

‘Bridging the Divide’

The interface between the Civil Law system and the Common Law system, with specific reference to the role of the Caribbean Court of Justice .

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Introduction

The Caribbean Court of Justice [1] is charged with two forms of jurisdiction: appellate and original jurisdiction. This address is about the original jurisdiction of the Court, which deals with cases between Member States and the Caribbean Community and among Member States and which cases have not yet been adjudicated by another court or tribunal.

In exercising original jurisdiction, the Caribbean Court will be discharging the functions of an international tribunal by applying rules of international law in the interpretation and application of the Treaty of Chaguaramas[2]. The Court’s jurisdiction will be exclusive and the Court will not be allowed to bring in a finding of *non-liquet* on the grounds of silence or obscurity in the law. So the Court is not allowed to refrain from a judgment on either of these grounds. Following from the doctrine of *stare decisis* judgments of the Court shall constitute legally binding precedents.

The principle of *non-liquet* and the doctrine of *stare decisis* are attributes of supra-nationality. Pollard has elaborated extensively on these attributes and has concluded that, in exercising original jurisdiction, these attributes appear to be open to considerably less ambiguity and speculation than in the exercise of the Court’s appellate jurisdiction[3].

My submission is that in the application of the principle of *non-liquet* and the doctrine of *stare decisis* in the jurisdiction of the Caribbean Court, differences in the legal systems of Member States become relevant.

There is a risk of a bias of the Court for common law reasoning when filling gaps in international treaty and customary law and when applying the doctrine of *stare decisis*. *Stare decisis* is not a doctrine of civil law. Nor is it a doctrine of international law, so it would be natural for the Court to relate in its decision making to the manner in which this doctrine is applied in common law. *Non-liquet* is a principle common to all three legal systems, however there is no shared view regarding the scope and the appropriateness of judicial law making resulting from the application of this principle.

As areas of concern from a civil law perspective, following from the above, this address will focus on the scope of the *stare decisis* doctrine, the policy dimension in filling gaps in international law and the procedural rules to be defined by the Court.

This address is divided in four parts. The first part gives an overview of the differences between the common law and civil law systems and the increasing convergence in the way jurisdiction is approached and applied in both these systems. In the second part, uniform interpretation of treaties based on the Vienna Convention[4] is being discussed as well as the dangers of recourse to municipal law.

The third part focuses on application of the *non-liquet* principle and the *stare decisis* doctrine by the Court and draws conclusions therefrom for judicial law making. And in the last part, suggestions are made to further bridge the common law - civil law divide in the work of the Caribbean Court.

Different paths

It seems useful to briefly dwell on the historically different paths of development and the different characteristics of the common law and the civil law systems. The techniques of discovering and applying the law and the typical methods of legal thought as a whole have developed very differently in the two systems.

Important differences are that lawyers from the civil law countries tend to be more conceptual, while lawyers from the common law countries are considered to be more pragmatic. And that priority is given to doctrine over jurisprudence in civil law; while the opposite is true in common law. Also, in civil law the legal rule has risen to a higher level of abstraction compared to common law.

In both legal traditions statutes are of equal paramountcy, however they differ in functions. Civil law codes provide the core of the law, while common law statutes complement the case law, which constitutes the core of the system. The drafting style of civil law is concise and presents a principle of law in a single, broad and general phrase. Civil law statutes do not provide definitions. On the other hand, the common law style of drafting emphasizes precision rather than conciseness. Common law statutes provide detailed definitions, and each specific rule sets out lengthy enumerations of specific applications or exceptions. These differences in style can also be found in international conventions.

Not only the function and the drafting style of statutes are different; also their construction and interpretation. In general, common law statutory construction is restrictive. It focuses on the ordinary grammatical meaning of the words. Interpretation of legislation in civil law jurisdiction is liberal rather than restrictive, focusing on the purpose of the provisions. The civilian judge is free to choose the methods and instruments which he expects to assist him in providing a convincing solution.

As a consequence of the above, judgments in the two systems can easily be differentiated. Civil law judgments are shorter and written in a more formal style than common law decisions. Common law judgments also give a far more explicit and complete explanation of the court's reasoning than their civil law counterparts do.

The last difference between the civil law and common law systems to be discussed is the binding force of precedents. The doctrine of *stare decisis* is unknown to civil law. Here judgments only enjoy the 'authority of reason'. In civil law the main tasks of courts are to decide on particular cases by applying and interpreting legal norms, while in common law, courts not only decide on disputes but are also supposed to provide guidance as to how similar disputes should be settled in the future. As David and Brierly write: 'The duty to observe the rules as stated by the judges (*stare decisis*- let the decision stand-) (...) is the logic of a judge made legal system'.^[5]

However, the rule of binding precedents is also applied in the common law system in the interpretation of statutes. Here of course, it no longer rests on the same justification and its application has not remained uncriticized.

Rapprochement

These conceptual differences between civil law and common law should not be exaggerated. Common law and civil law legal traditions share similar social objectives such as individualism, liberalism and personal rights. In fact both have been joined together in one single family, the Western Law family, because of this functional similarity.

The claim that common law is created by case law is only partly true, as common law is based in large parts on statutes, which the judges are supposed to apply and interpret in much the same way as the judges in civil law. And it is hardly an exaggeration to say that the doctrine of *stare decisis* in common law and the practice of the continental courts show clear signs of convergence.

Additionally, the growing globalisation of the world economy, which is based on closer integration and cooperation among states, imposes a need for legal certainty and unification of law. This process involves further reducing of differences between various legal systems and harmonisation of the common law and civil law legal systems. An important step has been made towards bridging the divide between major legal systems through adopting international treaties, conventions and uniform rules containing elements of both civil and common law. Such an example is the Vienna Convention.

It is clear that rapprochement between the civil law and the common law systems is manifesting itself and this will continue. There are however, methodological characteristics of the two systems, which are and will remain different. Mainly due to the application of the principle of non-liquet ('the Court can not abstain from decision making on the basis of silence or obscurity of the law') and the doctrine of stare decisis ('the Court is bound by its previous decisions') these differences could have a bearing on the original jurisdiction of the Caribbean Court. It is therefore necessary for every lawyer involved in the original jurisdiction of the Caribbean Court to be aware of these differences.

Treaty interpretation

However, even when the application of non liquet and stare decisis are not topical in the jurisdiction of the Caribbean Court, there are areas where the common law and civil law divide may carry over in the Court's decision making. One such area is the interpretation of treaties.

Cassese [\[6\]](#) summarizes the state of statute interpretation in international law before the Vienna Convention as follows: 'States and courts tended to agree that the main purpose of treaty interpretation was to identify and spell out the intention of the draftsmen. However, views differed when it came to specifying how this intention could be found. Some states (France, Italy, US) under the influence of their own legal systems, favoured resort to the negotiating history (a subjective interpretation). Other countries, such as Britain preferred instead, a construction based on the text of the treaty and the wording of its provisions (an objective interpretation). Courts tended to take different views depending on the cultural background of the judges. (...). This contentious area was satisfactorily settled in Articles 31-33 of the Vienna Convention. '

The Vienna Convention has indeed made a major contribution to unification of the methods for interpretation of international conventions. It gives recognition not only to literal, systematic and teleological interpretation methods but also to the civil law principle of effectiveness. This principle provides that logical implications and necessary consequences of written provisions also form part of those provisions.

By applying the principle of effectiveness the Court would adopt a practice of expanding the normative scope of the Treaty of Chaguaramas, thereby following the more 'liberal' civilian rather than the more 'restrictive' common law method of statutory interpretation

Municipal law reasoning

Another area where the common law-civil law divide is of interest outside the sphere of application of non-liquet and stare decisis is municipal law reasoning in international law. Shahabbuddeen [\[7\]](#), in his contribution to the Liber Amicorum for Sir Robert Jennings, wrote about 'the utility of drawing on the process of municipal law reasoning for the purpose of appreciating a concept or resolving a problem in international law (...)'. [\[8\]](#) He distinguishes the process of municipal law reasoning, in which international tribunals employ elements of legal reasoning and private law analogies, - in order to make the law of nations a viable system for application in a judicial procedure -, from applying general principles to fill gaps in the law, pursuant to article 38 (1 sub c) of the Statute of the International Court of Justice.

The problem does not concern the admissibility of analogy as a method, or its applicability to municipal law concepts, but the limits within which municipal concepts may be applied by analogy in international law.

These limits relate to dangers involved in the use of municipal law in international jurisdiction. Such dangers are ideas like the tendency to resort to notions peculiar to one's own municipal law; the failure to appreciate that solutions should foremost be found by making logical deductions from existing rules of international law or by means of analogy to them; the danger of confusing the terms used in a treaty with those from municipal law and more general, the risk that a particular form of civilization to which a judge belongs, becomes decisive for his alignment in a particular case. These are all concerns on which the civil or common law background of the judges of the Caribbean Court will have a bearing and therefore, accepting that municipal law reasoning can and will play a part in the thinking out of international legal problems by the Caribbean Court, it is submitted that not only will there be a need for adaptation of concepts to ensure that judgments are methodologically sound but also a requirement for prudence to make head against the hazards of a bias towards one system of municipal law by adopting a practice of comparative analyses in the decision-making of the Caribbean Court.

Non-liquet

The difference between the common law system and the civil law system becomes really relevant when the Caribbean Court will resort to judicial law making. It follows from the principle of non-liquet that the international legal system is considered for the purpose of the jurisdiction of the Court to be complete and that the Court will have to apply general principles of the law to fill gaps where treaties and custom law do not provide answers.

Addressed to the civil law members of the Caribbean Community, Pollard made the reassuring comment that the law applied by the Caribbean Court of Justice in exercising its jurisdiction under Article 211 of the Treaty of Chaguaramas shall be international law and therefore these members of the Community like their common law brothers should have no difficulty, to sign on to the jurisdiction of the Court in the exercise of its original jurisdiction'.^[8] But Pollard rightly also makes a proviso referring to the express provision of Article 217(2) that the Court shall not bring in a finding of *non-liquet* on the grounds of silence or obscurity of the law.

With the latter provision, side has been taken with those who are of the view that the concept of *non-liquet* is an unhealthy one for the judicial function and that international tribunals misunderstand their duties if they plead *non-liquet* in any given case. In international law one does not always discover a 'clear and specific rule readily applicable to every international situation, but (...) every international situation is capable of being determined as a matter of law', writes Jennings.^[9]

This is the notion of a 'closed' international legal order which 'thrusts upon the Court's responsibility for operating flexibly in the blankness, the leeways and the uncertainties' due to gaps and voids in the law. It rejects the concept of an 'open' legal order in which it is left to the Community to handle gaps in the law as best it can, pending a legislative determination *de novo* by the collectivity of Member States.^[10]

The principle of completeness underlying the concept of a closed legal order is accepted in modern common and civil law systems. Efforts to exclude judicial creativeness by use of the legislative reference have failed in both systems. But there remains controversy which does not concern the legitimacy of judicial lawmaking as such, but the source of law in instances where the courts fill gaps in the law and the appropriateness of judicial law making in the handling of a given problem. Both questions are also relevant for the Caribbean regional legal order. The first will be addressed now and the second in the closing part of my address.

General principles

Treaties and custom are the principal sources of international law, but they are not the only sources. Article 38 (1) [c] of the Statute of the International Court of Justice authorizes the Court to apply 'the general principles of law recognized by civilized nations' as a third source in order to provide in cases where treaties and custom give no guidance.

However, there is little agreement about the meaning of the phrase 'general principles of law'. International tribunals apply general principles of law both in the sense of 'principles of international law' and of 'principles of municipal law'. In moving from more specific to more general regulation, international tribunals first search for general principles, which are specific to a certain branch of international law, and then for general principles of international law. Only thereafter will they look for general principles of municipal law as a source of international law.

Of relevance to the jurisdiction of the Caribbean Court is the requirement that municipal law principles which are to be transplanted to the international level in filling gaps in the law, should be common to the common law and civil law systems. An undesirable practice would be the use, explicit or *sub silentio*, of principles drawn from one system without examining whether they are also accepted in the other system.

Stare Decisis

The impact of decisions of the Caribbean Court has been reinforced by adoption of the doctrine of stare decisis. The binding force of precedents is considered to be one of the main distinct features of the common law system. Civil law courts are not obliged to follow previous decisions; the reasoning being that an ordinary system of non-binding decisions sacrifices a degree of certainty, uniformity and logic compared to a system that recognizes *stare decisis*, but this is in exchange for the benefit of increased flexibility and decreased injustice.

Pollard mentions two considerations, which would influence the Caribbean Court's determination of what he calls 'the scope of application of the doctrine and the extent to which it constrains judicial innovativeness in establishing and declaring applicable norms' [\[11\]](#). The first consideration is the practice of 'distinguishing the instant case from previous decisions' and the second is the qualified application of the doctrine of stare decisis by the Judicial Committee of the Privy Council. The latter consideration is a reference to the Caribbean Court's appellate jurisdiction, but the Statement of the House of Lords in 1966 regarding the future application of the doctrine by the Committee is a clear illustration of a general tendency in the common law system to structurally soften its rigid application. The House of Lords abandoned the established rule that it was bound by its own previous decisions with the argument 'that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law' [\[12\]](#).

At least three additional considerations impacting on the Caribbean Court's application of the doctrine of stare decisis could be thought of. One has been referred to earlier. The justification for a rigid application of the *stare decisis* doctrine is based on the logic of a judge-made legal system but does not apply to a system of treaties and statutes, which has more affinity with the civil law system.

Then there is the fact that there is no formal *stare decisis* doctrine in international law. International courts are not obliged to follow previous decisions. Applying the principle in the jurisdiction of the Caribbean Court is an exception to general practice in international law, which should therefore be strictly constructed.

The last consideration is that the Caribbean Court's role as 'arbitrator' of the Treaty of Chaguaramas mitigates against strict stare decisis. One would expect situations to rise over time in which reversal of earlier rulings would be appropriate in order to ensure that the Treaty would be interpreted and applied as 'a living document' that steers rather than stifles development. These are compelling reasons for a restrictive policy in the application of the doctrine of stare decisis by the Caribbean Court.

Judicial Law Making

The reservations made concerning the application of general principles of law and of the doctrine of stare decisis influence the appropriateness of judicial law making by the Caribbean Court. An additional

influencing factor is the reluctance of courts in the civil law, common law and international law systems to act as would-be legislatures.

Civil law is based on the theory of separation of powers, whereby the role of the legislator is to legislate and of the courts to apply the law. Courts in the civil law system therefore tend to look for support in a text of law and creativity is nearly always hidden behind the screen of interpretation of legislation.

It would be incorrect to conclude from this, that in the civil law system the decision making process is only a quasi-mechanical process of analysis. Courts also approach decision taking with insight and apply a functional conception of the judicial process. Decisions are made after having fully considered the patterns of interest accommodated by the existing body of precepts and principles as well as the interests pressing for recognition in the case at bar.

However, it is also fair to say that courts in the civil law system tend to persist in their attitude of obedience towards enacted law, even when the legislature itself has recognised that there may be gaps in the legislation and has prescribed that in such instances the judge must decide 'as though he were the legislator'.^[13]

In common law, the courts are given the main task in creating the law and do so overtly. Decisions of the courts are an important part of the law, and Atyah^[14] explaining how the case law system works makes the following specific reference as to how the law is made by Parliament and the courts : 'A much controversial question concerns the reasons for which the law is made by the two sorts of institutions. On one view, judges are legislative delegates (...) On this view, judges must examine the policy issues involved in cases before them (...) and then decide what they think is best, just as a legislator might. An alternative approach, however, entirely rejects this idea of the judge as a sort of delegated legislator. On this view judges are concerned with rights, not policy. Matters of public interest, and broad policy questions relating to the community welfare are pre-eminently matters for Parliament and not courts; courts are concerned with conflicting private rights, and they are not well equipped for deciding major policy issues.....'

Atya's conclusion is that there may well be something of a bias in the judicial process, which tends to favour an orientation on individual rights rather than collective welfare in decision making, but that nevertheless courts in the common law system are not averse to judicial law making that shares characteristics with legislative law making.

Thus judicial law making is a common and generally accepted role in both legal systems. Judicial decisions play a creative part in the process of evolution of the law to the extent that judges depart from simple exegesis. But it seems that when major policy issues are involved, courts in the civil law system tend to observe a larger degree of self-restraint in judicial law making than their counterparts in the common law system.

International Courts also create new law. The International Court of Justice is particularly important in this respect. This Court as any other international court or tribunal is by no means the mechanical recorder of what law is supposed to be. Many of its decisions have introduced innovations in international law, which subsequently have obtained general acceptance. But it seems also true that 'dispensing justice and declaring the law' as the characterization of the role of the International Court of Justice, is understood to mean that its decisions find their objective justification in considerations lying not outside but within the rules of the law. ^[15] Obviously considerations of sovereignty are lying at the root of this concept.

Bridging the divide

It is evident that the Caribbean Court faces a number of issues related to the common law - civil law divide of its Member States.

The first of those issues is the establishment of the Rules of Court by the President of the Court pursuant to Article 221 of the Treaty of Chaguaramas and Article XXI of the Agreement establishing the Caribbean Court of Justice.

It is suggested that these Rules should in principle be sufficiently flexible to allow for dispute resolution approaches from the perspective of both legal systems. Its rules of how a dispute is commenced, developed and presented should guide a practice that embraces elements of both systems as a middle ground to parties from both sides of the divide.

The second issue concerns interpretation of the Treaty of Chaguaramas. The Treaty is an English text, designed and drafted by common law lawyers trained in the English legal tradition. There will be a natural inclination to understand, interpret and construct the text of the Treaty according to English style. However, by observing the principle of effectiveness as embodied in the Convention of Vienna, it would be avoided that an argument based on the grammatical meaning of words will prevail over a sound theological one.

The third issue concerns municipal law reasoning. The Court should seek to avoid a bias for one municipal law system and even the likelihood thereof. This would be achieved by not only adapting municipal concepts to ensure their compatibility with the specificities of international relations but by also adopting a practice of underpinning its judgments with comparative analyses of relevant municipal concepts.

The next issue relates to the scope of the doctrine of stare decisis. Introduction of the doctrine in the jurisdiction of the Court is a remarkable fact, given the recent retreat on the doctrine in the common law system and its absence in the civil law and international law systems. One would hope that decisions of the Court would earn their authority not so much on the basis of the formal legal precept of binding precedents but more on the basis of 'reason' to ensure that the Treaty lives and steers its environment. Indeed, for the law to be effective, it is required to be as dynamic as the environment it controls.

And finally there is the question of the appropriateness of judicial law making. It should be non-controversial that the responsibility of the Court is foremost to seek and rationalize decisions within the existing body of regulations. This should be done by giving precedence to specific regulations as embodied in the Treaty of Chaguaramas over general international law emerging from treaties, custom and general principles.

Judicial law making is within the realm of the jurisdiction of the Court. But it would be wrong to assume that the 'abstract consent' given by Member States to the Court to create law is also 'absolute'. The Caribbean Court will need to take into account in its jurisdiction the implications which follow from the common law - civil law divide for the principle of non liquet, the application of general principles to fill gaps in the law and for the doctrine of stare decisis. And in addition the Caribbean Court should be mindful that failure of Member States to agree on new legislation is not necessarily the result of lethargy but could well be a function of policies of Member States adopted by virtue of authentic sovereignty, which needs to be respected.

In concluding, the view is offered that the Caribbean Court by working within a well defined framework with due consideration to the above, would bridge the divide of the common law and civil law systems in the interpretation and application of the Treaty of Chaguaramas.

[1] Established by The Agreement establishing the Caribbean Court of Justice of August 15, 2001

[2] Treaty of Chaguaramas establishing the Caribbean Community including the Caricom Single Market & Economy revised on July 5, 2001

[3] Duke E.E. Pollard: 'The Original Jurisdiction of the Caribbean Court of Justice', Port of Spain, May 2003 page 15

[4] The Vienna Convention on the Law of Treaties of 1969

[5] Rene David and John E.C. Brierley: Major legal systems in the world today London 1985, 376

[6] Antonio Cassese: International Law, Oxford 2001, 133 -135

[7] M. Shabbuddeen, Municipal law reasoning in international law, Lowe/Fitzmaurice (ed) Cambridge, 1996, 90-103

[8] Above note 3,6

[9] R. Jennings/A. Watts (eds) Oppenheims International Law Vol 1, part 1, London 1992, 13

[10] Julius Stone, Legal System and Lawyers Reasonings, Sydney 1968, 188-194

[11] Above note 3, 9

[12] K. Zweigert and H. Kötz, An Introduction to Comparative Law, Oxford 1992, 269-270

[13] Article 1 of the Swiss Civil Code, article 4 of the French Civil Code and article 12 of Law of General Provisions of the Netherlands

[\[14\]](#) P.S. Atiyah, *Law & Modern Society*, Oxford 1995, 195.

[\[15\]](#) Peter Malanczuk, *Modern Introduction to International Law* 1997, 50-52.

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