

Exploring the Norwegian Legal Culture

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1. An outline of the lectures

- A brief introduction to Norwegian state formation from app. 800 till today
- A brief introduction to legal culture
- Exploring the Norwegian legal culture by using the legal cultural model

2. Norwegian state formation – Middle Ages

- Norway as a territory and no state till app. 1200
 - The four law territories: Gulating, Frostating, Eidsivating, Borgarting
- The emergence of King and Church as state power from app. 900
- The civil wars from 1130 till 1240
- The strong state app. 1250 till 1350
- The union with Sweden from 1319, and with Denmark and Sweden from 1397

2. Norwegian state formation – Early Modern Period

- The Black Plague and other plagues from 1350 till 1450
- The reformation in 1536
 - Norway a Danish province
- The slow recovery of state power from app. 1550
- The absolute kingdom from 1660
 - Norway again an independent kingdom
 - The bureaucratic state

2. Norwegian state formation – Modern Period

- The Norwegian Constitution of 1814
 - Norway still independent, but now in union with Sweden
- Introduction of the parliamentary system in 1884 – the liberal revolution
- The Labour party in government from the 1930s and the introduction of the welfare state – the socialist revolution

3. Legal Culture

- An analytical tool and not an entity to deduce legal rules from
- The increased references to legal culture from the 1990s
 - The internationalisation of law
 - The European Council with the ECHR and the European Union with the ECJ
- A label on a black hole of knowledge?

3. Legal culture as a model

Legal cultural structures and structural elements					
Institutional structure		Intellectual structure			
<i>Conflict resolution</i>	<i>Norm production</i>	<i>Idea of justice</i>	<i>Legal method</i>	<i>Professionalisation</i>	<i>Internationalisation</i>
Court hierarchy	Lawmaking	Predictability	Deduction	High degree	High degree – principles through professionals
Courts	Lawmaking and precedence	Equity	Differentiation	Low degree	High degree – principles through lawmaking
Mediation and violence	Precedence	Equivalence	Analogy	Non	High degree - rules

4. Exploring the Norwegian Legal Culture – Conflict resolution

- Norwegian conflict resolution today
 - Few specialist courts on the first level
 - Most important: a labour court and a land dispute court.
 - But several administrative dispute organs
 - Almost non specialist courts on the second level
 - Most important: A land dispute court (but only dealing with some aspects of the cases)
 - The Supreme Court deals with all issues
 - Civil cases, criminal cases, administrative cases, constitutional cases

4. Exploring the Norwegian Legal Culture – Conflict resolution

- End result:
 - A quite stringent court hierarchy
 - Suitable for passing down precedence
 - ECHR and ECJ are linked, quite loosely, to the Norwegian court hierarchy, and precedence in all cases are being passed down

4. Exploring the Norwegian Legal Culture – Conflict resolution

- Vengeance and mediation in the Gulathing Compilation, the Frostating Compilation and the Christian Laws of Borgarting and Eidsivating
- The Thing
 - An *ad hoc*, flexible organ
- Royal and Church influence, especially on the Thing, from the 1150s
- The two court hierarchies from the 1250s

4. Exploring the Norwegian Legal Culture – Conflict resolution

- The final structuring of the royal courts with the Norwegian Code of the Realm from 1274, and Norwegian Code of the Cities from 1276
 - One court hierarchy, but separate courts in cities and countryside
 - Local courts still in use
- King and Church had common first level court, but independent second and third level courts

4. Exploring the Norwegian Legal Culture – Conflict resolution

- The unification of Royal and Church courts after the reformation (1536/1600)
- The appeal system from 1590
- The required appeal from 1687/1719/1735
- The adoption of the Danish (in accordance with the continental) system of specialist courts at the first and second level from early 1600s

4. Exploring the Norwegian Legal Culture – Conflict resolution

- But one supreme Supreme court
 - The king council as supreme court till 1664, when a professional supreme court was established in 1661 with the king as one of the judges
- The strictly professional Supreme Court as the third state power with the constitution of 1814
 - The abolition of specialist courts during the first half of the 1800s

4. Exploring the Norwegian Legal Culture – Norm production

- Norwegian norm production today
 - Large degree of lawmaking
 - Statutes and not codes
 - The Norwegian Code of 1687 still the Norwegian code in use (only 4 articles!)
 - But statutes in the civil and not common law tradition
 - Deductive and not case law oriented
 - Precedence

4. Exploring the Norwegian Legal Culture – Norm production

- Norwegian norm production today
 - Precedence
 - Till recently only Supreme Court decisions
 - Acknowledged in an Act of 1926 – plenary sessions if abandoning precedence
 - But what with ECHR and ECJ?
 - Supreme Court ruling of 2002 in a case from 2001, abandoning a precedence from 2000
 - And Supreme Court ruling of 2010 awaiting a ECJ ruling

4. Exploring the Norwegian Legal Culture – Norm production

- Norm production through court rulings
 - Evident in e.g. the Gulathing Compilation
- The court could rule someone the competence to make laws
 - Royal lawmaking from the 10th century
 - Church lawmaking from the 11th century
 - Christian laws and not canon law applied, partly in opposition

4. Exploring the Norwegian Legal Culture – Norm production

- Lawmaking through peace legislation from the 1150s
- Canon law more than Christian Laws from the 1250s
- The marriage of princess Kristina and prince Filipe and the 100 persons visiting Castile 1257-58
- The Peace Law from 1260 as the beginning of broad scale lawmaking
- The failed lawmaking efforts 1267-1271

4. Exploring the Norwegian Legal Culture – Norm production

- The Norwegian Code of the Realm of 1274 – 1604/1687
- The Norwegian Code of the Cities of 1276 – 1621
- The Norwegian Administrative Code of 1277 – 1665
- The Icelandic Code (Jóns Bók) of 1281 –
- Additional laws till 1350s

4. Exploring the Norwegian Legal Culture – Norm production

- Lawmaking in the 16- and 1700s
 - The appeal system and lawmaking
 - The translated and edited code of 1604
 - The additional laws of 1643
 - The Constitution Lex Regia of 1665
 - The Norwegian Code of 1687
 - The plans of a new code in the 1730s
 - The more than 4500 additional laws of the 1700s

4. Exploring the Norwegian Legal Culture – Norm production

- The Constitution of 1814 based on the presumption that a civil and criminal code would be made within few years
 - A criminal code made in 1842, abandoned in 1902
 - A draft of a civil code made, but the project abandoned in 1845
- Norway got a code in 1274 and in 1687, but not after 1800 when codes became usual in Europe

4. Exploring the Norwegian Legal Culture – Norm production

- Precedence before 1274
- Precedence according to I-11 and IV-18 in the Code of 1274
 - The ruling in 1329
- Precedence after 1350
- The code of 1687 – the end of precedence
- Precedence in legal theory in the 1700s

4. Exploring the Norwegian Legal Culture – Norm production

- Legal positivism
 - The Montesquieu doctrine in the Constitution of 1814
 - The continuation and continuation of the liberal practice from the 1700s
 - The more and more limited interpretation of the Constitution

4. Exploring the Norwegian Legal Culture – Norm production

- Legal Realism
 - Long tradition
 - The shift from German to American legal doctrine after WWII
 - Legal realism in the lectures of Torstein Eckhoff from the 1950s, published in 1971
 - Legal realism in the Norwegian Supreme Court from the 1990s

4. Exploring the Norwegian Legal Culture – Idea of Justice

- The idea of justice in Norway today
 - The inheritance from natural law and legal positivism – predictability
 - Secured through lawmaking
 - Adjusted with the inheritance from legal realism – equity
 - Secured through precedence

4. Exploring the Norwegian Legal Culture – Idea of Justice

- The idea of justice in Norway today
 - Predictability dominating
 - But what about the Jack in the Box-problem with ECHR and EU-law in general and ECJ especially?
 - Continuous new EU-legislation and reinterpretations by ECHR and ECJ
 - Will the precedence-system or predictability prevail?

4. Exploring the Norwegian Legal Culture – Idea of Justice

- Equivalence as the most basic idea of justice
 - The idea of a balance between two parties
 - Exodus 21-23 to 25, Deuteronomy 19-21
- Equivalence in the Gulating and Frostating Compilations
 - An eye for an eye
 - Vengeance
 - Full compensation
 - Equivalence oath

4. Exploring the Norwegian Legal Culture – Idea of Justice

- Equity in the Greek antiquity
 - *Epieikeia*, e.g. the philosophy of Aristotle
- Equity in Roman law
 - *Aequitas*, e.g. Digest book 48
- Equity in Christian ideology
 - The Psalms e.g. no. 85
- Equity travelled to Norway by every intellectual high way there was

4. Exploring the Norwegian Legal Culture – Idea of Justice

- Equity in the Norwegian Code of the Realm of 1274
 - The idea formulated in IV-18:
 - And the judges are appointed to measure cases and misdeeds, and temper the sentence according to the circumstances in the same manner as the men at the *ting* and the person providing justice finds most truthful in the face of God and their own consciousness. And not, as has been stated by the fool, that they judge only according to law
 - found expressed in app. 1/3 of the 223 chapters
 - Opened the door to precedence next to lawmaking
 - The court ruling of 1329 revisited

4. Exploring the Norwegian Legal Culture – Idea of Justice

- Predictability and natural law
 - Available to all humans at all places at all times
- Predictability and absolutism
 - The barrier against tyranny
- Predictability and lawmaking
 - The Code of 1687 as the only source of law
- Predictability and the restructuring of the courts after 1590
 - Appeal as a source to unity and to precedence

4. Exploring the Norwegian Legal Culture – Idea of Justice

- Predictability and the Constitution of 1814
 - The ambition to make law codes and to abandon other sources of law
- Predictability and the German Freirechtsschule
 - The influence from app. 1900s
- Predictability and the American legal realism
 - The influence from app. 1950s

4. Exploring the Norwegian Legal Culture – Legal method

- Legal method in Norway today
 - Variations of the method the legal realist Torstein Eckhoff taught his students from the 1950s
 - It is based on three pillars:
 - 1. deduction from law
 - 2. studies of precedence
 - 3. supplied with other legal sources such as administrative practice, legal literature, customs etc.

4. Exploring the Norwegian Legal Culture – Legal method

- The combination of deduction and case law makes Norwegian jurists feel that they use a legal method not too far from the one of ECHR and ECJ
- But one important difference:
 - Principles play a minor role in Norwegian law
 - Too vague to deduce from, too rigid to use as interpretation tools

4. Exploring the Norwegian Legal Culture – Legal method

- Analogy as method in the Gulating and Frostating Compilations
 - The structuring of provisions
 - The use of outdated provisions

4. Exploring the Norwegian Legal Culture – Legal method

- Differentiation
 - The scholarly method when reading texts with internal differences
 - As the Bible e.g. concerning *bellum justum*/just war
 - Roman and canonical legal texts offered the same problem – produced by different persons in different time periods, hence not consistent
 - Developed into a legal method not at least by Gratian *et al.* in Decretum Gratiani

4. Exploring the Norwegian Legal Culture – Legal method

- Few examples of differentiation in the Gulating Compilation
 - Introduced by the king through giving up rights
 - The example of a man hanging in a rope
- The instrument that made equity operational as idea of justice in the Code of 1274
 - The example of theft

4. Exploring the Norwegian Legal Culture – Legal method

- Differentiation still used in the Code of 1687
 - The example of robbery
- Deduction as the method of natural law
 - Deducing from principles
- Natural law important in Danish-Norwegian law from app. 1700
 - The method taught at the Faculty of Law in Copenhagen from 1736
 - The method applied in statute making from 1737
 - The method applied in legal literature from 1750
 - The method applied in courts from the 1770s
 - The method used when making the Constitution of 1814

4. Exploring the Norwegian Legal Culture – Legal method

- But deduction found too rigid and too little life relevant as legal method by A.M. Schweigaard when in Germany in the 1830s
- Continuous disputed as legal method
 - E.g. attacked 1850s (Lerche), 1900s (Scheel) and 1920s (Knoph)
 - Finally adjusted with Eckhoff and legal realism from the 1950s

4. Exploring the Norwegian Legal Culture – Professionalisation

- Professionalisation in Norway today
 - A legal exam a requirement to practice law in Norway
 - The normal law study is now 5 years, but was 6 years prior to 2005
 - There are 3 faculties of law – Oslo (1811), Bergen (1969/1980) and Tromsø (1987/1997)
 - The teaching are aimed at presenting law and precedence, and do not focus on the system of law
 - The EHR and EU-law became central as subjects at the law studies first from 2005

4. Exploring the Norwegian Legal Culture – Professionalisation

- *Lagmannen* (literary meaning the lawman)
the first professional in Norwegian law
 - Advisor at the Thing
 - Royal official from app. 1180s
 - Competence to judge at the first level some time between 1240 and 1260 (the Peace Law of 1260)

4. Exploring the Norwegian Legal Culture – Professionalisation

- The lawman became appeal court judge with the Code of 1274
 - Competence to judge as sole judge at the first level
 - Competence to decide the juridical aspects of all major cases at the first level
 - Competence to sensor judgements at the Thing at the first level in all major cases
 - Competence to settle all minor cases if the parties did not accept the verdict of the sheriff

4. Exploring the Norwegian Legal Culture – Professionalisation

- Competence to decide the juridical aspects of all cases at the second level
- Competence to sensor all judgements at the second level
- Competence to fill the lacunas of law
- And the King could only change the judgements of the appeal court judge if they were unlawful

4. Exploring the Norwegian Legal Culture – Professionalisation

- Documented that the appeal court judges had at times studied law abroad between app. 1290 and 1350
- But those making the Code of 1274 had evidently studied law abroad
- And we know Paris was a much favoured place to study for Norwegians from app. 1150
- After the plagues between 1350 and 1450 few studied law abroad till after the 1550s
- The Faculty of law in Copenhagen from 1479 had few students before 1736

4. Exploring the Norwegian Legal Culture – Professionalisation

- In 1736 few practicing law had studied law
- This year it was made a requirement for all legal offices at all levels
 - Inspired by reforms of the legal system in Prussia from the 1690s on
- 4 possible exams to take
 - 3 exams in Latin, that few took, and 1 on Danish, that most took

4. Exploring the Norwegian Legal Culture – Professionalisation

- Lectures in Latin, hardly any textbooks in Danish
 - Students made a living from copying, translating and printing the lectures
 - Soon the professor would print their own lectures
 - The beginning of a Danish-Norwegian legal literature
 - The beginning of lawyers looking into legal literature to acquire knowledge

4. Exploring the Norwegian Legal Culture – Professionalisation

- By the 1770s all judges at all levels had studied law
- By 1800 all prosecutors and advocates had as well
- The esteem of lawyers, much mistrusted before app. 1750, increased
 - Close to 25 % of all representatives that made the Constitution of 1814 were lawyers
- From early 1900 women and persons writing *nynorsk* would study law
- And in 2004 only female judges presided in the Norwegian Supreme Court for the first time

4. Exploring the Norwegian Legal Culture – Internationalisation

- Internationalisation in Norway today
 - The welfare state project was (at least) a pan western world project
 - Still international in character, the welfare state was a national project dependant on national legislation
 - Hence, the least international period in Norwegian legal history was 1945 to 1994

4. Exploring the Norwegian Legal Culture – Internationalisation

- Internationalisation in Norway today
 - With the EEA-agreement between EU and Norway in 1994 and the transformation of The European Human Right to internal Norwegian law in 1999, Norway became a part of the ongoing internationalisation of law
 - But the internationalisation is not something new
 - Rather, it is one of the characteristics of the Norwegian legal culture

4. Exploring the Norwegian Legal Culture – Internationalisation

- The Gulating and Frostating Compilations show influence of Roman law, canon law, English law, Celtic law, and very likely East-European influences as well
- On one hand, the influence was only on a rule level
 - No one with the task of importing law
 - Internationalisation of law was much a bi-product of trade
 - No professionals who could identify and transform chunks of law into Norwegian law
- On the other hand, there was no institutions to filter the international impulses
 - The only criteria for good law was that people accepted it as suitable for the purpose

4. Exploring the Norwegian Legal Culture – Internationalisation

- With the emergence of a state power, this changed
 - King and Church both had an interest in what to import and what to reject
- But King and Church both had personell and an interest in importing law beyond rules
 - As we have seen, the court hierarchy, the technique of lawmaking, equity as idea of justice and differentiation as legal method was all imported during the 1200s, much through those going abroad to study
 - All taken inn through the lawmaking of King and Church

4. Exploring the Norwegian Legal Culture – Internationalisation

- But this changed again with the plagues from 1350 to 1450, since state power decayed
- Again internationalisation was on a rule level, and often a bi-product of trade
 - The presence of the Hanseatic League in Bergen was a major source of legal rules imported in Norway
 - Both because Norwegian traded with the Hansa
 - And because conflicts that arose during the trade was solved by a Hanseatic court in Bergen
 - Court cases that involved a member of the league would be appealed to Lübeck, and from there to the Reichskammergericht i Speyer

4. Exploring the Norwegian Legal Culture – Internationalisation

- A new wave of internationalisation came with natural law and the juridical exam in 1736
 - Natural law was treated in legal literature from many countries, but still with a supra national relevance
 - And it would be taken in directly through court practice, since judges, attorneys and prosecutors all had enough juridical knowledge through their studies

4. Exploring the Norwegian Legal Culture – Internationalisation

- And again law on all levels was received – from ideas on lawmaking to a legal exam as a requirement for practicing law
- This ought to have changed with the nationalisation of law after 1814 and the emergence of the German Historical School, claiming that good law was national law

4. Exploring the Norwegian Legal Culture – Internationalisation

- But it did not
 - The claim only became a filter for what international law to receive
 - One received law from cultures similar to ones own
- And in general, the internationalisation of law, that we in the aftermath of the welfare state experience as something new, is rather the order of things through out history
- And the two most important factors are a set of norm with a universal aspiration and students going abroad to study

5. The Norwegian legal culture revisited

Legal cultural structures and structural elements					
Institutional structure		Intellectual structure			
<i>Conflict resolution</i>	<i>Norm production</i>	<i>Idea of justice</i>	<i>Legal method</i>	<i>Professionalisation</i>	<i>Internationalisation</i>
Court hierarchy	Lawmaking	Predictability	Deduction	High degree	High degree – principles through professionals
Courts	Lawmaking and precedence	Equity	Differentiation	Low degree	High degree – principles through lawmaking
Mediation and violence	Precedence	Equivalence	Analogy	Non	High degree - rules