Teaching More Civil Law in the Law Schools of Hong Kong

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As many readers of this blog know, there are two broad legal traditions followed by most of the jurisdictions in the world, namely common law and civil law. Yet, things are not as simple when lawyers have to deal with laws of another jurisdiction, especially if that jurisdiction is part of a different legal tradition. There are many instances in comparative law when the same legal terms have different meanings, or different legal terms have the same legal effect, causing confusion for lawyers and their clients. This confusion is especially significant when civil law lawyers must deal with the common law or vice versa. Although the civil law system and the common law system have many issues handled in the same way, there are still major differences between the two legal systems in terms of their legal structures, classifications, basic concepts, and terminologies. This post seeks to argue that it is important for the international legal practitioners to have a better knowledge of the civil law system, mostly because of the crucial role of Hong Kong (a common law jurisdiction) as an international arbitration centre. To facilitate this, law schools in Hong Kong should give more attention to researching on civil law systems and educating law students on the operation of civil law.

Differences between Common Law and Civil Law

Common law and civil law are the products of two fundamentally different legal methods. In civil law, the main principles and rules are contained in codes and statutes, which are then enforced by the court. Case law is a secondary source of law while codes and statutory law prevail. The common law, on the other hand, is mainly formulated by judicial decisions and usually lack a rigid conceptual structure. Civil law is based on the theory of the separation of powers, that is, the role of the legislator is to legislate, while the court would apply the law. In common law, the theory of separation of powers is challenged as the judiciary is given the power to make laws through judicial precedents.

In relation to arbitration proceedings, civil law and common law principles deal with the proceedings of arbitration differently. In common law jurisdictions, the dispute resolution process is characterized by two opponents confronting each other, whose task is to submit their respective cases to the courts. Their respective claims will then be mutually determined by the courts. In civil law jurisdictions, the arbitral tribunal plays a more active role ("inquisitorial role") before investigating the case, while the lawyers of the parties involved would assist the arbitral tribunal in finding the correct answer in this process. Although in common law jurisdictions, parties usually produce relevant documents after submitting a written statement, the civil law system expects parties to do so immediately when submitting their claims. Common law systems often rely heavily on witnesses to introduce and verify documents, and witnesses are usually the preferred source of evidence, whereas civil law jurisdictions tend to place more emphasis on written documents.

The Legal System of Hong Kong

Hong Kong has been following the common law system since the British colonial rule. This did not change even when Hong Kong was handed over to the People's Republic of China (PRC) in 1997. As part of the handover agreement, Hong Kong will become a Special Administrative Region of the PRC and operates under the principle of "One Country, Two Systems". The legal system of Hong Kong is based on various sources including the Hong Kong Basic Law, existing common law prior to 1997, statute law and Chinese national law to a very limited extent. In particular, the Hong Kong Basic Law serves as the highest law in Hong Kong. It was passed by the National People's Congress of China in accordance with Article 31 of the Chinese Constitution and took effect in 1997. As the constitutional document of Hong Kong, it stipulates the constitutional status of Hong Kong, the political structure of Hong Kong and rights of Hong Kong residents.

The Necessity to Study Civil and Comparative Law

With the globalization of legal services, the practice of international commercial arbitration has aroused not only great interest among new entrants to the legal profession but also attracted cross-border lawyers from litigation to practice international arbitration. However, this also implies the problems of competition, success rate and market saturation. In order to develop this area of practice in an international commercial hub like Hong Kong, more education and training for arbitration lawyers and courts are needed. A deeper understanding and experience of arbitration and the relevant laws are required.

In its 2020 report, the Hong Kong International Arbitration Centre (HKIAC) reported that the parties that brought their disputes to the HKIAC in 2020 came from 45 jurisdictions, with 72.3% of the caseload having at least one non-Hong Kong party. Regarding the name of the countries, the top 10 users at the HKIAC in 2020 were Hong Kong, Mainland China, British Virgin Islands, the United States, Cayman Islands, Singapore, South Korea, Malaysia, the United Kingdom, and the United Arab Emirates in that particular order. Out of these top 10, it can be seen that three jurisdictions, namely Mainland China, South Korea, the United Arab Emirates, largely follow the civil law system. Although arbitrations conducted in Hong Kong are governed by the Arbitration Ordinance (Cap. 609), the detailed procedure would be governed by the arbitration rules that the parties have chosen. This means that parties to arbitrations heard at or administered by the HKIAC are free to choose the procedural rules for their arbitration. It is reported that 12 different governing laws were applied to the cases in 2020.

The statistics above illustrate the importance for lawyers and practitioners to understand the operation of civil law systems. Having knowledge of both civil and comparative law will enable legal professionals to view the law in an international, comparative and theoretical context. Being unaware of a legal method that is being predominantly applied may lead to the provision of inaccurate legal advice. It follows that it is necessary to use comparative legal research to familiarize themselves with some of the more important areas of comparative law. The method should emphasize the inherent advantages of different methods and solutions, rather than surface changes based on different historical developments. This kind of comparative law study will greatly help extract the greatest value from other legal orders and help to better understand contemporary issues. Furthermore, in order to meet the international standards and demands, even international law firms have international desks, specifically for dealing with civil laws for foreign (non-Hon Kong) parties. There is a demand for such legal professionals, and that means that there is a need to understand the law of particular nations.

Centres for Comparative Law in Hong Kong

There are currently three centres for comparative law in each of the law schools in Hong Kong, namely the University of Hong Kong, the Chinese University of Hong Kong and the City University of Hong Kong. This section will briefly look at the research focus of each of the centres and examine whether they are giving enough attention to civil law systems.

1. The University of Hong Kong – Centre for Comparative and Public Law

The Centre for Comparative and Public Law (CCPL) was established in 1995, with the aims to "advance knowledge on public law and human rights issues" through the lens of "international and comparative law and practice", to "encourage and facilitate collaborative work within the Faculty of Law ... and the broader community in the fields of comparative and public law" and to "make the law more accessible to the community and more effective as an agent of social change".

However, the scope of their work generally revolves around academic conferences, seminars and publications. After reading through their annual reports, it does not appear that they have particularly emphasized on civil law. In fact, the word "civil law" has not appeared in most of their annual reports, apart from the one in 2015-16. This suggests that its research on the nature of civil law systems is lacking.

2. The Chinese University of Hong Kong – Centre for Comparative and Transnational Law

The Centre for Comparative and Transnational Law (CCTL) is the newest research centre for comparative law in Hong Kong, which was established in 2020. Its goals are to "provide institutional support and encourage collaborative comparative and transnational law research" at the university.

Under the six "cluster groups" formed to facilitate collaborative research, the "Comparative Constitutional Law Research Forum" appears to be the most relevant in this regard. Though it also does not appear to have specific research on the civil law system, one should bear in mind its relatively new establishment. On the other hand, the Centre is organizing a conference on the theme of "Asian Legal History", and it is inviting proposals for individual papers. In particular, the "historical evolution of common law, civil law, and socialist law traditions in Asia" are included as a suggested topic. It shows that the research centre does at least pay some attention to civil law systems.

3. The City University of Hong Kong – Centre for Chinese and Comparative Law

Unlike other research centres, the Centre for Chinese and Comparative Law (RCCL), as the name suggests, has a particular focus on the Chinese legal system. The RCCL was established in 1994 to "foster research and scholarly discussion on the changing legal landscape of China". It endeavours to make Hong Kong the "centre of gravity for Chinese and comparative legal studies". It acknowledges Hong Kong's role as an "international legal and dispute resolution centre for the Asia Pacific region", and specifically states that comparative work involving commonwealth and civil law systems are encouraged. Having a brief look at the research papers, though, it does not appear that any of its research deals specifically with the civil law system. Even in a comparative work between China and Hong Kong, most of it focuses on analysing specific areas of law, rather than taking note of the specific features of a civil law system.

Briefly looking at the work done by the three research centres at the law schools in Hong Kong, it seems that they do not pay enough attention to the civil law legal system. This shows that the civil law legal system has been largely overlooked and ignored in the academic sphere in Hong Kong. It is also noteworthy that the University of Hong Kong and the Chinese University of Hong Kong both have specific courses on the civil law legal system, which shows that the law schools do recognize the importance of allowing students to be exposed to the civil law system. However, it does not seem like these courses are offered as the core of the law degree, meaning this is not made compulsory and are merely electives. Thus, it is right to conclude that local universities do need to focus more on Asian and comparative law, based on the current curriculum design.

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