducting the comparison of the ideal of justice in both Colombia and Germany. Other aspects of the Legal cultural model such as norm production, and legal method will also by discussed in connection to how the ideal of justice comes to show in further aspects of their legal culture. Finally there will be some further discussion of reflections and considerations concerning the comparison of these two countries.

The ideal of justice

Legal certainty

Similar for both counties are the balance between legal certainty and individual justice. By legal certainty both put emphasis on legality and that it is the rule of law that is conducted in legal reasoning. Legal certainty secure equal protection before the law, and therefor legal certainty is tightly connected to the legal norms and the process of conducting fair legal reasoning.

Formal sources of law such as statutes are heavily emphasized in both legal systems. In Germany the divide between formal sources of law and informal sources of law is significant in their norm production. One can only base their legal arguments on formal sources of law such as the constitution, legislative acts from the federal and state parliament and recognized international law. Other sources of law such as legal history (preparatory work), administrative regulations and legal writings are only of argumentative value and for guidance. One cannot conduct their legal reasoning based on the latter category. This further effects their legal method where law is perceived in a scientific point of view, where one can conduct the same systematic deduction and induction of legal reasoning to find the rule of law. Since the reasoning is first and foremost based on the wording and purpose of the legislation one, the strict use of legal syllogism is considered as significant for preserving the legal certainty.

In Colombia they do as well put emphasis on the written legislation, similar to Germany they prefer statutes and codes over precedent and the principle of stare decisis. However they acknowledge that all of the state power produce legal norms. The legislator is the only one who produces statutes, the executive branch produce administrational regulations and decrees, and the judiciary gives judgement which are binding, *inter partes.* However, in

Colombia it is further emphasized the judgement conducted from the constitutional court. The constitution is considered the norms of all norms and the rulings of the constitutional court are acknowledged to make clear the constitutional framework. The constitutional court can conduct three types of rulings, T-ruligs, SU-rulings and C-rulings. T-ruligs are for overseeig already decided tutela actions (will be discussed below), and human rights, SU-rulings for organization of precedent, and C-rulings for claims og unconsitutionality or other constitutional claims.

On the basis of this one can argue that Colombia have a more pragmatic approach to secure legal certainty than syllogistic Germany, because their legal method consists of more formally acknowledged legal sources due to them having more formally recognized norm producers. On the other hand a counterargument is that even with the strict division of formal and informal sources of law in Germany other sources of law is still used as guidance and argumentative patterns can be conducted from earlier judgement to secure equal protection before the law. Germany has a constitutional court as well, which also conducts important judgement on the scope of the Federal constitutional framework. The judgement form the Federal Constitutional courts are seen as just as significant in Germany as in Colombia. The difference is therefor in practice not necessarily as striking as it first might seem.

Individual justice

In Germany one believe that individual justice is served when one has gotten a fair and right result after conducting the legal reasoning. When conducted systematic and right, one has gotten the same equal protection before the law as other similar cases.

In Colombia on the other hand individual justice has a tight connection to the long history of corruption, war and discrimination the country has faces the over the decades. They usually then differentiate between direct justice and structural justice. By direct justice one wants to secure everyone materialistic right to justice, This through sustaining each right to equal protection and right to fair and just trials. This is however not always secured. The legal system in Colombia is overloaded with cases, and if one lives in the suburbs or outside the big cities it will be more difficult to access the judiciary system and legal aid.

Direct justice presume that there are no discrimination and that everyone is on equal basis, Colombia has however acknowledged that that is not the reality. Through structural justice the country works towards equal footing between especially vulnerable societal groups such as woman, disabled, and indigenous people just to mention a few.

To further secure the individual justice Colombia has the mechanism of tutela actions. Tutela actions are a free and accessible mechanism where everyone who believes that their fundamental rights have been violated by a person position in power or in a position of power over them can fill out a claim. The tutela actions are an extraordinary characteristic of the Colombian legal culture, with the purpose of serving individual justice. Every court has the competence to rule in tutale cases, it is however in the jurisdiction to the constitutional court to oversee them. Many will then frame their tutela action as a violation on their fundamental human rights to get a sort of fast track to the constitutional court.

Further discussion

One might argue that Colombia has better mechanisms to secure individual justice, because they seemingly have more mechanisms. That does however not show the bigger picture. Germany does also preserve structural justice, they have also recognized ands ratified the Convention of CRPD and other conventions to secure the rights of vulnerable societal groups. Furthermore the establishment of the tutela action is on the basis of the low trust the colombians have in their government. Tuteal actions are by many the only accessible option for legal aid. This affects the whole comparison, even though both states conceder them self

as social states which has the purpose of preserving fundamental human rights one can argue that they are not on the same sociopolitical level. The Colombians are still in the establishing fase of being a democratic state where many measurements are put in actions to persevere the peace, the tutela actions are just one example. In Germany on the other hand people show a higher trust in their government, even if the caseload is overloading the judicial system. This shows that the two different countries are at two different socio-political stages which causes different measurements to be taken.

Furthermore the how the ideal of justice is connected to norm production between Germany and Colombia is difficult to compare due to the fact that Germany is a federal state, where both the federal government and the state government are norm producers. One can however argue that the ideal of justice is always an underlying aspect of a legal culture, and that it would not be effected by how the hierarchical structure is set up. Both in Germany and in Colombia the norm producers, even if it is just one parliament or both a state and federal parliament, must be in accordance to the constitution. It is however not to deflect from the fact that Colombia and Germany are two very different countries with different structural measurements to provide legal certainty and individual justice.

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