COMMON LAW AND CIVIL LAW: COMPARISON OF METHODS

Palestine: A Case for Convergence

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INTRODUCTION

Palestine's legal system is undergoing a metamorphosis. Its present system is of mixed heritage, making the legal reform process a challenge to legislators, policy-makers and legal drafters alike. This system combines Islamic rules as codified in the Ottoman Code (Mejelle), Anglo-Saxon English Common Law and French Civil Code principles, an amalgamation of Jordanian legislation and Israeli military orders, and a rich tradition of customary practices. The complexity of legal reform arises from the fact that over the last three centuries new legal principles were layered atop old ones without any effort to resolve the philosophical and procedural discrepancies between them, and new laws were promulgated that neither repealed nor superseded earlier laws governing the same subject matter.

The challenge facing Palestinian law reformers lies in deciding the course to chart in institutionalizing a comprehensive, cohesive and consistent legal system. This system should be based on all the existing Palestinian legal traditions, which will require deciphering, peeling away and reassembling the various layers. Palestine requires a system of laws to support the development and evolution of its own jurisprudence, interweaving its rich legal heritage into the fabric of modern legal concepts.

Nowhere is the need for legal reform more urgent than in the private law areas and, in any event, jurisprudential matters involving constitutional and public law issues will take more time to develop due to their complexity. Even to begin work on private law reform, however, will require an understanding of the world's two primary legal systems, Common Law and Civil Law, and a decision on which concept to follow during the course of preparing reform legislation.

COMMON LAW AND CIVIL LAW SYSTEM: The Theory

In principle, the distinction between the two primary systems of jurisprudence is quite large, but easily grasped. The older of the two, Common Law, was developed in England. It began when courts had the power to make legal decisions, but little or no basis beyond common sense for making them. Lacking statutory definitions upon which to base their judgments, the court came to rely on *precedents*, decisions rendered by other courts or the same court under similar fact situations. They could do this because at the conclusion of each case, the judge would issue a written legal rational to explain and justify the judgment rendered. Each court decision would later be published. This process of referral to earlier court dispositions of law cases eventually led to a coherent body of law governing almost all legal situations, civil and criminal alike. The role of the judge under the Common Law system is critical, for the system demands highly intellectual, diligent and resourceful judicial talent if the system is to work effectively.

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Civil Law, or code law, dates back to the Romans, but its modern implementation began with the Napoleonic Code of 1804. the underlying premise of the Civil Law system is that all law must be defined by statute. The term "code' refers to the entire corpus of statutes, and to be effective the code must be totally comprehensive, dealing with every legally controlled aspect of human endeavor. The role of the court in a Civil Law system is to apply the codified statutes, and only those statutes, to all cases coming before it. In contrast to Common Law, discretion on the part of a judge is essentially eliminated and the judge is like a specialized civil servant.

COMMON LAW AND CIVIL LAW SYSTEMS: The Actuality

In purest form, neither system exists today. In all Common Law countries, including the United States and the United Kingdom, courts and expected to enforce a comprehensive set of laws, regulations, treaties and international agreements and to use those materials as the basis for deciding cases. In civil law countries, including France and Germany, courts must consider the existing body of decisions in similar factual situations in framing their judgments. The reasons for this convergence are obvious: all democracies have legislatures that enact laws that must be enforced and executives that issue regulations to implement that legislation; and all democracies require consistency in the application of those laws and regulations. Common and Civil Law nations, alike seek a Rule of Law, which basically means a system that is fair, transparent, predictable and accessible to all. Among other things, the Rule of Law requires the uniform adherence on the part of the judiciary to the will of the legislators and implementers of that legislation. Common and Civil Law courts alike must apply and enforce the decisions of the legislative and executive branches of government and, while one goal of good legal drafting is to address all possibilities and remove all ambiguities, in reality there are always unanticipated issues which Common and Civil Law courts alike have to adjudicate based upon materials extrinsic to the relevant legal document.

Notwithstanding the similarities that have inevitably involved between the Common and Civil Law systems, there remain several very basic distinctions between the two in the court systems and legal professions themselves. The divergence begins with legal education. In Common Law systems, all members of the legal profession enter it with a post-graduate law school education, culminating in a Juris Doctor (JD) degree[1]. Most degree holders go into the practice of law, either public or private, and from that cadre of legal practitioners, some are chosen to become judges; almost always, judges in Common Law jurisdictions have spent some years as practicing attorneys before becoming judges. In Civil Law systems, all members of the legal profession have received a Bachelor of Law degree (License en droit). Most of these degree holders (probably 90%) then drop out of the legal profession, going instead into government or the private sector. Those

[1] That is a slight oversimplification, for many jurisdictions, in principle, also allow entry into the Bar based upon an apprenticeship and an examination. Few if any actually enter the Bas this way.

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who do choose to enter the legal profession must first select one of three career paths; lawyer, magistrate, or prosecutor. Each path entails separate and lengthy post-graduate training. Of significance here is that under Civil Law systems, judges have no experience as practicing attorneys. The first distinction between the two systems, thus, is in the educational backgrounds of the members of the legal profession.

A second, more important distinction, one to which the differing educational backgrounds of the members of the legal profession undoubtedly contribute, is that the Common Law has an adversarial judicial system, while the Civil Law has a prosecutorial judicial system. Under the former, both plaintiff and defendant are equals before an impartial court. Opposing lawyers each present their cases in terms most favorable to their clients, with the judge acting as a moderator, and the lawyer with the better case wins. This adversarial approach to resolving court cases applies to both civil and criminal law proceedings. By contract, in Civil Law systems such a relationship between plaintiff, defendant and judge normally applies only to Civil Law cases involving private disputants. Whenever the government becomes a party to the case, whether civil or criminal in nature, the procedural rules of the court change dramatically. The prosecutor, is in effect, an arm of the judiciary, and the prosecutor works in tandem with the judge. The judge is also an active participant in the presentation of the evidence, and even require the production of additional evidence. This difference between the two systems is proba[2]bly most obvious in criminal law proceedings. With the judge acting primarily as a mediator during the course of the trial, under a Common Law system the criminal trial entails a lively interchange between prosecution and defense counsel over disputed facts and legal theory, and the trial may even take on some entertainment value. The Civil Law criminal trial is much more staid, but to a Common Law attorney the trial may appear to be basically unfair to the accused, for the judge is not only the moderator but also serves as a prosecutor and jury [2].

THE PRESENT PALESTINIAN SYSTEM

With its tangled legal heritage, Palestine today has a mixed, or perhaps undefined system. The Ottoman Codes became integrated, at least selectively, into the Common Law system brought by the British. This merger of legal systems, and the increments that followed, have rendered most areas of substantive law badly in need of systematic, coherent reform based on modern legislation.

During the period of their colonial rule in Palestine, the British usually adhered to the policy that with respect to matters of family law, property related to marital estates, inheritance and other land tenure questions, the personal law of the forum continued to apply[3]. Therefore, most matters of personal status, especially marriage and divorce, were and still are left to the exclusive jurisdiction of Moslem and Christian religious courts.

[2] The jury system is also a Common Law concept, although strictly speaking it is not an essential part of a Common Law system.

[3] This selective retention of local law was the British practice in all of their colonies.

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Functioning beside but independently of the government court system, these religious courts apply the traditional law of their respective communities. In all other aspects, the judicial system is a secular one. However, the substantive elements that make up the total body of law stem from different cultures and periods. For example, in the fields of contracts, commercial law, torts, rules of procedure and rules of evidence, the Common Law tended to displace Islamic law or other national laws. This strong Common Law influence in Palestine persisted long after the end of the mandate period, and still predominates.

The Palestinian judicial system, to the extent that it is a system, reflects its Common Law antecedents. There are courts, and these courts function in ways that generally resemble a Common Law court system. The courts are two-tiered: First Instance and Appeals in the West Bank and similarly in Gaza, although in Gaza, the court of appeals is a Supreme court [4]. The trial system is adversarial, as described above. Palestine does not use juries. There are two courts of appeal, one is called the Supreme Court in Gaza and one in the West Bank (Ramallah) called the Court of Appeals. Both courts handle direct appeals from the Courts of First Instance and decides issues of Law and fact. There are 4 courts of the First Instance located in Ramallah, Gaza, Nablus, Jericho and Hebron.

THE NEED FOR CHOICE

At least for the near future, making the fundamental choice between Common and Civil Law systems will not be highly significant with respect to drafting and enacting legislation, since most substantive legislation will work without any special modifications under either, or any system. However, the luxury of time to contemplate options does not exist with respect to the court system. The failure to choose quickly will hamper the courts in their daily activities, lead inevitably to injustices, and defer the possibility of upgrading the judiciary through training. Advocacy, the structure and hierarchy of the court decisions and legal interpretation, procedural steps, substantive issues and law enforcement become fundamental considerations as they will affect rights and obligations.

There is then an urgent need to make a choice. Palestine must make a formal decision on the basic tenets of its future legal system. This will not be an easy choice, for the it will have to recognize and resolve schisms concerning moral, political and social values. In

[4] The structure is two-tiered because the Supreme Court (third level) was moved to Amman, Jordan in 1948 from Jerusalem. All final appeals were brought in Jordan. When Israel occupied the West Bank and Gaza, all appeals, in any, were brought in the Israeli Supreme Court. Essentially, the Palestinian judiciary since 1948 did not handle any final appeal matter. Therefore, there were no final appeals and the one and only court of appeal, moved from Jerusalem to Ramallah by the Israeli Civil Administration in 1967, rendered final decisions. The system remains so today. In Gaza, with the advent of the PA, a court of appeals was established. This court, however, is called a supreme court and renders final decisions, just as the Court of Appeals does in Ramallah. Simply put, the Court of Appeals in Ramallah renders final decisions; the Supreme Court in Gaza renders final decisions on cases appealed directly from a Court of First Instance.

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this process of legal reform Palestine should certainly benefit from a careful comparison of the options available, drawing upon a variety of foreign models.

PALESTINE: A CASE FOR CONVERGENCE

Palestine, evolving towards independence, faces hard questions in legal drafting, be it areas involving the constitution, public law or private law. These questions are not unique to Palestine, for all emerging independent nations face similar problems. In every instance, in every facet of substantive or procedural law, there is a choice to be make between conflicting solutions. The first decision must be whether Palestine will strengthen its Common Law orientation, move towards the Civil Law by adopting a civil code, as its Jordanian neighbor did, or create a hybrid system where the Common and Civil Law system converge.

A fundamental drawback to a total code system is that codes are resistance to change and revision. In addition, the enormous number of issues and affected groups and interests is so vast that the process of revision will yield inevitably to massive political resistance. Finally, the task of codifying the entire body of laws is staggering, and a Civil Law system cannot function property unless and until all of its components are completed and in place. The primary drawback to a Common Law system is that it is evolutionary in nature, and can only develop gradually. While Palestine has evolved some elements of a Common Law system, nonetheless exclusive reliance on this process would require much time for the step-by-step development of jurisprudence.

The conclusion must be that Palestine should not try to establish either a Common Law or a Civil system exclusively. The situation in Palestine represents an excellent argument for a pursuing a measure of convergence between these two systems, based on a "common core" of legal rules. Comparative law is the vehicle for designing this convergence, making connections between and drawing from other systems where relevant.

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