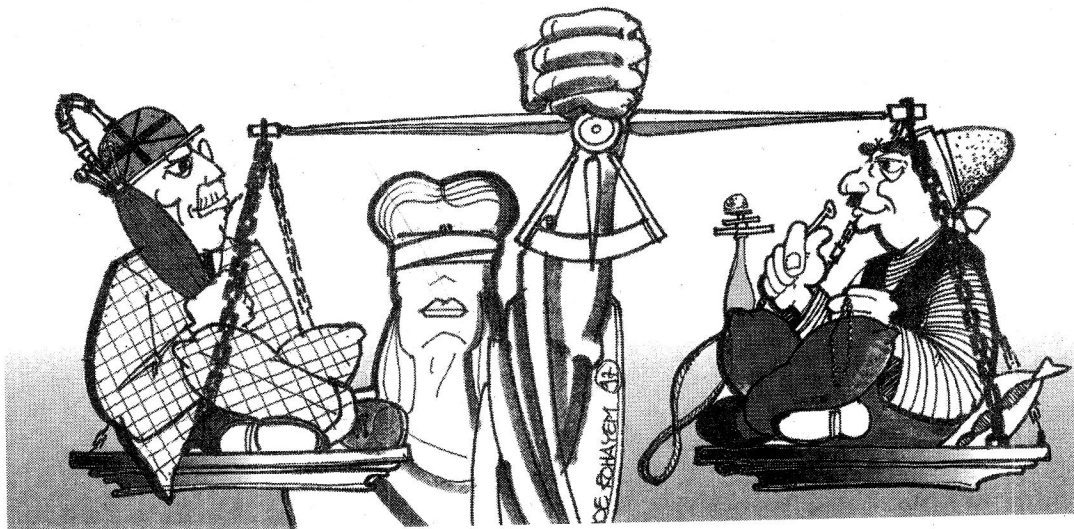


# dossier on two legal systems



## Comparative benefits:

Today's law page is dedicated to the general structure of the English and Lebanese legal systems, writes *Chibli Mallat*. This treatment offers an up-to-date appreciation of the court structure and the main divisions in the legal professions.

Together, judges and lawyers operate the immense machinery which produces the rule of law – and, one hopes, justice – in their respective countries. There are several benefits from such a comparison.

First, the legal structure and the fundamentals of the two systems offer a blueprint which is universal in each case: England was the point of departure for what is known as the common law, and, as the British empire started expanding in the sixteenth century to slowly cover much of the planet, many countries in the world have adopted the common law, which has survived colonialism.

The so-called "common law family" is now the most widespread legal system in the world, from the United States, Australia, India, Pakistan to half the jurisdictions of Africa.

Lebanon offers a microcosm of the other

great family of legal systems: the civil law system. French law is dominant in the country, and lawyers refer as a matter of course to French legislation and judgments. At the same time, the Lebanese system is unique. Until the end of the 19th century, it was dominated by the common law of the region, Islamic law. Some law relating to family matters remains, and the sectarian division in the court system for marriage, divorce, and inheritance, is an offshoot from this legacy.

Secondly, the influence of judges has increased significantly. This is currently happening across the world, including in the civil law countries. A decision by the French Court of Cassation featured prominently across several columns on the first page of *Le Monde* last week (inconceivable a few years ago), and the Italian public swears by its judges, who are the only officials who are taken seriously in a country riddled with corruption.

In Lebanon, a day rarely passes without some political grouping reaffirming its trust in the judges and the judiciary.

Increasingly, judges are perceived as the

main guarantors of the rights of the citizen, and the respectable protectors of the fairness of the political process as a whole.

There is, however, a crisis developing within both systems. We shall examine this crisis soon in the *Daily Star* with a depiction of a criminal trial in London and one in Beirut, in special contributions to this law page. This crisis is wider than the problems in the penal system, and a major review has just been completed by the Master of the Rolls, Lord Woolf, to overhaul the civil system in England.

The review, called *Access to Justice*, was released last July, and will introduce one of the most significant changes in civil procedure since the great English judicial reform of 1875. Both the comparative method of Lord Woolf's team and its substantive conclusions and suggestions should offer ample food for thought to the much-needed reform of Lebanon's clogged courtrooms.

Before one embarks on reform, however, the basics need to be stated in as clear a form as possible. The articles on this page should be of assistance.

# Lebanon: the importance of civil law

by Chibli Mallat

## Precedent

There is no such concept as precedent in Lebanese or French law, which belong to the 'civil law' family, in contrast to the English and American 'common law' system. However, judgments may be highly persuasive. It is the persuasive use of previously rendered judgments, especially at the level of the higher courts, which makes for a good argument by a good lawyer.

Courts in Lebanon increasingly refer to their own previous judgments, departing therefore from the muted attitude of the French tradition.

But the courts here will just make reference to the case and avoid quoting it at length, as often happens in the common law tradition of precedents. It is in this manner that Lebanese and French judges are said not to make law, but merely to pronounce on it.

## Legal Profession

The advocacy profession in Lebanon is not divided between two branches. A lawyer will be entitled to appear before any court after three years of practice as *avocat stagiaire*. But the law graduate may choose to become a judge. For this, he or she needs to pass a special exam, which will allow entry to a special school for judges.

This is radically different from Britain, where judges are chosen from among the most prestigious lawyers – known as QCs – (Queen's Counsel) or endearingly 'silks', for the little silk cloth they are entitled to wear after 20 years or more at the bar.

A young Lebanese graduate from the school of law at one of the five universities which teach law in the country can choose between a career at the bar and a career as judge.

Both will be paid poorly at the beginning, but a good lawyer can make money in corporate law or in a real estate career in Lebanon. A good judge will never make money, and judges' salaries remain depressingly low.

The Beirut bar association includes some 4000 lawyers covering all of Lebanon, except for the much smaller bar association of

Tripoli. There are some 350 judges in the country, who are overloaded with cases, some dating back before the war. In 1996, some 100,000 claims were lodged before the courts, and the ministry of justice is actively recruiting for the judiciary.

## Court structure

There is a division within the Lebanese and French court structure between criminal courts and civil courts, but it is much less pronounced than the division between 'administrative' judges and 'civil' judges. Criminal courts are considered to be part of the 'civil' system as opposed to the 'administrative system'.

The civil jurisdiction takes the form of a pyramid. Depending on the pecuniary importance of the case, first degree courts consist either of a single judge or of a bench of three judges. There are five chambers in Beirut plus a chamber in each of the ten districts (*muhafazat*). There is one appeal court (*mahkamat isti' naf*) in each district.

The Court of Cassation (*mahkamat al-tamyiz*) is the highest court for all civil cases – civil law is understood here to include criminal and commercial law and some personal status matters for the non-Muslim communities in the country.

As in Britain, civil courts deal with all disputes between persons and/or legal entities such as companies and trade unions. However, the Lebanese system follows the unusual distinction established in France between administrative and civil law.

The administrative courts deal with cases involving the state or a public body as a full party. There is only one degree of administrative jurisdiction, the *Majlis al-shura*, which is the equivalent of the Conseil d'Etat. It is also overloaded with cases, which take years to be heard, and it might be appropriate to relieve the *Majlis* in less important cases with a first instance administrative judge, as is the case in France.

In the rare cases of jurisdictional uncertainty or conflict between administrative and civil jurisdictions, a tribunal of conflicts composed of judges from the Court of Cassation and from the *Majlis al-shura* solves the issue of competence.

The Court of Cassation also provides the

judges for the so-called Judicial Council (*al-majlis al-'adli*), which operates as original and final jurisdiction for particularly sensitive criminal offences of a political nature, like the Geagea trials.

Normal criminal cases are heard by one judge, if the case is minor. If it is a major offence, it will be heard by the Court of Assizes (*mahkamat al-jinayat*), before a bench of three judges.

The state is represented by a public prosecution office (*niyaba 'amma*), which is assisted by investigative judges (*qudat tahqiq*). There is no jury system in Lebanon.

Decisions of the Court of Assizes can be appealed, on a point of law, to the Court of Cassation. The Court of Cassation also hears appeals on points of law from the Court of Appeal (*mahkamat al-isti' naf*) in most civil cases. The Court of Appeal itself hears cases upon appeal from the court of first instance (*mahkamat al-bidaya*).

There are special tribunals for family law matters, which are the prerogative of each of the 18 recognised religious 'communities'.

For the three Muslim communities (Sunni, Shi'i and Druze), these tribunals deal with marriage, divorce, custody, inheritance and wills. For non-Muslims, personal status jurisdiction is split: the law of inheritance and wills falls under national civil jurisdiction, but the Christian and Jewish religious courts are competent for marriage, divorce, and custody.

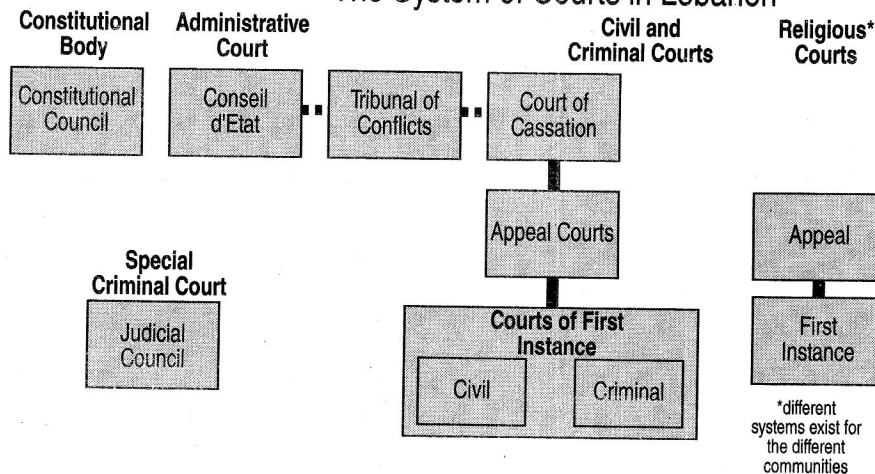
All these courts have more than one degree, and Catholic communities enjoy a special and unusual extra-territorial right of appeal before the Vatican Rota court.

In 1993, a Constitutional Council (*al-majlis al-dusturi*) was established to review the constitutionality of legislation, but only upon the request of a number of officials (following the French Conseil Constitutionnel).

The Constitutional Council has ten members, half elected by parliament and half appointed by the government. Its first decision was rendered in February 1995, and decisions on recent challenges to the elections of the summer of 1992 are to appear within a few weeks.

Chibli Mallat edits the *Daily Star* law page

## The System of Courts in Lebanon



## Court outlaws tribal practices

The customary use of young women as compensation payment by tribes in the mountainous South Pacific nation of Papua New Guinea is illegal and must be abandoned, according to a national court judge.

National court judge Salamo Injia ruled against a tribe's decision to give 18-year-old Miriam Willingal to another tribe as part of compensation for a shooting death. Injia said the practice was "unlawful, unconstitutional and repugnant to the principles of humanity".

"If their customs and practices conflict with national laws, then they must give way to our national laws," Injia ruled on Monday.

The court in the remote mining town of Mount Hagen in central Papua New Guinea heard that Willingal and another woman were given as compensation, along with money and pigs, after her father was shot dead by police as he protected a wanted man.

Willingal's grandfather blamed the April 1996 murder of his son on Willingal's tribe and demanded compensation.

Willingal, a student, was ordered to marry a man from her grandfather's tribe, but she refused. It is not known what happened to the other woman. Willingal's case was taken up by a local human rights group after details of the compensation deal were published in a local newspaper and Willingal was freed by her grandfather's tribe.

Papua New Guinea remains one of the world's last great mysteries, with thousands of tribes, speaking hundreds of different languages, scattered over its mountainous terrain.

While 97 per cent of the population are Christian, superstitions persist in remote areas, where most people live in primitive conditions and where bigamy is widespread. — *Reuter*

## Govt criticised by child rights group

Children's rights activists criticised the Sri Lankan government yesterday for deporting a Swiss national accused of molesting boys, saying Western countries are too lenient on child abusers.

"Western prisons are luxurious compared to Sri Lanka's. They would get a much tougher punishment here," said Kalyananda Tiranagama, director of Lawyers for Human Rights and Development.

Victor Baumann was taken into custody upon his return to Switzerland, Zurich's district attorney's office said. Exact charges against him are still to be decided.

Last week, another Swiss man became the first foreigner jailed in Sri Lanka for sexually abusing children in the island nation, which is a popular destination for tourists seeking sex with children.

Armin Heinrich Pfaffhauser, a 58-year-old native of Zurich who has lived in Sri Lanka for over 25 years, was convicted last week of having sex with two boys aged 11 and 12 in 1995, and sentenced to two years in prison.

Baumann, 53, was arrested on October 16 after police raided his home in Negombo, a town on Sri Lanka's west coast, and found three boys aged 11 to 16 in his company.

A local magistrate asked police to prepare formal charges, but Baumann was deported before the case could proceed.

Sri Lankan president Chandrika Kumaratunga announced on Monday that she is establishing a Child Protection Authority and drawing up a plan to curb child labour and sexual abuse of children.

Last year, Sri Lanka toughened its laws to discourage foreign pedophiles, raising prison

terms to a maximum 20 years for pimps and their clients. But critics have accused law enforcement agencies of being lax. Estimates of the number of boy prostitutes in Sri Lanka range from 5,000 to 30,000. — *AP*

## Rifkind attacks China's plans

British foreign secretary Malcolm Rifkind said yesterday that Britain opposes moves to roll back human rights laws in Hong Kong.

"We share the view of the Hong Kong government that any proposals to repeal any of the human rights ordinances in Hong Kong would be a retrograde step," Rifkind told reporters after a meeting with Singapore foreign minister Shanmugam Jayakumar.

China, due to take over Hong Kong from British rule on July 1, has said it plans to roll back some civil rights after the handover. The move has triggered strong protests in Hong Kong and prompted the international community to lodge official protests with China.

"There's been concern expressed right across the international community, in the US, in Europe and elsewhere, and we hope that the Chinese side will give very serious consideration to these concerns and reflect on the implications of them," Rifkind said.

Speaking on his arrival in Singapore for a series of meetings between Asian and European foreign ministers, Rifkind declined to elaborate on what he would stress in his talks with Chinese foreign minister Qian Qichen on the sidelines of the Asia-Europe meeting in Singapore on Friday.

But he appeared to rule out a role for the World Court in disputes regarding Britain's handover of the colony to China on June 30. "I want to have good and constructive discussions with Mr Qian Qichen," he added. — *Reuter*

# England: the power of common law

by Boris Kasolowsky

## Precedent

A judgment rendered by an English court is binding on that court and any lower court. It becomes automatically a 'precedent'. A precedent may not be departed from because it is considered unjust that different decisions may be made on the same facts.

Where a court has decided a similar issue, a previous decision of the court itself or a higher court is therefore relevant. The previous decision must be followed where the facts are the same.

Where the earlier decision can be 'distinguished' that is to say, a reason can be found why the present case is different from the earlier case, the earlier case does not need to be followed. The circumstance that earlier cases must be followed is known as 'the doctrine of binding precedent'. It is in this manner that English judges are said to make law.

## Legal Profession

The legal profession is divided between advocates known as barristers – who until very recently were the only lawyers entitled to appear before the higher courts – and solicitors. Solicitors prepare the cases and deal with the clients, while barristers argue their cases before judges. A young graduate from Cambridge would never hesitate to follow the far more prestigious "call to the Bar" and become a barrister. There are 7,700 barristers in England and Wales, compared with 76,000 solicitors.

## Court structure

There is a broad division within the English court structure between criminal courts and civil courts.

Criminal cases are heard by the Magistrates' Court and the Crown Court. The Magistrates' Court hears less serious offences. The Crown Court, presided over by one judge and assisted by a jury, hears cases involving graver criminal offences. However, every defendant has the right to choose to have his case heard by the Crown Court and thus have a jury trial.

Appeals from the Magistrates' Court go to the Crown Court, but in those situations the court will not be assisted by a jury. Appeals against decisions of the Crown Court go to the Court of Appeal. Where a jury has decided that a particular defendant is guilty the Court of Appeal is unlikely to overrule that decision.

Civil courts deal with all disputes between persons and/or legal entities such as compa-

nies and trade unions.

A person with a claim, known as the plaintiff, will – depending on the nature and value of the claim – bring it in front of a county court or the High Court. The more valuable claims and more complicated matters will be brought before the High Court. Thus a claim based on breach of contract worth £1,000,000 and a claim against the government are dealt with by the High Court.

There is no distinction, as in French or Lebanese law, between administrative courts and civil courts. A personal injury claim worth £10,000, and disputes between landlord and tenant, are usually judged by the county court.

As the name suggests, there were county courts in every county (an administrative district). The county courts are presided over by one judge who deals with all matters. County court judges are generalists and thus cannot be expert in every area of law. The High Court, on the other hand, has judges who have expertise in particular areas of law and who judge in the main cases within their expertise.

The High Court is divided into three special divisions: the Family Division, which deals with such things as divorce and custody; the

A plaintiff or defendant who is dissatisfied with the decision of the county court may appeal against it. The appeal goes to the High Court. Exceptionally, appeals may be heard by the Court of Appeal. Appeals from the High Court go to the Court of Appeal. The Court of Appeal does not hear evidence again but rules only on points of law.

The Appeal Court consists of a bench of three judges. The Court of Appeal is presided over by the Master of the Rolls, who is the most powerful judge within the English judiciary. Certainly, much of important English 'judge made law' derives from decisions of the Court of Appeal.

Exceptionally, decisions of the Court of Appeal may be appealed to the House of Lords. Appeals are only permitted where the issue is one of law and one of exceptional public importance. Although technically part of the Houses of Parliament, the House of Lords is a judicial body separate from the legislative chamber.

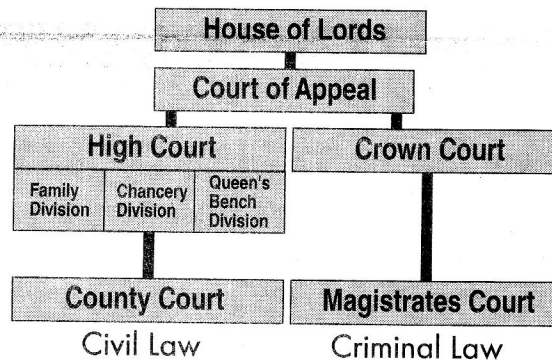
A Law Lord, as he is known (his real title is 'Lord of Appeal in Ordinary'), is appointed from among the most competent Court of Appeal judges. Upon appointment he is "created" a Lord, and will usually add the name of some obscure village to his title so as to preclude any confusion that may arise were his son to become a Law Lord too.

There are currently a total of 12 Law Lords but the Lord Chancellor's Department may increase this number. The House of Lords usually consists of a bench of five Law Lords.

Fewer than 80 cases are heard by this court per year as compared with over 1,000 by the highest French court, the Cour de Cassation. Usually each of the judges writes a judgment. The judgments are much longer than those rendered by comparable courts of other European countries. English lawyers attribute the additional length to the fact that their judgments are "reasoned".

Since the United Kingdom joined the European Union, the country's highest court has now become, in theory, the European Court of Justice (ECJ). The ECJ's jurisdiction is limited in so far as it rules only on matters of European law – but the scope of European Union legislation is increasing all the time.

*Boris Kasolowsky will be working for a leading solicitors' firm in London. He studied law at Oxford and SOAS (London), and is currently Chercheur associé at the Institut Français des Etudes Arabes de Damas*



Chancery Division, which deals with trusts and applies the principles of 'equity, justice and good conscience', and the Queen's Bench Division, which regroups all specialities not found within the other divisions (admiralty, commercial, contract, tort).

High Court judges are appointed by the Lord Chancellor's department – the equivalent of the ministry of justice – usually from among the most competent barristers. Although successful barristers may earn much more as independent practitioners, many consider the appointment as a judge an honour, all the more so as the appointment is accompanied by a knighthood.