INPROL | INTERNATIONAL NETWORK TO PROMOTE THE RULE OF LAW

PRACTITIONER'S GUIDE

Common Law and Civil Law Traditions

March 2012

Written By:

Dr. Vivienne O'Connor

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Note:
All opinions stated in this Practitioner's Guide have been made in a personal capacity and do not necessarily reflect the views of particular organizations. INPROL does not explicitly advocate policies.

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I. Introduction and Overview

A. Goal of this Guide

The goal of this Practitioners' Guide is to provide an overview of both common law and civil law legal traditions—comparing and contrasting them—so that practitioners deploying to post-conflict or developing countries can become familiar with them, and more easily work in a country that follows a tradition that is unfamiliar to them.

B. Importance of Understanding Comparative Legal Traditions

Understanding comparative legal traditions is not just of theoretical value to the practitioner. There are very real and practical benefits to understanding comparative legal systems, and potentially, very negative consequences to not understanding them.

Take the example of the United Nations peacekeeping mission in Kosovo (UNMIK) in the late 1990's. Foreign police officers deployed to Kosovo and were empowered, under a **United Nations (UN) mandate**, to conduct law enforcement activities in Kosovo. In practical terms, this meant that a UN police officer had the same powers and duties as a local police officer. UN police officers began arresting alleged criminals and conducting investigations. Kosovo, being a civil law country, required that an investigating judge (discussed below in Section VI), rather than a police officer, interview a witness and take a written statement. This was because in the Kosovar system at that time, the witness would not testify in court; instead his or her statement would be used as the evidence in court (see Section VII for further discussion on this). If a police officer were to conduct the interview, the evidence would be inadmissible.

United Nations Mandate

The United Nations, acting through a resolution of the Security Council under Chapter VII of the United Nations Charter, can authorize a peacekeeping operation where there is a threat to international peace and security. A Security Council Resolution authorizes the peacekeeping mission and creates a mandate that outlines the powers and duties of UN actors who are part of this mission.

Unaware of this feature of the civil law tradition in Kosovo, foreign police officers conducted interviews in several cases, thus making valuable evidence inadmissible in court and jeopardizing ongoing criminal investigations. This example demonstrates the importance of understanding the local legal system rather than relying on how things are done in one's home country.

International assistance providers can serve in a wide range of roles: international police monitor, mentor and advise national police counterparts. International rule of law advisors may be placed in the Ministry of Justice or the Ministry of Interior as mentors to offer advice on reform initiatives, other international rule of law practitioners offer technical assistance in justice

Bilateral Donors

Many countries give aid to developing countries on a bilateral basis – meaning directly from the donor country to the recipient country. Normally donor countries will have a specific agency responsible for delivering development aid. For example, in the United Kingdom, this is the UK Department for International Development (DFID). In the US, the US Agency for International Development (USAID) has this role.

reform projects, including for example, law reform and court reform. Advisors from the United Nations, **bilateral donors** or other rule of law organizations develop projects/programs that will assist in promoting the rule of law and enhancing the justice system. It is simply not possible to monitor, mentor or advise on the justice system, or to develop rule of law projects/programs in a country, when international practitioners are unfamiliar with the particular legal tradition that informs how the legal system is set up and operates on a day-to-day basis.

In the context of Iraq—a civil law country—one practitioner noted that "American lawyers who worked in Baghdad during the first few years of the occupation say they were … hamstrung by the lack of familiarity with Iraq's legal traditions."[1] One of the golden rules, or international best practices, in rule of law assistance is to "take context as the starting point,"[2] and this includes the legal/justice system.

C. Ground Reality for Practitioners

Most practitioners who deploy to a post-conflict or developing country to provide rule of law or policing assistance have only worked within their own legal system in their home country and therefore have experience with one legal tradition—usually common law or civil law. This experience may be as a judge, police officer, prison/corrections officer, prosecutor or lawyer. In general, the training/education they undertook to work in their home jurisdictions did not include sessions on other legal traditions. So, when practitioners deploy to a post-conflict or developing country, the practitioner ovocvften finds himself or herself working within an unfamiliar and alien legal tradition, without any prior information on it.

Many practitioners make a real effort to understand the intricacies of the justice system in which they are now working. This is incredibly challenging however because they are missing huge chunks of information about the legal tradition in operation. When it comes to suggestions for reform, it is human nature to revert back to what we know. So, practitioners unfamiliar with the local legal tradition will make suggestions about the new legal order based on how things work in their own home countries. For example, at meetings on post-conflict law reform German practitioners suggested a new legal provision be based on German law; US practitioners suggested it be based on

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[1] Ben Hallman. "Wilson Myer's War," *American Lawyer*, September 3, 2008. Accessed June 8, 2011.

[2] See Organization for Economic Cooperation and Development. *Principles for Good International Engagement in Fragile States and Situations* (Paris: OECD, April 2007). Accessed June 8, 2011.

US law; British practitioners suggested it is based on UK law, and so forth. These suggestions often do not take into account what sort of legal provision would fit best in the particular context and legal tradition in question.

This Practitioner's Guide will provide a broad and high-level overview of both common law and civil law legal systems, with the hope of filling any knowledge-gaps about these systems that practitioners may have. This should provide a good starting point for the practitioner to understand a particular common law or civil law system and how it operates.

D. Disclaimers

There are two disclaimers that should be noted before proceeding. The first is that when looking at a legal system it is too simplistic to classify the system as either common law or civil law. It may be a hybrid of both, as discussed below in Section IX.

In addition, there will likely be more than one legal system operating in the country. For example, many people in post-conflict and developing countries do not seek justice from the formal justice system. Instead, approximately 80% of the world's people address their grievances through customary justice systems. Most justice systems in post-conflict and developing countries are a mixture of formal laws and institutions and **customary justice system(s)**. In addition to this, religious legal traditions (e.g., **Islamic Law**) play a huge part in the lives of many people. Religious law can form part of the fabric of formal laws and institutions, as well as be applied by customary justice systems. In Muslim states, religious laws are often integrated into formal laws and are applied by the justice institutions. For example, certain crimes set out in the Koran may be contained in a domestic penal code.

The term "legal pluralism" captures the fact that there will be multiple legal orders operating in any given post-conflict or developing countries that will look like "an unsystematic collage of inconsistent and overlapping parts."[3] Knowing that most states practitioners will work in are legally pluralistic, we cannot simply declare any given country to be common law or civil law. The common law or civil law is just one subsystem of the broader legal reality of the post-conflict or developing country. That said, it is an important subsystem and one that many practitioners will be working with on a day-to-day basis.

Definitions

Customary Justice System(s)

Community-based social regulation and dispute resolution practices that are distinct from, even if influenced by and intertwined with, the state-sponsored western-style justice system. The term encompasses a vast array of practices that vary from community to community and is not meant to imply a single, uniform system. Yet, what they generally have in common is their origin in longstanding localized social structures, which greatly inform their notions of justice.

Islamic Law

A basic set of rules contained in the two primary sources: the Koran and the Sunnah (the model behaviour of the Prophet Muhammad that was written down). This basic set of rules is further developed by Muslim jurists using ijtihad (independent reasoning) in order to achieve either ijma (juristic consensus) on a given issue or rely on qiyas (analogical deduction) to expand the law to new cases while remaining within the broader framework (objectives) of Sharia (Dr. Niaz Shah, 2011).

[3] Werner Menski. *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*. 2nd ed. (Cambridge: Cambridge University Press, 2006), 115.

When we talk about civil law countries or common law countries as groups, we are referring to the fact that each group of countries shares a "distinctive heritage"[4] or a "legal tradition."[5] "Legal tradition" refers "to a set of deep rooted, historically conditioned attitudes about the nature of law, about the role of law in the society … about the proper organization and operation of a legal system, and about the way the law is or should be made, applied, studied, perfected and taught."[6] Legal tradition needs to be distinguished from a "legal system," which "is an operating set of legal institutions, procedures and rules."[7] France and Germany share the same legal tradition (i.e. civil law), as do Canada and Sierra Leone (i.e. common law); however, France and Germany, and Canada and Sierra Leone, have variations in how their individual legal systems operate.

By understanding the civil law and common law traditions, a rule of law practitioner will understand many things about the nature and the role of law, the organization and operation of the legal system, and the way law is applied, studied, perfected and taught in any given legal system. However, there will be differences in how each individual legal system operates, and its procedures and its rules. The rule of law practitioner will need to learn the specificities of the justice system in each new country he or she works.

III. History

It is in understanding their history that we begin to understand the core philosophical underpinnings of both the civil law and common law traditions.

A. The Civil Law Tradition

The civil law tradition is the oldest and most widely distributed legal system (evident from the map below), dating back to 450 B.C in its origins.[8] Even though it is the older of the two systems, the civil law took exponentially longer to develop than the common law, the genesis of which was swift in comparison.

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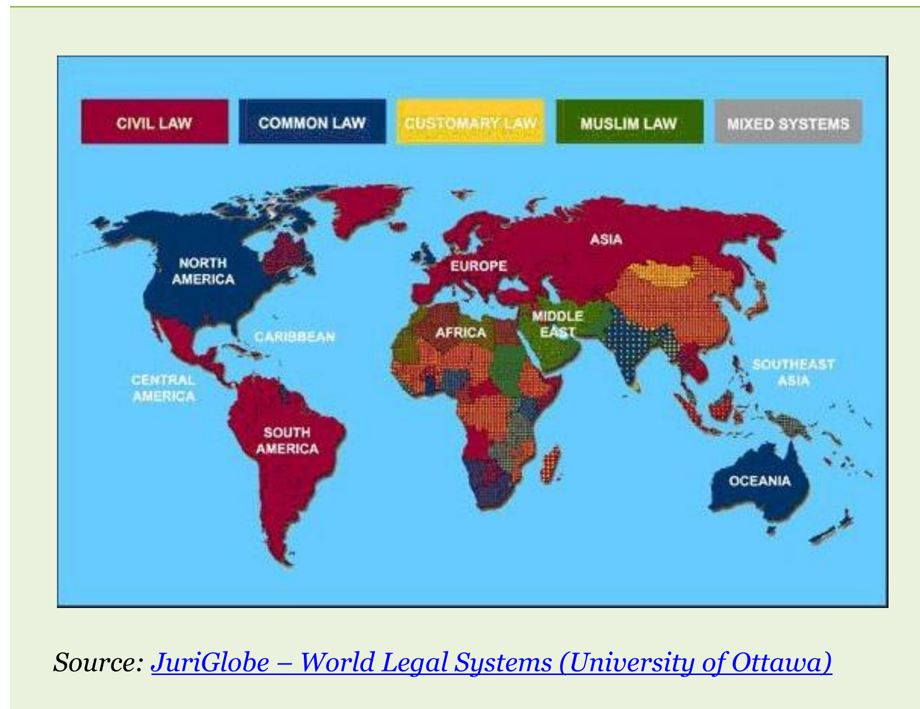
[4] Mary Ann Glendon, Michael W. Gordon, and Paolo G. Carozza, *Comparative Legal Traditions,* (St. Paul, Minnesota: West Group, 1999), 16.
[5] John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America.* 2nd ed. (Stanford: Stanford University Press, 1985), 2.
[6] Merryman, *The Civil Law Tradition,* 2.
[7] Ibid.
[8] Ibid.



Source: JuriGlobe – World Legal Systems (University of Ottawa)

Four hundred and fifty B.C. is designated as the beginning of the development of the civil law because this is the year of the *Twelve Tablets*, the first written law and rudimentary system of dispute resolution in Ancient Rome. The next significant period in the development of the civil law comes in the 6th century A.D., when the Emperor Justinian of Constantinople commissioned the *Corpus Juris Civile* to be written, which would codify the Roman law on family, inheritance, property, and contracts, among other areas of law.[9] After the fall of the Roman Empire, codified Roman law was no longer in use. However, during the Enlightenment Period in Europe (11th- 15th Centuries) after the so-called "Dark Ages," the *Corpus Juris Civile* was re-discovered. During this time the first modern European university was founded in Bologna, Italy. Students came to study the civil law from all over Europe and brought this influence back to their own countries.[10]

As well as studying Roman law, scholars at Bologna also studied Cannon Law, developed by the church for its governance and to regulate the rights and obligations of its followers.[11] This coupled with Roman law formed the basis of the laws applied in Europe at this time. Also influential in developing a common legal framework in Europe was commercial law that also

[9] Ibid: 6.
[10] Ibid: 9.
[11] Ibid: 10.

developed in Italy and that regulated trade throughout Europe. These three bodies of law, according to John Henry Merryman, "are the principal historical sources of the concepts, institutions, and procedures of the private law and procedural law, and much of the criminal law of modern civil law systems."[12] **Public law**, including **administrative law** and **constitutional law**, came later following the American and French Revolutions that emphasized the rights of the individual vis-à-vis the state.[13]

Public Law

"Public Law" is the law regulating the relationship between the state and its citizens.

Administrative Law

"Administrative Law" is the law regulating the relationship between the administrative branch of government and the legislature, the judiciary and the public.

Constitutional Law

"Constitutional Law" is the law governing the organization and operation of the state.

During the Enlightenment period (11th - 15th centuries), Continental European countries gradually began moving from customary norms and practices as the basis for solving disputes to formal, written laws. In most cases, national customs were integrated into the civil law sources, which partly accounts for the variations in how civil law legal systems operate in practice. "France's codification of private law, under Napoleon in 1804, was the world's first national, systematic and rational codification of law … The Civil Code of Germany of 1900, advanced systematic legal thought still further." [14] France's codes were drafted in a way so as to be accessible to ordinary citizens, an ideal replicated today in many civil law countries. Germany's, on the other hand, were more complex. It emphasizes legal precision and represented an ideal whereby a law could be drafted so as to cover every eventuality in a way that was rational, logical and coherent. The desire for rationality and coherence in the law is definitely an overarching principle of the civil law that will be evident in countries following this legal tradition and in the approach of civil law lawyers.

The civil law tradition spread well beyond Europe. As European countries colonized countries in South America, Africa, the Middle East and Asia, they brought their legal systems with them.

In many post-conflict countries, knowing which country was the former colonizer will let the practitioner know what type of legal system is in operation. For example, the French legal system is still influential in former colonies like Haiti, the Ivory Coast (Cote D'Ivoire), the Democratic Republic of the Congo, Cambodia, Tunisia, and Libya.

[12] Ibid: 13.
[13] Ibid: 14.
[14] H. Patrick Glenn, *Legal Traditions of the World*, 2nd ed. (Oxford: Oxford University Press, 2004), 135.

B. The Common Law Tradition

The development of common law has been described as a "historical accident," arising from the conquest of England by the Normans in 1066 A.D.[15] William the Conqueror, in an effort to establish a Norman legal order in a foreign country, deputized a "corps of loyal adjudicators"[16] (or judges) to resolve disputes at the local level and essentially make law. In more serious cases, there was a referral system to the King for adjudication. Juries were also introduced, which represented the local interests of the ordinary person to decide the case. This strategy kept the populace happy and less likely to revolt against the occupying power. Because the jury was comprised of mostly illiterate people, the proceedings were oral,[17] the implications of which can still be seen today in the modern common law system.

In 1701, the Act of Settlement created an independent judiciary. After this, Blackstone, an eminent legal scholar, published his Commentaries on the Laws of England, which were carried to colonies and also influenced the development of American law.[18] The common law influence spread to countries like Australia, Canada, South Africa, New Zealand, India, Zimbabwe, Ghana, Sierra Leone, Gambia, Nigeria, Somalia, Tanzania, Uganda, Kenya, Zambia, Botswana, Malawi, and many Caribbean islands (e.g., St. Kitts, Barbados, Bahamas, Jamaica, Trinidad and Tobago)

IV. Sources of Law

A. The Civil Law Tradition

Parliamentary legislation is the principal source of law in civil law countries. This legislation includes codes, separate statutes and ancillary legislation (e.g., Police Implementing Regulations that provide more details on the provisions of the Police Act). Within civil law countries, there is a hierarchy of laws. At the top of the hierarchy is the Constitution, followed by codes and other legislation (emanating from the executive or parliamentary branches depending upon the legal system), then executive decrees, then regulations, followed by local ordinances. Custom, as a rare source of law sits at the bottom of the pyramid and would rarely be relied upon in court.

This reliance on codes and laws is a central characteristic of the civil law. At

15 Glenn, *Legal Traditions of the World*, 223.
16 Ibid: 224.
17 Ibid: 229.
18 Merryman, *The Civil Law Tradition*, 164.

Treaties and Conventions

A "Treaty" or a "convention" is an international agreement concluded between States in written form and governed by international law. (Vienna Convention on the Law of Treaties, Article 1). Treaties may be signed between two or more states.

Monist

"Monist" countries are those in which international law and domestic law are seen as part of a unified legal framework. As such, once a state has ratified a treaty or convention, it is considered to automatically apply without the need for implementing legislation (although legislation is normally adopted or amended to reflect new international obligations).

Ratification

"Ratification" is also called "acceptance", "approval" and "accession" and it means in each case the international act whereby a State establishes on the international plane its consent to be bound by a treaty (Vienna Convention on the Law of Treaties, Article 1). Each treaty specifies what act signifies ratification. For example, the International Covenant on Civil and Political Rights (Article 48) requires that instruments of ratification should be deposited with the Secretary-General of the United Nations.

the heart of the civil law lies a belief in codification as a means to ensure a rational, logical, and systematic approach to law. Many civil law proponents believe that a code can address all circumstances that might need legal regulation, without the need for judicial interpretation and without the need for judges to refer to case law. Judges generally interpret codes and laws very strictly; the kind of expansive readings of existing legal provisions to create new interpretations, and by extension, new law, is not done. This phenomenon is seen in many common law countries where lawyers creatively argue for a new interpretation of a law, even if that was not envisaged by the drafters. We have witnessed many rule of law practitioners from the common law tradition working in post-conflict countries offer up similar suggestions to judges in the civil law tradition, only to be met with disbelief and even horror at the thought of "playing" with the law in that way.

International **treaties and conventions** also are sources of law in civil law countries. Most civil law countries are **"monist"** meaning that when the country **ratifies** a treaty, it automatically becomes part of domestic law. This means that a judge can automatically apply it and a party in court can rely on international law in proceedings. In some countries, the judge can declare a national law or provision to be invalid if it conflicts with an international treaty or convention that the country has ratified.

In order to ascertain what treaties or conventions a state has ratified, it is useful to look at the website of the Office of the High Commissioner for Human Rights. See:

United Nations Treaty Collection - Human Rights

Traditionally, case law did not play any role in civil law countries as a source of law. The judge would decide each case based on codes or legislation and would not look to another case for guidance even if the facts were identical. This was premised on the belief that the code contains all the information necessary to decide upon the case. It was also premised on the strong belief that the legislature makes the law, not the judges.

More recently, the role of case law has been changing. Settled lines of cases are now considered to have authority and are accepted due to the fact that

they ensure consistency in the application of the law.[19]

While case law is eschewed in many cases, “doctrine” which is the writing of prominent legal scholars, is considered an important authority in civil law countries. The origins of this may date back to the “commentators,” a group of scholars in Ancient Rome based in Bologna at the new University who produced authoritative statements on the interpretation of the law.[20] Doctrine is incredibly influential when the law is unsettled. Some areas of law will have one legal scholar who is the national authority and whose opinion is given great weight by judges.

Each code in a civil law country will likely have a set of commentaries that gives expression to the doctrine (and can sometimes summarize settled case law in a particular area of law). For example the criminal code, has a set of commentaries that are drafted by the leading scholar(s) in the country on criminal law.

> *When gathering domestic laws in a post-conflict or developing country, the practitioner should endeavor to get a copy of the commentaries to each law.*

This reliance on scholarly commentaries to the laws sets civil law countries apart from common law countries, where academics do not have the same stature in terms of defining the law. This is discussed in greater detail in Section VI.

B. The Common Law Tradition

The focus in the common law was originally on resolving the disputes at hand rather than creating legal principles that would be articulated in a generally-applicable code. Common law developed historically on a case-by-case basis from the bottom-up (namely from judges), rather than the civil law that has always been developed top-down by the legislature.

The practical ramifications of this approach to the development of law have been aptly described as follows:

The civil law, being laid out in advance, was more susceptible to careful

19 Christie Warren, *Introduction to the Major Legal Systems* (unpublished, 2005) (on file with the US Institute of Peace), 20.
20 Merryman, *The Civil Law Tradition*, 9.

Precedent

A "precedent" is "an adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law." Blacks Law Dictionary, *(6th Edition), (West Publishing Co, St. Paul, Minnesota) (1991), pg. 814.*

Stare Decisis

Stare Decisis *is a principle that requires a judge to follow previously established precedents. This applies to precedents established by higher courts. A higher court will not be bound to follow the precedent of a lower court even where the facts are identical (although the higher court may choose to).*

logical analysis and presentation as a coherent, abstract system, while the common law had a more chaotic structure and looked more to the solution of concrete problems than the construction of grand general principles.[21]

Many common law lawyers will point with pride to the flexibility and creativity of their system. However, civil law lawyers critique what they perceive to be the unsystematic nature of the common law.

Given the central role of the judge in the common law tradition, it may come as no surprise that judicial opinions were historically the primary source of law. In contrast to the civil law tradition, where judges are tasked with applying the law only, common law judges were tasked with making the law. The development of case law, which was the authoritative source of law in the common law, lead to the creation of **precedents** and a system called **Stare Decisis** in order to ensure certainty, fairness and consistency in the system.

Historically, laws or statutes were viewed as a secondary source of law, their role being to correct judicially-created rules.[22] Today, legislation is far more central in common law countries. In the twentieth and twenty-first centuries, the common law underwent a crisis due to the modern trend to use the law to create new social order: the case-by-case method is not well suited to the idea of bringing about rapid and extensive social change.[23]

Consequently, there is an increasing trend towards codification within the common law tradition, although certain distinctions should be made between a code in a common law country and a code in a civil law country. In a civil law country, the rationale for a code is to create a comprehensive legal regime and general principles on a particular area of law. In the common law, however, codification may not comprehensively address an area of law. It may not even abolish a prior law.[24] In some cases, codes will merely incorporate prior case law, address one particular social issue or bring uniformity to an area of law.

In common law countries, a practitioner should also look for standard operating procedures (SOPs) as a source of law. SOPs are developed, with the same aim as regulations: to provide more concrete guidance to public servants and justice actors. In common law countries, SOPs may reflect both statutory law and case law, translating both into operational guidance for police, other justice actors and public servants. SOPs will be very important

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21 Warren, *Introduction to the Major Legal Systems*, 57.
[22] Ibid: 57.
[23] Ibid: 56.
[24] Merryman, *The Civil Law Tradition*, 32.

for police officers, providing guidance on key operational areas.

The final source of law in common law countries is international law, namely treaties and conventions. As discussed above, in the civil law tradition, which is "monist," international law automatically becomes part of domestic law. The opposite is true in most common law countries, which are **"dualist."** In the common law tradition, international law is seen as a separate body of law that only begins to apply domestically when it is converted into domestic legislation by the legislature. Given the reliance on case law in the common law tradition, lawyers can invoke international treaties and case laws in court as so-called **persuasive precedent** but treaty provisions are not binding on the court, until they have been "domesticated" into national legislation.

In order to ascertain what treaties or conventions a state has ratified, it is useful to look at the website of the Office of the High Commissioner for Human Rights. See:

United Nations Treaty Collection - Human Rights

The Court System

A. The Civil Law Tradition

Civil law countries make a theoretical and practical distinction between **public law** and **private law** - that does not hold the same importance in common law countries. What difference does this distinction make in practice? It is most evident when looking at the court structure in countries following the civil law tradition. The courts have divided according to public law cases and private law cases. Courts in civil law countries are more specialized than in the common law. There are multiple sets of courts and each has its own jurisdiction, hierarchy, judiciary and procedure.[25] For example, in addition to ordinary courts that deal with private law matters, there may be Labor Courts, Social Security Courts, Commercial Courts, Administrative Courts and Agriculture Courts addressing public law cases.

Dualist

"Dualist" countries are those in which international law and domestic law as seen as separate fields of law. As such, once a state has ratified a treaty or convention, it requires domestic implementing legislation in order to have any domestic impact or for citizens to be able to invoke the rights contained in treaties before the courts in the particular country.

Persuasive Precedent

A "precedent" is "an adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law". Blacks Law Dictionary, *(6th Edition), (West Publishing Co, St. Paul, Minnesota) (1991), pg. 814. A "persuasive precedent" is a case that is relevant to the matter at hand but it not strictly binding on the court but is used to assist in judicial interpretation.*

Public Law

"Public law" is the body of law that deals with the relationship between the state and its subjects, for example, administrative law, constitutional law and criminal law.

Private Law

"Private law" is the body of law that deals with the relationship between private individuals (and includes corporations), for example, family law, inheritance law, property law and commercial law.

[25] Merryman, *The Civil Law Tradition*, 85.

When assessing the courts in a civil law country, a rule of law practitioner should therefore be looking for multiple Appeals Courts and Supreme Courts rather than just one of each.

The general rule is that private law matters are dealt with by "ordinary courts." One anomaly is that criminal law is also dealt with by ordinary courts, even though it rightly belongs in public law. Decisions of the ordinary courts can be appealed to Appellate Courts. At the head of the ordinary courts (and above Appellate Courts) sits the Court of Cassation (*Cour de Cassation*). This court decides on only questions of law and the interpretation of statutes. Its purpose is to ensure uniformity in the law. It can either affirm the ruling of the Appellate Court or declare the ruling to be incorrect and refer to the case back to another court of appeal for reconsideration. The latter is termed "casser" or "break," and this is where the name Court of Cassation came from.

Administrative Law

"Administrative Law" is the law regulating the relationship between the administrative branch of government and the legislature, the judiciary and the public.

Constitutional Law

"Constitutional Law" is the law governing the organization and operation of the state.

Public law matters, namely, **administrative law** and **constitutional law** have their own separate jurisdictions.

Traditionally, in the civil law tradition, there was no supreme administrative court that would decide upon administrative and constitutional law. Instead, like in France today, the Council of State—a government body—acts as the administrative court of last resort. Some countries today, like Sweden, have Supreme Administrative Courts.

The court of last resort for constitutional law, established to review whether a law is constitutional, has increasingly become the Constitutional Court. Constitutional Courts exist in countries like Germany, Kosovo, Russia, Azerbaijan, Belgium, Colombia, Uganda, Spain, Egypt, and Iran. In other countries like France, instead there exists a Constitutional Council – a government body like the Council of State—to rule on the constitutionality of legislation. The reason behind the reliance on councils rather than courts is the traditional civil law view that judges cannot quash legislation as this would infringe the separation of powers doctrine (under which judges apply the law and the legislature makes, amends, or repeals the law).

Where it is unclear is whether a case falls under the ordinary court system or administrative or constitutional courts. There may exist a Conflicts Tribunal,

such as in France, to determine which court system has jurisdiction.[26]

B. The Common Law Tradition

Common law courts are unified, meaning that there is generally one Appeals Court and one Supreme Court in which any case may be subject to final scrutiny.[27] The jurisdiction of inferior courts, which deal with criminal and civil matters, is limited geographically and according to the nature of the subject-matter.[28] At the bottom of the court system may be Magistrate Courts, which originate and still exist today in the United Kingdom. They can still be found in former colonies like Uganda, Sierra Leone, Nigeria, Palestine and Barbados. The exact jurisdiction of these courts will vary from country to country. There will also be variance if the country is federal, in which case the rule of law practitioner will need to determine the jurisdiction of federal (national) and state (sub-national) courts.

Of late, there has been a move towards developing specialized courts (also known as "tribunals") in common law countries such as Employment Courts, Tax Courts, Family Law Courts, and so forth. The rule of law practitioner should look out for these in the post-conflict or developing country he or she is working in. In contrast to civil law countries, each of these specialized courts will not have its own Supreme Court.

VI. Justice Actors

This section discusses the various justice actors in the common law and civil law legal traditions. It should be noted that its focus is mainly on the criminal process rather than the civil process.

A. The Civil Law Tradition

Investigating Judge

An investigating judge *(juge d'instruction*) is a member of the judiciary. This judicial officer was first seen in the French Napoleonic Criminal Procedure Code of 1808. Instead of adjudicating cases, like a common law judge would, the investigating judge is responsible for leading the criminal investigation which includes interviewing the accused, the victim, and witnesses; and preparing the case file (known as the *dossier)* to be passed on to the sitting

[26] Merryman, *The Civil Law Tradition*, 88.
[27] Ibid.
[28] Glendon, Gordon and Carozza, *Comparative Legal Traditions,* 185.

judge(s) for adjudication. The investigating judge has broad powers during the investigation phase and can order search warrants and other warrants or orders. He or she can visit the crime scene, carry out reconstructions, and arrest and detain suspects. With regard to detention, a recent phenomenon is the creation of a *juge des libertés et de la detention* (judge for liberty and detention) who decides on detention issues rather than the investigating judge. The investigating judge model was exported as part of colonization and can be seen in countries like Haiti, Egypt, Tunisia, Syria, and Lebanon.

There have been wide criticisms of the investigating judge model because of the belief that it creates a slow and secretive criminal justice process. The fact that the defense never gets an opportunity to cross-examine witnesses or the victim is also problematic. The recent trend is towards the abolition of the investigating judge model. It has already been abolished in Germany and Italy. It will soon be abolished in Haiti and, even in France, where it was born, there are moves to end this institution of justice.

More information on the role of the investigating judge in a criminal investigation is contained in Section VII below.

Sitting Judge

In addition to investigating judges, there are also sitting judges who hear the case in court. The sitting judge may sit alone for minor cases but, for more serious cases, will sit in a panel of judges (normally, three judges). Because of the different nature of the trial in the civil law system, the judge has a very different role to a common law judge. Rather than being an impartial referee, like a common law judge, the civil law judge is a central part of the trial. The sitting judge is the person who questions witnesses (although oral testimony is not required as discussed below in Section VII) and experts, and calls evidence. This is discussed in more detail in Section VII.

Police/Judicial Police

In many civil law countries, and particularly for more serious cases, there are specially designated "judicial police" who are tasked with assisting the investigating judge and prosecutor in the criminal investigation. In certain exigent circumstances, the judicial police may have powers to search premises, collect preliminary evidence, and arrest suspects. This is rare and generally the police do not have many independent powers. When the police learn of a crime, they must inform the prosecutor. Later, when the investigating judge is conducting his or her investigation, the judicial police take directions and act on orders from him or her.

A new trend is the specialization of police. Thus, special police units may exist for certain serious crimes like trafficking in persons, trafficking in drugs, domestic violence, money laundering, and so forth. These police will have been specially trained to investigate these complex crimes.

Prosecutor

The role of the prosecutor can vary from one civil law country to the other. In many countries, the prosecutor is part of the judiciary (as discussed below). This is evidenced by the fact that the prosecutor will walk out with the judges at the beginning of the court session and will sit close to the judges rather than in the same position as the defense counsel (as is the case in the common law system). A recent trend, however, is for greater independence of the prosecutor, with the exception that in many civil law countries the Minister of Justice can order the prosecutor to open a prosecution.[29] Prosecutors may also wear many hats—representing the state, society, and/or the victim.

The general process for a criminal proceeding begins with the police informing the prosecutor about an alleged crime. The prosecutor will then open and lead a preliminary investigation and determine whether there is sufficient evidence to refer the case to the investigating magistrate. The prosecutor's review of the evidence will be largely paper-based and will not be as extensive as the judicial investigation carried out by the investigating judge. The main role of the prosecutor is to determine if there is enough evidence to open a judicial investigation. The prosecutor also defines the scope of the crimes being investigated. Moreover, the prosecutor (depending on the country) may present the case at trial, although as will be discussed below (see Section VII), this is not as extensive a role as it is in common law.

In countries where there is no investigating judge, like Germany and Sweden, the prosecutor is responsible for the entire criminal investigation, as well as presenting the case at trial.

In some civil law countries, there is a policy of "compulsory prosecution" and so the prosecutor has no power to dismiss a case. However, in other civil law countries, the prosecutor can dismiss a case.

Lawyer/Avocat

[29] Mireille Delmas-Marty, ed., *European Criminal Procedures* (Cambridge: Cambridge University Press, 2005), 427.

An avocat roughly equates to a lawyer in the common law system that acts as an advisor, an advocate, an intermediary, a custodian, an arbitrator, a trustee or more.[30] For example, he or she may negotiate and draft contractual agreements; act as an agent for his or her client; and receive fund on behalf of the client. In addition, he or she may assist clients in planning business and property affairs.[31] Usually, an avocat operates as a lone practitioner rather than in partnership with other senior lawyers.[32] Avocats are independent and self-regulating through the local bar association. The role of the advocate as a defense counsel is discussed next. The role of the advocate in a civil case is must greater than in criminal cases; they are responsible for developing and investigating the case to a larger extent than in criminal cases.

Defense Counsel

An avocat may act as a defense counsel, sometimes called "avocat de la defense." In the common law tradition, defense counsel must represent their clients "zealously within the bounds of law"[33]. Counsel is representing the client (i.e. the accused) first and foremost. In civil law countries, according to their codes of legal ethics, defense counsel are independent of the state and the client.[34] According to Luban, in Germany for example, lawyers are trained to think like judges and be impartial advocates rather than the common law-style partial advocates.[35]

In the civil law tradition, defense counsel has historically not been present when the investigating judge is interviewing the suspect. More recently, laws in many civil law countries have been changed to allow defense counsel to be present. Even with that, however, defense counsel is present only to make sure that the suspect is being treated legally; defense counsel may not participate in or interfere in the investigation.

Thus the role of counsel is more limited than in the common law tradition, which is discussed below. During the criminal investigation, the defense counsel can request that the investigating judge or prosecutor interview certain persons or collect certain evidence. Counsel can also call certain matters to the attention of the court and advise his or her client on how to respond as the proceedings unfold.[36] Defense counsel can also access the

[30] See Zia Oloumi, "Avocat à law Cour de Paris: Functions and Duties," accessed June 8, 2011.
[31] Merryman, *The Civil Law Tradition*, 105.
[32] Ibid.
[33] Dean J. Spader, "Teaching Comparative Criminal Procedure: Russian Dolls, Color Charts and Cappuccino," *Journal of Criminal Justice Education* 10 (1999), 123.
[34] Spader, "Teaching Comparative Criminal Procedure," 123.
[35] Ibid.
[36] Merryman, *The Civil Law Tradition*, 130.

"dossier" (the case file) and review the evidence. However, during the investigation phase, the defense counsel is not busy preparing evidence and witnesses, as he or she would be in the common law systems. It should be noted also that, in the civil law tradition, defense counsel are not allowed to contact witnesses and are forbidden from influencing them. This stands in stark contrast to the common law, where each party chooses its own witnesses and can coach them in preparation for trial.[37]

Because there is no adversarial trial, discussed below in Section VI, in most civil law countries, defense counsel's role in court looks very different from the common law. In fact, many common law judges observing a trial in a civil law country, when seeing how little defense counsel says at trial, often assume that defense counsel is incompetent. This, however, is not the case; in a typical civil law trial, defense counsel really says very little. One will not see defense counsel raising an objection before the judge, examining witnesses, calling evidence and so forth. Furthermore, defense counsel can request that the judge (who is responsible for questioning a witness) to ask a particular question in court but may not do so directly.

Lay Judges

"Lay judges" are non-judges, drawn from the community, who assist the judge in a trial. Selection varies from country to country. Some are randomly selected, while in other cases they need to apply and undergo a short training course to become a lay-judge.

Jury and Lay Judges

Juries are more typical in common law countries, but jury trials now exist in many civil law countries, like France and Belgium, though this depends on the jurisdiction and type of case at hand. As in the common law, the role of the jury is to determine the guilt or innocence of the accused based on the facts presented. In some civil law countries, **lay judges** are coupled with professional judges to form a type of "mixed jury." Some systems have one professional judge and two lay judges while others have three professional judges and six lay judges, the latter forming a mini-lay jury.[38]

The Victim

In the civil law tradition, the victim has a much more central and powerful role than in the common law. The victim has several rights during the criminal process and, in some civil law countries, also has the right to bring a "private prosecution." Private prosecution can involve the victim joining on to the criminal case being brought by the state by attaching a civil claim for damages (the victim now becomes a *partie civile*). In some countries, under private prosecution, a victim will also have the power to institute proceedings where the prosecutor has not opened a prosecution.[39] As an example, in

[37] Spader, "Teaching Comparative Criminal Procedure," 123.
[38] Ibid., 122.
[39] Delmas-Marty, *European Criminal Procedures*, 543.

Germany, the victim has most of the rights granted to the public prosecutor when instituting proceedings, although, not the powers of coercion (e.g., the victim cannot compel a witness to attend an interview).[40] The powers granted to the victim during private prosecutions will vary country to country.

When a victim has joined the public prosecution case, the victim has similar rights to those granted to the accused. The victim, through his or her lawyer, can request that the judge gather certain evidence or interview witnesses during the investigation phase. One aspect that surprises common law lawyers at a civil law trial is seeing the victim's lawyer in court. The victim's lawyer will sit close to the defense counsel and will play a similar role in protecting the interests of the victim during the trial.

Notary

A notary serves three functions in the civil law tradition. First, a notary drafts legal instruments such as wills, corporate charters, conveyances of land, and contracts.[41] Second, he or she authenticates instruments (called "public acts").[42] Finally, a notary acts like a kind of public record office, retaining originals of every instrument prepared and furnishing authenticated copies on request.[43] Countries and towns are divided into notorial districts, in which a notary has a monopoly; a new notary can only take over when the existing one vacates office.[44]

The Academic

As discussed above, the work of academics has a very high stature in civil law countries. As such, they can greatly influence a criminal trial in two ways. First, doctrine developed by academics will be used by the court in determining the law around a certain issue. Second, in some instances, judges will seek input from academics on a particular case. It is not uncommon for an academic to write a legal opinion on the case based on the case file sent to him or her by the judge. It is also not uncommon for the judge to rely on the legal opinion in determining the case, in some instances the legal opinion may be incorporated into the final judgment.

B. The Common Law Tradition

Police

[40] Delmas-Marty, *European Criminal Procedures*, 452.
[41] Merryman, *The Civil Law Tradition*, 105.
[42] Ibid., 105-06.
[43] Ibid., 106.
[44] Ibid.

Compared to the civil law tradition, police in common law countries have significant, independent, and investigative powers. The police will conduct the initial investigation of a crime, from minor to more serious crimes, without any supervision from a prosecutor. Instead, oversight is indirectly provided by a judge. In the common law tradition, a judge is required to issue a warrant or order where a particular action taken by the police is coercive or would interfere with the rights of a person. For example, except in exceptional circumstances (e.g., where evidence may be tainted), the police are required to get search warrants from a judge. Other examples include arrest warrants and orders for covert surveillance. During the investigation phase, the police are responsible for collecting and securing evidence, as will be discussed below in Section VII.

Prosecutor

The prosecutor in the common law tradition is responsible for: (1) filing an indictment against the alleged perpetrator; and (2) presenting the criminal case at trial. He or she generally has no role in the initial investigation of the case, though in some countries the prosecutor can advise the police on the gathering of evidence. Instead, once the police have finished their investigation, they hand over a file to the prosecutor. If the prosecutor determines that there is sufficient evidence to proceed to trial, the prosecutor will file an indictment (as described below in Section VI). If this indictment is approved, and the case moves forward, the prosecutor will then represent the state (and the victim) at the trial. The prosecutor plays a very active role in the trial compared to the civil law prosecutor. He or she will give an opening statement, cross-examine witnesses and experts, present evidence, and finally will present a closing statement at the end of the trial. The role of the prosecutor during the trial is discussed at length in Section VII.

Judge

The judge in the common law tradition is a much more powerful figure than in the civil law. First and foremost, as discussed in Section IV, judges were traditionally vested with the power to make law. Today, they still have this same power but are also bound by statutes that cover many areas of the law. In interpreting statutes, judges in the common law tradition may read provisions much more expansively than judges in the civil law. This has lead to novel interpretations of existing legal provisions and the broadening of the law in certain areas. In the context of criminal trials, the judge acts in an oversight capacity during investigations because he or she is responsible for issuing orders or warrants when the police want to take an action that would

infringe upon the rights of a person (e.g., arrest warrants, detention orders, orders for witness protection, search or seizure). At trial, the judges acts like a referee with the two parties (i.e. the prosecution and the defense) taking center-stage.

Defense Counsel

Defense counsels play a far more active role in common law countries than in civil law countries. From the moment of arrest, a defense counsel can be present during the questioning of a suspect and can advise his or her client on how to answer a particular question. During the investigative phase, he or she can gather evidence independently, hire independent **expert witnesses** (a concept that does not exist in the civil law system where expert witnesses are retained by the court), and select witnesses to call at trial.

During the trial, the defense counsel is considered an equal party to the prosecution. The prosecution and the defense sit at opposing tables before the judge. Defense counsel has the opportunity to make an opening statement; to examine witnesses called by the prosecutor; to call its own witnesses; and to make closing remarks at the end of the trial, as will be discussed in Section VII.

The Victim

Victims in common law countries do not play as active a role as in civil law countries. At the core of the common law doctrine is the fact that the prosecution is representing society as well as the victim, and by consequence, there is no need for the victim to be represented. Primarily, the victim's role is to be called as a witness in the trial. In addition, where the accused is found guilty, the victim may also have the right to make a **"victim impact statement"** at the sentencing hearing (which happens after the trial) to influence the judge's (or jury's) decision regarding what penalties to impose upon the convicted person.

The Jury

Juries have historically played a major role in the common law system. Back in the 12th century when the common law was evolving, juries were responsible for determining cases in their locality. The judge in a criminal trial by jury is responsible for interpreting the law and instructing the jury. The role of the jury is to make a finding of fact; namely, to determine **"beyond a reasonable doubt"** whether the accused person is guilty or innocent. The exact number, composition, and selection of the jury vary from

Expert Witnesses

An "Expert Witness" means a witness qualified as an expert by his or her knowledge, skills, experience, training or education in a particular area of scientific, technical or other specialized knowledge.

Victim Impact Statement

A "Victim Impact Statement" is a written account or oral testimony about the impact of the crime on the victim and the victim's family.

Beyond a Reasonable Doubt

The term "beyond reasonable doubt" is difficult to define but in general it means that the trier of fact (the judge or jury) must have no doubt that would prevent him or her from being firmly convinced of the accused's criminal responsibility for the offenses charged."

country-to-country.

VII. The Criminal Process

A. The Civil Law Tradition

Investigation

Once a crime has been discovered or reported, the police (or judicial police where they have jurisdiction) begin an investigation. The primary responsibility of the police is to report the alleged crime immediately to the prosecutor. As mentioned previously, the police do not have many unsupervised investigative powers throughout the criminal process. In certain cases, where exigent circumstances exist, their powers are broadened to make sure that they can attain evidence that might otherwise be lost.

As was discussed above, in countries where there is also an investigating judge, the prosecutor will open and lead a preliminary investigation. He or she will then determine if there is sufficient evidence to refer the case to the investigating magistrate and will define the scope of the crimes being investigated.

The investigating judge, upon receiving the request to conduct a judicial investigation from the prosecutor, will begin to gather evidence. Investigating judges have wide powers during the investigation. They can visit the scene of a crime, carry out reconstructions of the crime, hear witnesses, search and seize property, and arrest and remand suspects. If the prosecution or defense wishes to investigate any matter, they must file a request that the desired investigation be carried out by the investigating judge. It should be noted that defense counsel has access to the case file during the judicial investigation phase.

At the conclusion of the investigation, the investigating judge determines whether to refer the case for trial or not. If the case is referred to trial, the case file is transferred to the sitting judges who will hear the case.

In civil law countries where there is no investigating magistrate, the prosecutor will lead and supervise the entire investigation. In some countries, the prosecutor will direct the police to take action to gather evidence. In other civil law countries, the prosecutor may also take action to gather evidence himself or herself. This can include interviewing witnesses, victims, and expert witnesses. For coercive actions that would impinge upon the rights of

the suspect or other persons (e.g., searches, seizures, and covert surveillance), the prosecutor must seek a warrant from a judge (sometimes called "a judge of the investigation").

Indictment

An "Indictment" is the formal written accusation issued by a prosecutor against a suspect charged with a criminal offense.

Plea-Bargain

"Plea-Bargaining" is the name given to the process whereby the accused person (through his or her lawyer) enters into discussions with the prosecutor with regard to whether the accused will admit guilt. Negotiations ensue about whether the prosecutor will ask the judge for a reduced sentence in exchange for the accused admitting guilt. Alternatively, the prosecutor could offer to prosecute the crime based on a lesser charge (e.g., manslaughter instead of murder) that would carry a lesser sentence. This can be done informally, however, in some countries it is done through a formal "Plea Agreement." While the recommendation to the judge is not binding, it can be very persuasive.

Indictment

If there is an investigating judge, the judge will close the investigation and refer the case to the sitting judge. Where there is a prosecutor only, an **indictment** will need to be drafted and a court will determine if there is enough evidence to proceed to trial. At the conclusion of the investigation, the prosecutor must present written charges (or an indictment) to the court. Usually, the indictment will describe the acts committed by the suspect, and outline the applicable law and the evidence upon which the accusation rests.[45] If the court confirms the indictment, the case proceeds to trial.

Trial

Whether the particular civil law country has an investigating judge system or not, the prosecutor will present the case at trial. This duty is not as involved as the duty bestowed upon the common law prosecutor. In court, the judge is the central figure, acting as an inquisitor to find the facts and the truth. Neither the prosecutor nor the defense counsel takes center-stage in the trial, as one would see in a common law trial. Other significant differences between a common law trial and a civil law trial are as follows:

- In a civil law trial, given that the judge will have read the case file in advance of the trial, the trial itself will be much shorter than in common law countries.

- In common law countries, the accused is asked if he or she will opt to admit his or her guilt to the court at the beginning of the case, the so-called "plea." In contrast, in the civil law countries, the notion of "entering a plea" and the **"plea-bargaining"** that goes along with this generally does not exist.

- In the civil law tradition, witnesses are not central to the trial because the investigating judge will have already interviewed them and made detailed notes in the case file that the trial judge(s) can follow, rather than re-interviewing the witness. More recently, however, civil law trials are increasingly using live witness testimony at trial. The judge is responsible for interviewing the witness, although the prosecutor

[45] "The Role of the Public Prosecutor in Court," Euro Justice, accessed June 8, 2011.

and defense counsel can request that the judge asked particular questions. Cross-examination is being introduced into the laws of some countries (e.g.,,Germany); however, it is not being employed on a regular basis.[46]

- In the civil law, the accused is permitted to make an unsworn statement, as well as the option to appear as a sworn witness in the trial.

- In civil law trials, expert witnesses, if called, "belong" to the court. In contrast, in common law countries each party (the prosecution and the defense) calls their own independent experts to make their case.

- The breadth and scope of evidence admissible in the civil law court is much broader than in the common law system. As will be discussed below, the common law system is bound by very complex rules of evidence, and rules for exclusion of certain evidence—that were developed because of the presence of a jury in the trial. In contrast, the civil law propounds the "free evaluation of evidence." Traditionally, professional judges, who adjudicated cases, could weigh the evidence appropriately, including evidence that may be tainted (e.g.,, a confession based on torture). Today, there is a move within the civil law system to introduce some exclusionary rules, particularly rules to ensure that evidence obtained in violation of international human rights law is not allowed to be a factor in considering the guilt or innocence of an accused person.

Verdict and Sentencing Hearing

Once the trial is over, the judge (or the jury) releases the verdict, at which point the accused person will either be released or convicted. A sentencing hearing follows the trial to determine the type and duration of penalties to be imposed upon the convicted person.

Appeal

The convicted person can appeal on one of three bases: (a) an error in law; (b) an error in fact; or (c) the penalty imposed. With regard to (a), as well as arguing that the law was incorrectly applied, the appeal can be based on "a substantial violation of procedural law." For example, the convicted person may argue that he or she did not have an interpreter during an interview, if

[46] "The Role of the Public Prosecutor in Court."

required under the law, or that the judgment was based on evidence that should have been excluded. If a substantial violation is found, the court must order a retrial.

Whatever the appeal filed, it will be referred to an appeals court. In contrast to common law countries, where the appeal court will generally only hear an appeal on a matter of law, civil law countries, appeals courts always hear the trial *de novo*, meaning it hears the whole trial over again. In fact, in some civil law countries, the defense is permitted to request the addition of new evidence and witnesses for the consideration of the appeals court. Where the trial judgment is reversed or modified, the appeals court can directly modify the judgment and/or the penalty, or they can order a retrial.

B. The Common Law Tradition

Investigation

The police play the central role in the investigation of a crime in the common law tradition. When the police learn of the alleged commission of a crime, they will begin to investigate immediately. Where exigent circumstances exist, or where a suspect has been caught red-handed or fleeing from a crime, the police can arrest the individual on the spot. Otherwise, in non-urgent cases the police will seek an arrest warrant from a judge.

When the police want to take an action that would interfere with the rights of the suspect or someone else (e.g, search, seizure, and covert surveillance), the police must seek a warrant or order from the judge. This way the judge acts as an independent oversight mechanism in the investigation. The judge is charged with ensuring the rights of the suspect and other persons are safeguarded throughout the process.

The police in common law countries interview witnesses, victims, and the suspect. Defense counsel is permitted to be present and will play a major role in advising his or her client on how to answer questions. As in the civil law tradition, they will take interview notes; however, these notes are generally not entered as formal evidence in the case file. Instead, all relevant witnesses and victims will be required to testify in court during the trial.

For lesser offenses (e.g., petty theft), the police will generally have the power to bring charges against the accused and will present the evidence in court. For more serious offenses, the police will gather and store evidence and then pass the evidence along to the prosecutor. The prosecutor will in turn determine what charges to bring against a suspect.

Indictment and Disclosure

Once the prosecutor has determined that there is sufficient evidence, he or she will draft an indictment and present it to the court for confirmation and approval.

There is no formal equivalent to the case file (i.e. dossier) developed by the investigating judge in the civil law tradition. As was stated earlier, the defense has access to the case file in its entirety. In common law countries, a system of **"disclosure"** or "discovery" exists which regulates the evidence that the prosecutor must make available to the defense. The defense must have a reasonable opportunity to examine this evidence in advance of trial. This could include witness statements, tangible objects (e.g., a murder weapon), crime scene photographs, records, books, data, items seized from the accused, as well as exonerating evidence that would prove the innocence of the accused.

Disclosure

"Disclosure" is the procedure whereby relevant evidence is transmitted to or served upon either the prosecution or the defense in advance of the trial.

Cross-Examination

"Cross-examination" means the questioning of a witness by the party other than the one that called the witness to testify. In the common law system, where both the defense and prosecution can call witnesses, it refers to the other party examining the witness each has called.

Trial

Once the indictment has been confirmed, the case will proceed to trial. The common law trial contrasts greatly from the civil law trial. The first big difference is that the trial generally lasts much longer than a civil law trial because of the necessity of "live testimony," meaning that witnesses will generally be present to deliver their testimony before the court and the parties.

The central players in the common law trial are the prosecutor and the defense counsel while the judge acts like an impartial referee between the two.

After both the prosecutor and defense counsel make opening remarks, the prosecution calls its witnesses. Once the prosecution has examined its witness, the defense can **cross-examine** the witness, after which the prosecution can re-examine him or her. After all the prosecution witnesses are called, the defense calls its witnesses. In the same manner, the defense calls its witnesses, examines them, whereupon the prosecutor cross-examines, and then the defense re-examines them. Both the prosecution and the defense have the opportunity to make closing statements before the trial ends.

If there is a jury, the jury will be responsible for voting on the guilt or innocence of the accused, based on the evidence presented in court. The judge's role vis-à-vis the jury is to instruct the jury on matters of law arising from the evidence heard in court.

Verdict and Sentencing Hearing

Once the verdict is read by the judge or jury, the accused is either released or declared guilty and held in custody, pending a sentencing hearing. At the sentencing hearing, the judge determines the nature and duration of penalties to impose upon the convicted person.

Appeal

The convicted person may appeal the conviction on a point of law. In many common law countries, the convicted person will require leave of the trial court to appeal the decision. In countries that do not require leave of court, rules will outline the requirements to preserve a potential point of law. The Appeals Court can only rule on matters of law. No factual evidence may be considered.

VII. Legal Education and Training

A. The Civil Law Tradition

The education of law students in the civil law tradition is through an undergraduate university degree. The primary reference materials for civil law student are codes and the commentaries to these codes (see Section IV for a discussion on commentaries). Case law does not play a major role in legal education. On day one, students begin at Article 1 of the code and the professor brings them through the code systematically. Rather than engaging in an interactive method of teaching, professors in the civil law lecture to a class that is usually very large.

After students complete their undergraduate education, they then make a choice as to what legal profession to pursue. Very early on, graduates must chose whether to become a government lawyer, public prosecutor, advocate, notary, judge or scholar. Lawyers do not often change careers.[47]

If a law graduate wants to become a judge, he or she must attend a special

[47] Merryman, *The Civil Law Tradition*, 101.

training school for judges, pass exams and be appointed (often by a judicial council). In the alternative in some civil law countries, the judge must undertake a form of apprenticeship coupled with ongoing training. If the graduate would like to become a public prosecutor, he or she must take a state exam and, once accepted, must complete practical training and be appointed (like the judiciary, appointment may be by the judicial council).[48] In some cases, because the prosecutor is also considered part of the magistracy (see Section VI), the prosecutors will conduct their training with their judge colleagues in a National School of Magistrates.[49] It should be noted that given the close association between judges and prosecutors in civil law countries that a magistrate may serve as a judge and as a prosecutor at different times in his or her career.[50]

In some civil law countries, there is an office, or pool, of government lawyers to which a law graduate must apply should he or she want to take on this role. In other civil law countries, the young lawyer must apply to a particular department or agency.

To become an advocate (discussed in Section VI), the law graduate must undergo a period of apprenticeship in the office of an experienced lawyer.[51] To become a notary (discussed in Section VI), a law graduate must also serve an apprenticeship in a notary's office and take a national exam.[52]

The final career path—becoming an academic—is extremely challenging given the high stature of this position. Unlike in the United States, where everyone who teaches at a law school is given the title of Professor, in many civil law countries, a professor is a person with a PhD who has been awarded a professorial chair. For example in Germany once a student has completed his or her doctorate, he or she may become a professor by taking a junior professorship or by completing a second thesis. This is why the title of some civil law professors is "Professor, Dr. Dr. Smith."

Outside the realm of lawyers, police officers are usually trained in a Police Academy under a general curriculum. They later may receive specialized training depending on their assignment. For example, if a police officer is part of an Organized Crime Unit, he or she will be given specialized training on the skills needed for this type of investigation.

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[48] Merryman, *The Civil Law Tradition*, 104.
[49] Delmas-Marty, *European Criminal Procedures*, 422.
[50] Ibid.
[51] Merryman, *The Civil Law Tradition*, 105.
[52] Ibid., 106.

B. The Common Law Tradition

In some common law countries like the United Kingdom, Ireland, Canada and Australia, a law degree is an undergraduate degree. In others, like the United States, a law degree is a post-graduate degree, requiring both an undergraduate degree and the completion of a Law School Admission Test (LSAT) that tests logical and verbal reasoning skills.

University classes in the common law countries are usually highly interactive. Rather than professors lecturing to the class, they generally use the "Socratic method" of teaching, where the Professor asks students a series of questions and elicits responses (as well as pointing out inconsistencies in the responses or the logic of the student responses) so as to get the student to think critically.

In the common law educational system, a key learning objective is to demonstrate to students that there can be more than one answer to a particular question or that there may be no one "right" answer at all. It is important to contrast this with the civil law system where it is presumed that the codes and doctrine provide clear guidance and an answer can be easily extracted without the need for judicial interpretation or creativity in the process. The common law educational system thus rewards creative and novel interpretations of laws and cases.

In common law countries, case law rather than codes are the primary reference material for law students. Rather than refer to one set of commentaries as a civil law student would, common law students may have several textbooks that may offer differing conclusions on the same legal issue.

A common law student, at the end of his or her education, is not required to choose one particular legal career and stick to it, as a civil law student would. A common law student is more likely to switch roles during his or her career than a civil law student. For example, a practicing lawyer could become a prosecutor, then a judge, and could eventually switch to academia.

In the traditional common law, originating for the United Kingdom, a law student seeking to become a lawyer must undertake an apprenticeship. Also traditional in the common law system—and still in the United Kingdom, Ireland, Japan, Hong Kong, New Zealand, and some Australian states—is the division of the tasks of a lawyer into two distinct fields of practice: **barristers** and **solicitors**. To become a solicitor, a law student must undertake an apprenticeship with a senior solicitor as well as undertake professional training courses, generally organized by the Law Society of that

Barristers

Historically a "barrister" had exclusive jurisdiction to represent clients before the higher courts. That has changed recently. The primary roles played by barristers continue to be representation of clients in higher courts (under the instruction of a solicitor), as well as drafting legal pleading and providing legal opinions on complex issues.

Solicitors

A "solicitor" is the first point of call for a client and will provide legal advice and representation in lower courts (e.g., town courts). Previously, solicitors could not represent clients in the higher courts, although this is now changing. That said, solicitors frequently engage a barrister to represent their client and act as an advocate in higher courts or to draft legal pleadings for the courts of higher jurisdiction. Solicitors also engage barristers to provide legal opinions on complex legal issues.

country. In order to become a barrister, a law student must also undertake an apprenticeship (oddly enough called "deviling" in the UK system) as well as complete professional training courses.

Many common law countries have departed from the tradition split between barrister and solicitor in favor of lawyers who can undertake both roles. In the United States, Canada, Nigeria and Ghana, to name a few, a law graduate must complete a bar examination in order to qualify to become a lawyer. Upon passing, they are "admitted to the bar" and are then qualified to practice.

In common law systems, there are no judges' schools. In fact, judges generally do not undertake the same extensive training as their civil law counterparts. In most common law systems, judges are appointed either by the executive or by a judicial commission. There are certain requirements that must be met, such as a requisite number of years of practice, before a lawyer can become a judge. In other common law countries, judges are elected to office by the public.

To become a prosecutor, a law graduate will apply to work for the prosecuting authority in the state. In more traditional common law countries like the United Kingdom and Ireland, a solicitor will represent the Director of Public Prosecutions (DPP) and will engage a barrister to represent the DPP in court (interestingly, barristers will routinely act for the DPP in some cases and act as defense counsel in others).

In the United States, all those who teach at law schools are termed "professors," however, in countries like Ireland, the United Kingdom and Australia, they are termed "lecturers" (there are both junior lecturers and senior lecturers). The term "Professor" is reserved for a Ph.D graduate who has been awarded a "chair," and these appointments are very limited in number.

Outside the realm of lawyers, like in the civil law, police officers are usually trained in a Police Academy under a general curriculum.

VIII. Combining the Civil Law and Common Law? "Mixed" or "Hybrid" Systems

A leading scholar, John Henry Merryman, has remarked about the civil law and the common law:

> "The two systems... are converging from different directions toward roughly equivalent mixed systems."[53]

It has been said that today there is no pure system. Another scholar, Mirjan Damaska, said that "talking about the common law and the civil law is like stressing coffee and cream when cappuccino is the norm"[54] This tendency is not just playing out in theory but also in contemporary practices in common law and civil law countries around the world. There has been significant borrowing between both. So much so, some argue, that because the borrowing has been so extensive "it is no longer possible to classify any of the criminal justice systems in Western Europe as wholly accusatorial [common law] or wholly inquisitorial [civil law]"[55]

Witness the common law world moving toward codification—a historical trademark of the civil law tradition. In addition, the historic aversion to allowing the judge to see any evidence before trial has been diluted with the introduction of plea and directions hearings and preparatory hearings.[56] In the civil law world, we see the introduction of live witness testimony in court, coupled with cross-examination by the prosecution and defense. This stands at odds to the traditional judge-led trial that has been the rule in the civil law tradition. We also see in the civil law world an increasing reliance on case law to supplement the codes.

Beyond piecemeal borrowing, there are now many systems that are truly a fusion of both the civil law and the common law (e.g., Italy). This can be seen also if we examine reform efforts in both developing and post-conflict countries. The trend appears to be that reformers take the best of each tradition and fuse these elements to create an overall system. Recent reform efforts in Kosovo, Bosnia-Herzegovina, and ongoing efforts in Haiti, blend elements of the common law and the civil law. As this plays out, it demonstrates that one system is not necessarily "better" than the other; they both have their strong points and their weak points. By fusing the best of both worlds, countries undertaking reforms arrive at stronger, more efficient systems of justice. This tendency towards borrowing from both the common law and civil law system speaks against those who say that only common law lawyers should provide assistance in reform efforts in common law countries

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[53] Merryman, *The Civil Law Tradition*, 126.
[54] Mirjan Damaŝka, *The Faces of Justice and State Authority* (New Haven: Yale University Press, 1986), 12, 93, 241.
[55] Delmas-Marty, *European Criminal*, 5.
[56] See e.g., in the United Kingdom: Practice Direction (Crown Court: Plea and Directions Hearing) [1995] Weekly Law Reports 1318 (1995).

(e.g., Sierra Leone, Liberia) emerging from conflict. Or that only civil law lawyers should provide assistance in reforming laws in civil law-based post-conflict states (e.g., Cambodia, Iraq, Haiti). A healthy dialogue between civil law and common law lawyers on what elements of each system might work best would seem to provide the optimal environment for national actors in choosing which to incorporate into their new system.

IX. Conclusion

This guide has sought to provide a broad overview of the common law and civil law traditions. To access further resources on common law and civil law traditions, please visit the INPROL Digital Library. The Digital Library also contains resources on other legal systems, such as Islamic Legal Systems and Customary Justice Systems that will provide the reader with information on the other systems that will be operating in a developing or post-conflict country context.