councils of state. In Germany and countries that follow its model, special administrative courts have been created.

In theory, ordinary court and administrative court jurisdiction is separate and exclusive, but disputes arise. In France, a special Tribunal of Conflicts decides which is the proper court for a disputed case. In Germany, the court in which the case is filed decides whether it has jurisdiction and may transfer cases over which it declines jurisdiction. A decision refusing jurisdiction is binding in the transferee court. In other countries, such as Italy, the Court of Cassation is the final authority on conflicts of jurisdiction.

Constitutional law poses a special problem for civil-law judicial administration. The recent adoption of written constitutions, for example in Germany and Italy since World War II, illustrates the extent to which the public–private law dichotomy affects court structure and jurisdiction. In those countries, some method of reviewing legislative action for constitutionality was necessary, yet it was clear that this power could not be exercised by the judiciary (i.e., the ordinary judiciary) without violating the doctrine of separation of powers and limiting the supremacy of the legislature.

Just as the development of the modern administrative state led to the creation of a separate jurisdiction to review the legality of administrative actions, in Germany and Italy the solution to the question of judicial review was to establish separate constitutional courts. Civil-law fundamentalists have occasionally argued that these tribunals cannot really be "courts," since civil-law courts, strictly speaking, merely interpret and apply the law made by the legislature. Nonetheless, this view has yielded in the same way that most observers now regard entities such as the French Council of State as a "court" and its officials as "judges." Thus, the strong principle of separation of powers and the traditional civil-law limits on judges' powers continue to apply to the work of the ordinary judiciary. Conversely, the separate administrative and constitutional courts are not thought to violate that principle.

The Legal Process

Civil Procedure

Modern codes of civil procedure stress that judicial proceedings are public and controlled by the parties. Party control, however, is somewhat tempered by the extensive power of the civil-law judge to supervise and shape the fact-finding process and by the role of the public prosecutor in private actions.

In contrast to the progressive unfolding of evidence—under near complete control of the parties—that occurs through the discovery process in the American common-law system, there is no formal civil-law counterpart to discovery. Nor, in most cases, is there any single event that the common-law lawyer would recognize as a trial. Instead, a civil-law civil action is a continuing

series of meetings, hearings, and written communications through which evidence is introduced and evaluated, testimony is taken, and motions are made and decided. Initial pleadings are quite general, and the issues are defined at the direction of the judge as the proceedings progress.

The civil process tends to be conducted primarily in writing, and the concept of a highly concentrated and dramatic "trial" in the common-law sense is not emphasized. Thus, a lawyer who wishes to question a witness must first submit to the judge and opposing counsel "articles of proof" describing the scope of the potential questions. The witness will be questioned at a later hearing at which the judge will typically ask the questions, often framing or reformulating the issues raised in the case. Cross-examination is uncommon. Instead, opposing counsel's role is to make certain that the record summary of the testimony is complete and correct.

The judge supervises the collection of evidence and preparation of a summary of the record on which a decision will be based. Since there is no "pretrial" phase of the proceeding, the evidence is not "discovered" in the sense understood by common-law lawyers. Instead, the parties submit proposed evidence to the judge in writing or at oral hearings, and the judge delivers rulings concerning the relevance and admissibility of evidence. Admissible evidence is presented, for the first and only time, in the final hearing that constitutes the trial.

Many of the differences between the common-law and civil-law judicial process may be attributed to the absence of the civil jury. While some specialized courts involve lay people in the court's decision-making process, such "lay judges" are not usually chosen on the basis of their impartiality, as are common-law jurors. Lay judges are generally selected on the basis of experience in the subject matter of the court (e.g., labor law), or as representatives of a particular interest group (e.g., unions or management). Unlike common-law jurors, lay judges usually serve for a continuing term instead of only a single case.

Civil-law procedure does not emphasize the need to have a single-event trial because there is no need to convene a jury to hear the evidence, find the facts, and apply the law to the facts. The absence of the civil jury also helps to explain the relative lack of restrictions on the admissibility of evidence in the civil-law system. Hearsay and opinion evidence is more freely admitted than in common-law systems. Issues of evidentiary weight are left to the judge.

Nonetheless, there are indications that the common-law and civil-law procedures are not as different as they appear. American pretrial discovery, for example, significantly reduces the amount of "surprise" evidence that will come forth at trial. And efficiency concerns have led some civil-law countries, such as Germany, to experiment with more concentrated trials to resolve simple cases. A central difference between the common-law and civil-law systems, according to

one analysis, is that the common-law system "leaves to partisans the work of gathering and producing the factual material upon which adjudication depends."[10] In contrast, lawyers in the civil-law system mainly act as "law adversaries" (i.e., arguing points of law), and judges more actively control the investigation and fact-finding process. The public prosecutor may also have a role in a civil case (see *infra* page 31).

Criminal Procedure

The typical criminal proceeding in a civil-law court is divided into three phases: the investigative phase, the examining phase, and the trial. In the investigative phase, a government official (generally the public prosecutor) collects evidence and decides whether it is sufficient to warrant formal charges.

During the examining phase, which is primarily conducted in writing, an examining judge completes and reviews the written record and decides whether the case should proceed to trial. At this stage, the defendant may be questioned, but has the right to remain silent and to be represented by counsel. The examining judge plays an active role in the collection of evidence and interrogation of witnesses. As in civil proceedings, however, there is no counterpart to common-law cross-examination.

As a result of the thoroughness of the examining phase, the trial itself differs significantly from a common-law criminal trial. Perhaps the most striking difference is that the record already has been made and is equally available to the defense and the prosecution well in advance of trial. The main function of a criminal trial is to present the case to the trial judge and, in certain cases, the jury, and to allow the lawyers to present oral argument in public.

As noted above, civil-law countries do not have a tradition of jury trials in civil cases. Some countries, however, have introduced the jury trial for serious criminal matters, while others use a combination of lay judges and professional judges in criminal cases.

Appellate Procedure

A primary difference between common-law and civil-law appellate procedure is that intermediate appellate review in the civil-law tradition often involves a de novo review of both the facts and law of the case. Thus, intermediate appellate courts may obtain additional testimony, supervise the collection of new evidence, and seek out expert opinions. In some civil-law systems, appellate review in criminal cases does not involve de novo factual review. In Germany,

[10]. John H. Langbein, Restricting Adversary Involvement in the Proof of Fact: Lessons from Continental Civil Procedure, Speech to the American College of Trial Lawyers, September 25, 1984, *cited in* Mary Ann Glendon et al., Comparative Legal Traditions 169 n.2 (1985).

for example, most criminal trial court decisions are subject to appeal only on points of law, and those appeals are heard by an appellate court of last resort.

Appellate courts of last resort, like their common-law counterparts, generally consider only questions of law. Some of these courts follow the French system of "cassation," in which the court decides only the question of law that has been referred to it, not the case itself. The Court of Cassation may either affirm the lower court decision or remand the case for reconsideration to a different lower court. The remand court is, in theory, free to decide the case the same way as the previous lower court. If that occurs, a second appeal may be taken to the Court of Cassation, which will then sit in plenary session. The court may then issue a dispositive ruling in some cases; in others it must remand the case to a third lower court to issue the judgment. In the German system, the high court may reverse, remand, or modify the lower court decision and enter the judgment itself.

Legal Actors: Tradition and Transition

The division of legal labor in the civil-law world is greatly influenced by the traditional dogma of legal science. This generally accepted legal "folklore," as Prof. John Merryman refers to it, deeply affects the way legislators, judges, and lawyers work.

Legal Scholars

According to the legal folklore, the legal scholar does the "basic thinking" for the legal system. Indeed, academic lawyers continue to enjoy an honored place in the civil-law tradition. The civil-law codes historically have been greatly influenced by the work of legal scholars, as has been indicated in the earlier historical section of this treatise. Judges and legislatures, as a general matter, look to legal scholars for definitive views on the law. Though legal scholarship is not a formal source of law, the "doctrine" as developed by scholars is highly valued in the civil-law tradition.

The Legislature

The legislature in the civil-law tradition strives to supplement and update the codes in those areas in which the legal scholars have suggested that codes are defective or incomplete. New legislation, therefore, in theory employs the concepts and follows the structure established by the legal scholars and embodied in the earlier codes. Legislatures seek completeness and clarity, attempting to produce laws that are consistent with the tenets of legal science and compatible with the established legal order.