Høgskolen i Innlandet

KANDIDAT

729

PRØVE

JUS2007 2 Western Legal Culture & Comparative History and Theory of Legal Methods

Emnekode	JUS2007
Vurderingsform	Hjemmeeksamen
Starttid	14.10.2019 07:00
Sluttid	18.10.2019 12:00
Sensurfrist	08.11.2019 22:59
PDF opprettet	08.11.2019 09:59

Seksjon 1

Oppgave	Tittel	Oppgavetype
i	Information	Dokument
1	File upload	Filopplasting

1 File upload

Din fil ble lastet opp og lagret i besvarelsen din.

Last ned | Fjern | Erstatt

Filnavn:	Home exam, Western Legal Culture, candidate nr. 729.pdf
Filtype:	application/pdf
Filstørrelse:	281.41 KB
Opplastingstidspunkt:	18.10.2019 05:02
Status:	**Lagret**

2019

JUS2007-2 19H Western Legal Culture & Comparative History and Theory of Legal Methods Home exam

CANDIDATE NR: 729

WORD COUNT: 3468

Date of submission: 18.10.19

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Task 1. The Role of legal scholarship in Common Law and Civil Law

1.Introduction

By looking at the importance of legal scholarship in different legal system, one may observe divergences, especially while comparing Civil law countries to Common law countries. Some places legal scholarship has a more significant role than the other.

In this text there will be a discussion on the role of legal scholarship in respectively civil law and common law systems. In addition, there will be an illustration on how legal scholarship is considered in Norway, and whether the Norwegian legal system on this point has more similarities with Civil law or Common law.

1.1 Definitions and clarifications

Legal scholarship is a term which is well availed in comparative law. In this context, however, legal scholarship is to be understood as everything that has a close connection to the academics of the law, such as prominent law professors, legal literature and legal science at large.

Further on, when it comes to the comparative method that will be conducted in this text there will be applied a more superficial approach, a so-called macro-comparison. Zweigert and Kötz describe the macro-comparison as a comparison of "the spirit and style of different legal systems, the methods of thought and procedures they use" [1]. This approach tends to provide an overall comparison of legal systems, as here with legal scholarships.

2. General features of Civil Law and Common Law

2.1 Geographical placement

Civil Law is alongside with the common law tradition two large and predominant legal traditions. The civil law tradition, for instance, covers a great amount of continental Europe[2]. This applies to countries such as France and Germany. Nonetheless, the Civil Law tradition may also be seen outside of Europe, for instance in countries of Latin America[3]. One could say that the inner filet of Civil Law is positioned around where the former Holy Roman Empire stretched, as many of these nations stems from the Roman tradition[4].

[1] Zweigert and Kötz 1998, 4. In contrary to micro-comparison which goes down a specific and concrete level on certain field, see p. 5
[2] Marryman, J. H., & Pérez, P. R. (2007). The Civil Law Tradition, An introduction to the Legal Systems of Europe and Latin America (3 ed.). Standford: Standford University Press, pp. 2-3
[3] Glendon, M. A., Carozza, P., & Picker, B. C. (2007). Text, Materials and Cases (3 ed.). St. Paul: West Academic Publishing. Carozza Paolo; B, Picker, p. 69
[4] Muller-Chen, M., Muller, C., & Widmer Luchinger, C. (2015). Common Law and Related Systems . In Comparative Private Law. Zurich : Dike, p.153

The Common law tradition, on the other hand, covers other large proportions of the world. Besides England, Common law is the prevailing law in countries that historically have been deeply involved with the colonization of the British Empire, such as in United States, India, the English-speaking parts of Canada and Australia[5].

2.2 Historical lines

As earlier mentioned, Civil Law originally derived from Roman law, and still is influenced by the Roman tradition. In the times of the Roman Empire there were several attempts to collect and write down Roman law. Firstly, by Emperor Justinian in the mid early sixth century, who tried to collect ancient Roman law in his Codex, Corpus luris civilis[6]. This codex was rediscovered and developed further by scholars at the University of Bologna in the eleventh and twelve centuries, with a more systemizing collection of Roman law[7].

Thus, Roman law was the foundation stone of the Civil Law tradition, and the scholars were the driving force behind establishing the modern Civil law.

When it comes to the Common law tradition, vital historical differences may be detected. While in the Roman tradition in medieval times endeavoured to create a law codex to cover the entire empire, the Common Law tradition were different. There's is no indication of the Common law's early history line where one may observe that legal scholarship has had a deep impact on the development of the legal tradition, but rather a development of the legal tradition in court practice[8]

In the following a more deeply comparative discussion on these to legal branches will be conducted, where the utility of scholarship in Civil Law and Common Law will be elucidated.

3. How scholarship is utilized in Civil Law and Common Law

3.1 Legal Scholarship in the Civil Law tradition

Legal scholarship has already mentioned to have an enormous impact in the development of law in many Civil law nations. The comprehensive German Civil Code was mainly written by high prominent scholars, which had completed several decades of scientific law research[9]. The scholars also provide commentated supplement to the legislation, to account what the intention of the law is. In contrast to Norway for example, were the law intentions usually is written by the legislator in the preparatory works of the law.

[5] Muller-Chen, M., Muller, C., & Widmer Luchinger, C. (2015). Common Law and Related Systems . In Comparative Private Law. Zurich : Dike, p. 210
[6] Repgen, T. (2009). Civil Law. In The Oxford International Encyclopaedia of Legal History (Vol. II, pp. 4-11). Oxford: Oxford University Press, p. 5
[7] (Repgen, 2009, pp. 6-7)
[8] (Muller-Chen, Muller, & Widmer Luchinger, 2015, p. 214)
[9] Koch, S. (2017). An Introduction to German Legal Culture. In S. Koch, K. E. Skodvin, & J. Ø. Sunde, Comparing Legal Cultures (1 ed., pp. 171-201). Bergen: Fagbokforlaget, pp. 187-189

In France the role of scholarship might not perhaps be that immense as in Germany, yet it is still heavily regarded as valuable, among other thing, when it comes to formation of the law and assistance to judges[10]. Thus, scholarship is a great factor in legal systems of Civil law.

3.2 Legal Scholarship in the Common Law tradition

In Common law the attitude towards legal scholarship is more hesitant. The British academic William Robson proclaims that "[i]t is scarcely too much to say that jurisprudence hardly exists in Great Britain"[11]. Although this statement might be deemed as unprompted and punchy, Robson do have a point. For Common law nations, such as England and United States, case law traditionally was deemed as the most significant source of law[12]. Albeit, enactment of laws since 20th century have been more domination in Common law nations[13].

However, the scholars did not have that much influence on this process. The written laws of the Common Law tradition derived most often from legal rules developed in the judiciaries. In contrary to the Civil law tradition, were case law and the courts served more as a function for further development of the law. Hence, legal scholarship has, on a general basis, a more passive role in the Common law tradition.

3.3. Comparison on the importance of legal scholarship in these two branches

The next section contains a comparison between Common law and Civil law on of the role of legal scholarships.

Jakob Sundberg separated these two legal branches, by stressing out that Civil law "springs from the pens of professor", while Common law "is the creation of judges"[14]. Further, if we think about this perspective regarding who the author of the law is, several cleavages may be detected, chiefly regarding linguistic differences.

In respect to the Civil law tradition one may observe well-articulated legal norms and coherent structure of the legal codes.[15] While in the Common law nations, in terms of statutes, it seems like the most important aspect is that the language is concise and understandable, and not necessarily perfectly precise. By this, it is important to highlight that the content of Common law for the most part derives from practice of the courts, while the content of Civil law evolved from the many years of legal research in the universities[16].

In academic writing, one may therefore claim it requires rigorous professional standards in terms of formulations as such. This also applies to the composing of laws for the society,

[10] Bragdø-Ellenes, S. C. (2017). An Introduction to French Legal Culture. In S. Koch, K. E. Skodvin, & J. Ø. Sunde, Comparing Legal Cultures (pp. 131-160). Bergen: Fagbokforlaget, p. 154
[11] Robson, W. A. (1935). Civilization and the Growth of Law (42 ed., Vol. 11). London: Macmillan Publishers, p. 254
[12] (Muller-Chen, Muller, & Widmer Luchinger, 2015, p. 241)
[13] Ibid, p. 222
[14] Sundberg, J. W. (1969). Civil Law, Common Law and the Scandinavians. In Scandinavian Studies in Law (Vol. 13, pp. 179-205). Stockholm: Almqvist & Wiksell, p. 187
[15] Zweigert, K., & Kötz, H. (1998). The Legal Families of the World. In Introduction to Comparative Law (3 ed.). Clarandon Press, p. 69
[16] (Zweigert & Kötz, The Legal Families of the World, 1998, p. 69)

especially when the law is an offspring of decades of scientific research. Even though laws which are not written by people from the academic field, there still is demanded to hold a certain adequate standard of formulation. Although, it cannot be asserted that it requires the same strict standards as law formed by scholars.

Another point is the former diverge focus on legal education. In United States, for instance, there for a long time was, in several states, provisions that allowed citizens to practice as a judge or lawyer, without the wide demands of professionalisation that there is today. This left some traces behind, when it comes to formalities in court[17]. As a Common law country, one may theorize that this might be one of the reasons why provisions in countries such as United States are not that well-articulated than for example in Germany. Further, it is important to highlight that the scholars of the Civil law tradition usually, among other thing, were teachers[18]. Thus, Civil law writers have greater demands in the making of the law in light of their background.

Further on, back to the question on who the author of the law is, one also may elucidate the importance of personality of respectively the judges of Common law and the legal scholars of Civil law. An adjudication from a high-profiled and experienced Common law judge carries for instance more weight than a decision from a new and unknown judge[19].

Correspondingly, has high-regarded scholars in, for instance the Civil country of Germany much value in both the supplementary comments of the German Legal Code, and in the construction of it. As an illustration, resulted the writings of the famous law professor Carl Friedrich von Savigny that the codification of German law to be postponed by almost 70 years, and hence provided the legal scientists a wiggle room for developing the code even further with more legal research[20].

Wherefore, it is possible to state that the highly regarded positions of scholars in Civil law jurisdictions may be equivalent to the respectively same position prominent judges has in the Common law tradition. This might be considered as a reason why legal scholarship is that noticeable in the Civil law tradition and not so much in the Common law tradition.

3.4 Summary remarks

Briefly summarized, these to legal traditions constitutes the main branches of law in the western legal cultures and diverge when it comes to scholarship. It is suitable to proclaim that the role of legal scholarship is of greater importance in the Civil law tradition than in Common law.

[17] Zweigert, K., & Kötz, H. (1998). The Law of the United States of America. In Introduction to Comparative Law (3 ed., pp. 238-255). Oxford: Clarendon Press, p. 241
[18] Max Rheinstein, "Common Law and Civil Law: An Elementary Comparison," 22 Revista jurídica de la Universidad de Puerto Rico 90 (1952), p. 101
[19] (Muller-Chen, Muller, & Widmer Luchinger, 2015, p. 228)
[20] (Koch, 2017, pp. 187-188)

4. The Norwegian Legal Traditions and the country's utility of legal scholarships

Further on in this text, there will be a discussion on Norway relationship towards this topic, and where to place the Norwegian attitude towards legal scholarships in relation to Common law and Civil Law.

4.1. General aspects and historical lines

According to professor Berhard Gomard of the University of Copenhagen, Norway is to be placed in the Scandinavian law tradition, along with the nations of Denmark, Iceland, Finland and Sweden[21]. Further, in Zweigert and Kotz opinions the Scandinavian law is to be regarded as an own legal tradition, which contain elements from both the Civil law and Common law[22].

Before the twelfth century the laws in Norway were one way or another produced by the case deciding regional assemblies[23]. Thus, law was not made by the scholars, but in practice by a collection of high regarded figures of the contemporary society. It also is important to highlight the fact that no universities were to be found in Norway at medieval times. Therefore, did impulses from, among other, the universities of continental Europe serve as inspiration for example for King Magnus Lagabøte in composing the Code of the Norwegian Realm in 1274,[24].

Even though there existed legal literature, and famous Norwegian authors like Ludvig Holberg produced some legal literature[25], Norwegian scholar, based out of Norway, was not visible until the years after 1811, when Norway got their own university, the University of Oslo[26].

4.2 Where to put Norway in this topical discussion

So where in this landscape of utilization of scholarship is it judicious to put Norway? Jørn Øyrehagen Sunde is on the assumption that the Norwegian legal culture can characterised as "a mixed legal culture" [27]. This may be interpreted as Norway is laying in between Civil and Common, also when it comes to legal scholarship

As a legal source in isolation, the opinions from legal scholars do not have tremendous weight in the Norwegian legal system, especially if we follow Torstein Eckhoff's ranking system for legal sources in Norway. In the ranking system legislation is placed on top, followed by preparatory works and case law[28]. Legal literature is detected much longer down

[21] Gomard, B. (1961). Civil Law, Common Law and the Scandivavians. In Scandivavian Studies in Law (pp. 27-38). Stockholm: Almqvist & Wiksell International, pp. 33-34
[22] Zweigert, K., & Kötz, H. (1998). Introduction to Comparative Law. Oxford: Clarandon Press, p. 277
[23] Sunde, J. Ø. (2013). An Unexpected Journey (A study of Norwegian Legal Literature that Indicated a Place for Norwegian Legal Culture between Civil and Common Law. Revista Juridica, pp. 1-15
[24] (Sunde, 2013, p. 7)
[25] (Sunde, 2013, p. 11)
[26] (Sunde, 2013, p. 13)
[27] (Sunde, 2013, p. 15)
[28] Jørn Øyrehagen Sunde, 2013, The Legal cultural dependency of the Norwegian legal method – and its future – to be publishing in: Contribution to the understanding of legal argumentation in Norway and Germany, p. 5

on the legal ladder, and hence cannot be deemed as a mandatory legal source while solving legal disputes, while legislation is, and to some degree case law. The same can be said in the Civil law tradition, for instance with the immense German Civil Code and the French Code Civil.

In Civil law nations such as Germany legislation and custom are deemed as binding.[29] Court practice and for instance opinions of legal theory, "cannot form the basis of legal claim" [30]. Nevertheless, they might be highly valuable arguments, if they are supported in a unified legal practice. This also applies to France. For legal literature might be a helpful tool to update what de lege lata of the law is (i.e. current law)[31]. This also implies that legal theory might be of help when establishing how the law is to be understood.

The same can be seen from a Norwegian perspective. In the Supreme Court of Norway, legal theory may be cited to substantiate the premises of the Justices, provided that the primary sources of law are utilized. For instance, in the Supreme Court judgement from Rt. 2011 p 1767, the court refer to the law professor Erik Monsen to clarify the starting point of the claim deadline for terminating a purchase of deficient apartments.

I addition there's an increasing number of legal scholars in Norway, from 12 in 1969, to be increased to about 90 scholars today[32]. With more legal academics, more legal literature and knowledge about the law may be spread, and the legislature may get impulses to update the legislation. This may imply that legal science in Norway has a more significant importance in modern times. This favour the use of scholarship in Norway and turns the country towards the Civil law's attitude on legal scholars.

On the other hand, it is important to highlight, that the law in the earlier part of Norway's legal history was made in legal practice, as there were no domestic universities to get a law degree from until the 19th century[33]. Meaning those who wanted to gain knowledge of the law and a degree in law had to get it elsewhere. In fact, law degree was not a requirement for practicing law before 1736, albeit still very recommended[34]. This implies that the qualitative and professional standard which may be detected in the Civil law countries were not to the same extent in the case of Norway.

In similar, was the level of professionalization in the early colonization period of United States not that prominent, as the highest priority was survival[35]. As mentioned in the distinction between Common law and Civil law above there also in United States existed provisions that allowed citizens to practice law without a law degree[36].

[29] (Koch, 2017, p. 191)
[30] (Koch, 2017, p. 191, cited further in footnote 111)
[31] (Bragdø-Ellenes, 2017, p. 154)
[32] Jørn Øyrehagen Sunde, 2013, The Legal cultural dependency of the Norwegian legal method – and its future – to be publishing in: Contribution to the understanding of legal argumentation in Norway and Germany, p. 19
[33] Ibid, p 19
[34] Ibid, p. 18
[35] (Zweigert & Kötz, The Law of the United States of America, 1998, p. 239)
[36] (Zweigert & Kötz, The Law of the United States of America, 1998, p. 241)

Another important aspect is that a great of many authors of legal literature in Norway actually are judges and other people who practices law[37]. Judged have experience on how law works in practice, and how it optionally should improve. This shows that the position of judges, like in Common Law countries is of importance. This favour the assumption to shift Norway towards the Common Law tradition's frame of mind on legal scholarships.

4.3. Closing remarks

In summary, one may agree that Norway has element of both legal branches when it comes to the role of legal scholars.

Even though, impulses from Civil law Countries such as Germany was of great assistance in the development of Norwegian statutes and gave importance to legal literature as such, legal practice also contributed to the development of the Norwegian legal system. Thus, we may one a general basis assert that the Norwegian legal system has a more pragmatic approach to legal scholarship.

In relation to Civil law's point of view, for instance, the utility of legal scholarship in Norway gives substance to legal argumentation. Before the entries of the universities, Norway more was alike the Common law countries, in terms of composing law in practice, and not by legal science. However, the law is still often influenced by practice from case law. So, the influence of Common law has not been abandoned.

Indeed, good reason favours both branches point view, and it is suitable to say that the role of legal scholarship in Norway is to be place in between Common law and Civil law.

[37] (Sunde, 2013, p. 15)

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Judgements

- Rt. 2011 p. 1767

Task 2: Strengthens and weaknesses of Sunde's Legal Culture Model

Introduction

There exist several ways to get an insight in a country's legal culture. Some approaches endeavours to give a more detailed and complementary elucidation, while other provides a shallower approach.

The Norwegian professor, Jørn Sunde created, in his article Managing the Unmanageable, a tool which he called the Legal Cultural Model, that is divided into respectively an institutional structure, including conflict resolution and norm production and an intellectual structure, containing idea of justice, legal method, professionalisation and internationalisation[38].

With this model Sunde intends to "mapping and navigating the unmanageable concept of legal culture"[39]. The question is however if he manages to create a sufficient rundown model for legal cultures, so it may be applied on any legal cultures. This is the topical issue that will be discussed in this text. Firstly, I shortly will define some aspect regarding this topic. Secondly, I will detect positive and negative aspects of the model as a whole.

Definition on legal culture and the specific elements

Sunde defines legal culture as "ideas of and exceptions to law made operational by institutional(like) practices"[40]. In this one may assume he meant a system where two aspect is dependent on each other. Sunde defines the institutional structure as "a question of who", while the intellectual structure as "a question of what"[41].

The institutional structure, containing conflict resolution and norm production, provides information on where disputes are to be resolved and who's creating the laws and rules. While the intellectual elements more elucidates the content of what the institutional

[38] Sunde, Ø. J. (2017). Managing the Unmanageable - An Essay Concerning Legal Culture as an Analytical tool. In S. Koch, S. K. Einar, & J. Ø. Sunde, Comparing Legal Cultures (pp. 13-25). Bergen: Fagbokforlaget

[39] (Sunde Ø. J., 2017, p. 13)

[40] (Sunde Ø. J., 2017, p. 15)

[41] Sunde, J. Ø. (2010). Champagne at the funerel - An Introduction to Legal Culture . In J. Ø. Sunde, & K. E. Skodvin, Rendezvous of European Legal Cultures (pp. 11-28). Bergen: Fagbokforlaget, p. 22

element provides.

What are the strengths and weaknesses of this model?

The question further, however, is if this model works up to his purpose. In one way the model provides insight in the judiciaries in any country's legal system. For instance, in respect to Germany where the courts structure is more complexed than in Norway. Whereas Germany has their own constitutional court and four specialised Supreme Courts[42], Norway only has one Supreme Court on the top. This information is easily attainable by using this model.

However, Sunde himself acknowledges that he can't go a millimetre level when creating a model[43]. He compares his model with a map of Bergen with general information on where things in the city are located, and not detailed glance at how much traffic or how the weather is in the parts which the map covers[44]. The model itself is quite straightforwardly if you want general information on how the legal culture in a country is described. If you want a detailed approach, you need a more complex model.

One thing the model lacks is an element which elucidates historical changes of a legal culture. The history line may give a deeper understanding on why, for instance, the idea of justice is alleged to be equity or legal certainty. In this regard one may concur with Zweigert and Kotz, whose includes history as an own element in their model.[45] According to Zweigert and Kotz the historical development in certain legal cultures, which originally has much similarities, as Roman law and Nordic law, might lead to the assertion that they should be separated as legal cultures[46]

Another point which Zweigert & Kotz clarifies is the element mode of thought, which provides a better glimpse into the legal culture way of legal thinking, more than the elements of Sunde's "legal method". Zweigert and Kotz visualise the distinction between English Common law and Roman and Germanic legal culture. Whereas the Germanic and Roman legal culture for instance is more focused on coherent systems and complex way of thinking, the English Common law tradition has a more practical approach and deal with issues as it comes[47].

In addition, Sunde does not have an own element for legal sources, but rather includes it in the element of legal method[48]. However, for instance in Norway it could be judicious to separate legal sources as an own element. In this Norway the legal sources are ranked in a

[42] Koch, S. (2017). An Introduction to German Legal Culture. In S. Koch, K. E. Skodvin, & J. Ø. Sunde, *Comparing Legal Cultures* (1 ed., pp. 171-201). Bergen: Fagbokforlaget, p. 177
[43] (Sunde Ø. J., 2017, p. 13)
[44] (Sunde Ø. J., 2017, pp. 13-14)
[45] Zweigert, K., & Kötz, H. (1998). The Legal Families of the World. In Introduction to Comparative Law (3 ed., pp. 63-73). Oxfrod : Clarandon Press, p. 68
[46] (Zweigert & Kötz, 1998, p. 69)
[47] (Zweigert & Kötz, 1998, p. 69)
[48] (Sunde Ø. J., 2017, p. 23)

hierarchical list of the most preferable sources of law[49]. Hence, it could be preferable to have one separate element of legal sources, or at least one element referred to as 'legal method and legal sources. This implies both method of solving the dispute and the sources of law involved.

Finally, as Sunde stresses, he could have included legal education in his model[50]. There are reasons to say that this could have contributed to a better understanding on how the educational system works in the legal culture.

Summary remarks

In summary, Sunde's model of legal culture is a fine instrument to gain general knowledge of a country's legal culture. However, there is certain areas it might improve, including history, legal education, clarification on legal sources and mode of thought.

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