COMPARATIVE LEGAL TRADITIONS – INTRODUCING THE COMMON LAW TO CIVIL LAWYERS IN ASIA

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As our focus turns from purely domestic law to regional and global issues, there is an increasing need to explain and, where possible, reconcile, the world's two major systems of law – the common law and civil law systems. Both play a crucial role in the legal infrastructure of Asia, and their sometimes uneasy relationship is one of the many challenges to overcome if we are to establish connections and forge understanding between the various legal traditions in this continent.

This paper will focus on the particular challenges involved in introducing the common law to Asian lawyers from civilian jurisdictions. It will consider the difficulties which lawyers who are accustomed to a codified system of law experience when faced with the notionally more fluid and less structured system adopted in common law countries. The paper will also, however, consider the underlying similarities between common law and civil law systems, and it will examine the characteristics which the two systems share – characteristics which ultimately suggest that the innate differences have more to do with process than with philosophy.

I. THE ROLE OF CIVIL LAW AND COMMON LAW IN ASIA

The two predominant legal traditions in the world – the civilian and common law systems[1] – are to be found operating side by side in Asia. In an age when co-operation and mutual understanding are core aims, there is a strong impetus for lawyers from each system to be familiar with and able to function within the other. And while a formal legal grouping similar to the European Union may remain a distant dream in Asia, the fact that the E.U. has been able to bring together a large number of civil and common law traditions under a single legislature shows that the two systems are by no means as incompatible as they might at first appear.

The two systems were, of course, introduced in Asia largely through colonization. Common law was introduced in countries colonized by the British, and it applies today in territories such as India, Malaysia and Singapore. Civil law was spread through colonizers such as the French and the Dutch to territories like Indochina and Indonesia. In addition, even without the civilian tradition being imposed through colonization, several major jurisdictions (notably China, Japan and Thailand) chose to adopt systems which were based, either purely or predominantly, on civil law.

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[1] The civil law is a much older legal tradition than the common law. It has its origins in Roman law and dates back about 2,500 years, whereas the common law can be traced back less than 1,000 years. Civil law spread through Europe via the universities, and was therefore originally an academic system of law. Common law, on the other hand, developed as a very practical system to enable the travelling courts (or assizes) within England to apply law which was 'common' to the whole country.

In modern times, the fundamental difference between the two systems lies in the fact that most civil law jurisdictions have comprehensive written codes which are designed to cover every area of law. Common law systems, on the other hand, are based on judge-made law, which is developed on a case by case basis, although (particularly in technical areas) statutes play an increasingly important role.

II. THE CHALLENGES IN INTRODUCING A CIVILIAN TO THE COMMON LAW

The main challenges facing a civil lawyer who wishes to understand and function within a common law system relate to the role and structure of statutes and the significance of case law.

A. STATUTES

Statutes are the paramount source of law in both civilian and common law jurisdictions. But there the similarities superficially end. For while in civilian systems codes – complemented by statutes – form the core of the law, and jurisprudence plays only a secondary role, in common law jurisdictions case law is the backbone of the system, and statutes apply only in certain areas.[2]

Civilians, both in Asia and elsewhere, are used to codes which offer a sequential view of the law in a given area, moving from first principles to specifics within a clear framework. Codes are written at a high level of abstraction, and are based on principles derived from the scientific study of legal data. Both codes and statutes within civil law systems make extensive use of definitions and classifications, and they offer a highly systematic and exhaustive overview of the law.

Statutes in common law systems, on the other hand, address only selective areas of the law, but they normally cover these areas in depth. They are thus also exhaustive, but in a different sense, since they do not cover all law but provide detailed rules in a particular area. However, although a statute in a common law jurisdiction is designed to lay down a comprehensive set of rules in a specific field, it is unlikely to do this in a sequential manner, and it will rarely offer a clear snapshot of the area as a whole as a civil code or statute would do. Moreover, since statutes in common law systems are often quite technical, it can be difficult to understand the law without recourse to other materials. For this reason, statutes in common law jurisdictions can initially strike the civilian as being extremely detailed but at the same time incomplete as an explanation or description of the relevant area of law.

In introducing the common law to civilians it is therefore necessary to impart the concept that statutes within a common law system are not supposed to be read alone, and that they are part of a bigger picture. A civil lawyer will therefore be discouraged from trying to read the whole of a statute to gain an overall understanding of the area of law as he might do with a civil code. Instead, he will be trained to use texts and other explanatory

[2] For further analysis of the differences between the two systems see William Tetley “Mixed jurisdictions: common law vs civil law (codified and uncodified)” http://www.unidroit.org/english/publications/review.

materials to assist in his understanding of the applicable area of law, and he will be encouraged to focus on the part or parts of the statute which are relevant to the issue before him.

B. JURISPRUDENCE

Perhaps the most striking aspect of the common law system lies in the hugely influential role of judges. In civil law systems, judges – at least in theory – have a purely interpretative role, within which doctrinal guidance leaves little room for individual discretion. In common law systems, however, judges play a pivotal role, moulding and changing the law through case-by-case development. This inherently flexible and efficient system allows for a timely and relevant response to the changing requirements of society and the formulation of detailed provisions to cater for developing areas of law. In this respect, the common law offers a system of law-making which is both comprehensive and focused.

A civilian may take a while to appreciate these qualities in the common law. The first response of many civil lawyers is to see judge-made law as somewhat inefficient, given that the development of the common law is dependent on particular fact patterns coming before the courts. Civilians often find the idea of the law being framed only when disputes arise to be odd and even somewhat crude and unsophisticated. Although in time many come to appreciate the benefits of a system which provides for response to changing social circumstances, some are never converted to the system and find its fluidity, and the inevitable gaps in the law to which it gives rise, incompatible with their idea that law must be predictable and certain.

In fact, the extent to which certainty is valued in both the civil law and common law traditions is what really lies at the heart of the differences between them. For while in civilian jurisdictions certainty is the fundamental goal, common law systems regard flexibility as equally important. Under the common law, a judge bears major responsibility for ensuring certainty and stability, but also for exercising the discretion to change and develop the law. Rather than being elevated to the level of dogma, certainty is achieved through the rules of *stare decisis*, or binding precedent.[3]

The rules of *stare decisis* – under which a lower court must follow decisions of courts above it in the judicial hierarchy, thus preventing a multiplicity of inconsistent rules developing in any given area – are fundamental to the common law system. However, they can prove very problematic for civilians. This is not so much because civil law jurisdictions do not recognize the significance of prior decisions (in practice, civilian judges are, of course, influenced by the decisions in earlier cases) as because the application of *stare decisis* necessitates a detailed analysis of often complex decisions in order to determine whether or not an earlier case *must* be followed. Under the rules of *stare decisis* only the ratio of a case – *i.e.*, the decision on the facts, is binding. Obiter

[3] For further discussion of the differences between the civil law and common law systems see *e.g.*, John Henry Merryman, *The Civil Law Tradition* (Stanford: Stanford University Press, 1969) at pp. 50-58.

dicta – *i.e.*, observations which are not crucial to the decision, are not binding, even if they are statements by the most eminent judges in the highest courts. It is therefore critical within the common law process to determine the ratio of every case. But this can be a very difficult task, both because common law judges rarely spell out the ratios of their decisions and because their judgments are often long and discursive (thus differing from judgments in civil law jurisdictions, where judges are trained to adopt a concise and formalistic approach).

The process is complicated by the fact that in common law systems all decisions of higher courts contain multiple judgments, and judges often give separate judgments even when they agree on the outcome. As a result, a lawyer attempting to determine the ratio of a case has to draw from several – often subtly different – judgments the single point for which the case stands. For someone new to the common law, and for whom English is often a second language, the process of working out exactly what a case has decided can be quite daunting. Moreover, because it is often difficult to determine the precise ratio of a previous decision, judges in subsequent cases frequently distinguish (and thus treat as not binding) authorities which might appear to other lawyers to be on point. To a civilian, these aspects of the common law can be a source of frustration and consternation.

Only by constant exposure to common law reasoning processes and to judicial techniques can a civilian familiarize himself with the way in which law develops within common law systems. Starting with relatively straightforward decisions containing single judgments, a civil lawyer has to be introduced to the process of drawing principles from multiple judgment decisions and to the judicial manoeuvring which is often involved in distinguishing unpalatable precedents. Good textbooks and casebooks can, of course, be very helpful, particularly in terms of summarizing decisions and explaining how a chain of cases has given rise to developments in a particular area of law, but understanding the common law judicial process is primarily a matter of exposure and experience.

III. SHARED VALUES AND INCREASED MUTUAL UNDERSTANDING

Despite all the technical differences between the civilian and common law systems, there are a large number of similarities, the most important of which are, of course, the shared aspirations of regulating society, resolving disputes and meting out justice in as even-handed a manner as possible.

In addition, many of the apparent differences in fact relate more to form than to substance. A civilian who becomes familiar with a particular area of common law may well, for example, find that if he transcribes the relevant provisions into a civil law format, there is a surprising degree of similarity between the two. Moreover, while civil law is supposedly more complete and coherent, in practice civilian judges face many of the same challenges as those faced by common law judges. Like common law judges, they are required at times to deal with legislative gaps and to reconcile apparently conflicting statutes. And they too have the ability – albeit within a less obviously flexible framework – to adapt to changing social conditions and to assist in the law's the evolution, with legislation often delegating powers to courts through general clauses. In

addition, the civil law and the common law systems have historically shared a similar lack of clarity with respect to the most appropriate approaches to statutory interpretation, and both have come to favour a purposive approach over the plain meaning or literal rule.[4]

And even where real differences *do* exist, the significance of these differences is being constantly reduced by increased levels of communication and interplay. Ease of access means that the legal world is becoming a smaller and less disparate place. Cultural and legal influences are spreading, and we are beginning to see far greater willingness to look outside our own legal heritage. This is being reflected in a number of ways. One is the growing willingness of common law judges to refer to the position under civilian codes.[5] Another is the increased movement of lawyers between common and civil law jurisdictions, both at the academic level, with student and staff exchanges, and at the business level, with law firms opening offices in every continent, frequently employing a mix of common and civil lawyers.

The effect of these developments is being felt particularly acutely in this part of the world. While historically the physical distance between Asia and major common law jurisdictions such as the United Kingdom and the United States meant that (unlike civil lawyers in Europe and South America) civilians in Asia were both physically and psychologically removed from common law cultures, this is no longer the case. Nowadays there are an increasing number of common lawyers – both practitioners and academics – to be found in Asia, particularly in the major business hubs. This fosters a level of understanding and acceptance which would have been unheard of only decades ago and suggests that integration of our respective legal cultures is likely to increase exponentially in the coming years.

[4] Traditionally, a number of sometimes contradictory approaches were employed when interpreting statutes in common law jurisdictions. (For discussion of these approaches, see, eg, John Willis, "Statute Interpretation in a Nutshell" (1938) 16 Canadian Bar Review 1 and Ruth Sullivan, "The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation" http://aix1.uottawa.ca/~resulliv/legdr/pmr.html). However, nowadays the purposive approach is increasingly favoured in many jurisdictions. (See *e.g.*, section 9A of the Singapore Interpretation Act, Cap 1, 1999 ed.). For further discussion of the civil law position, see Merryman, *supra* note 3, at pp. 43-46.

[5] For a relatively recent example of a case in which the House of Lords in England varied the rules relating to causation of damage in negligence after examining the provisions of several civil codes together with the position in other common law jurisdictions, see *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32.