

# Domestic legal traditions and states' human rights practices

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## Abstract

Empirical analyses of domestic legal traditions in the social science literature demonstrate that common law states have better economic freedoms, stronger investor protection, more developed capital markets, and better property rights protection than states with civil law, Islamic law, or mixed legal traditions. This article expands upon the literature by examining the relationship between domestic legal traditions and human rights practices. The primary hypothesis is that common law states have better human rights practices on average than civil law, Islamic law, or mixed law states because the procedural features of common law such as the adversarial trial system, the reliance on oral argumentation, and *stare decisis* result in greater judicial independence and protection of individual rights in these legal systems. We also examine how the quality of a state's legal system influences repression focusing on colonial legacy, judicial independence, and the rule of law. A global cross-national analysis of state-years from 1976 to 2006 shows that states with common law traditions engage in better human rights practices than states with other legal systems. This result holds when controlling for the quality of the legal system and standard explanations for states' human rights practices (economic growth, regime type, population size, military regime, and war involvement).

## Keywords

civil law, colonial legacy, common law, human rights, Islamic law

Human rights scholarship has made great strides in seeking to explain variance in states' human rights practices. Political and economic factors have been shown to significantly influence states' willingness to employ political terror (Mitchell & McCormick, 1988; Henderson, 1991; Poe & Tate, 1994; Davenport, 1995; Poe, Tate & Keith, 1999).<sup>1</sup> Recent human rights research has

explored domestic legal explanations of state repression, focusing on differences across types of domestic legal systems, the extent to which the rule of law operates domestically, and the level of judicial independence (Cross, 1999; Peerenboom, 2004; Keith & Ogundele, 2007). This relates to a broader research agenda that links the characteristics of domestic legal systems to economic and political outcomes, such as economic growth, rule of law, institutional quality, corruption, democracy, and

<sup>1</sup> We define violations of human rights more explicitly in the research design section. We focus on states' violations of personal integrity rights, including freedom from extrajudicial killing, disappearance, torture, and individuals' political imprisonment at the hands of their governments.

bureaucratic effectiveness (La Porta et al., 1997, 1998, 1999, 2004; Chong & Zanforlin, 2000; Joireman, 2001, 2004; Mahoney, 2001; Lange, 2004; Levine, 2005).

A typical domestic legal explanation of states' human rights behavior posits that common law states have better human rights practices than civil law or Islamic law states. Common law is often touted as a superior legal system because it creates a stronger, more independent judiciary, resulting in more effective restraints against government repression (Keith & Ogundele, 2007). Common law is designed to protect individuals from the state, while civil law systems treat the state as supreme and citizens subservient to the state, an artifact of the development of civil law in the context of the Roman Empire (Joireman, 2001: 573–574). Lawyers are more powerful and proactive in common law systems relative to other legal systems due to the adversarial nature of litigation; this provides an additional check on the state's power. Many common law systems developed lengthy and in-depth constitutions at independence, which curbed the power of the executive further (Keith & Ogundele, 2007: 1071). There are many features of common law that provide checks and balances in the political system and place limits on a government's ability to repress its citizens.

However, some empirical analyses do not support theoretical claims that common law systems experience less repression, at least in the context of sub-Saharan Africa (Keith & Ogundele, 2007). Keith & Ogundele (2007) find little difference between civil law and common law states with respect to human rights practices. When differences are found, they push in the direction of civil law states having superior records on torture and repression. These results are puzzling because they stand at odds with a variety of other empirical studies that find positive outcomes for common law systems. La Porta and his colleagues (1997, 1998, 1999, 2004) demonstrate that common law countries have better economic freedoms, stronger investor protections, and more developed capital markets than countries with French legal origins. Chong & Zanforlin (2000) find states with French civil law traditions to have less bureaucratic development, more corruption, and weaker contractual enforcement than states with other legal traditions. Levine (2005) shows that states with French legal origins have fewer property rights protections than states with British legal origins. Scully (1987) finds that common law states have significantly better political and civil liberties than civil law, Marxist-Leninist law, and Muslim law states. Joireman (2001) finds that common law countries in Africa have superior records in maintaining the rule of law and protecting civil liberties, especially since 1990.

In this article, we seek to explain these puzzling results by examining the relationship between domestic legal traditions and human rights practices in all regions of the world. We argue theoretically that common law states should have better human rights practices than states with civil law, Islamic law, or mixed law traditions. We also argue that legal systems imposed via colonial rule are weaker than non-colonial legal systems, such that countries with colonial legacies will have worse records of repression than states without them. Variation in the quality of legal systems also influences states' human rights practices; states with more independent judiciaries and a stronger rule of law will experience less repression. Empirical analyses of global state-year data from 1976 to 2006 show that common law states have superior human rights records relative to civil law, Islamic law, and mixed law states. We also find that colonial legacy increases repression, while judicial independence and a strong rule of law protect individuals' physical integrity rights. Our analyses show that the success of the international human rights regime depends partially on the legal characteristics of countries in the international system.

### **Legal explanations of states' human rights practices**

A state's opportunity and willingness to repress its citizens is contingent on various political, economic, and cultural factors (Poe, 2002; Schmitz & Sikkink, 2002; Davenport & Armstrong, 2004).<sup>2</sup> There are few studies that examine the relationship between domestic legal traditions, states' willingness to ratify human rights treaties or join human rights courts, and states' human rights practices (Cross, 1999; Peerenboom, 2004; Keith & Ogundele, 2007; Simmons, 2009; Mitchell & Powell, 2011). This is surprising because if we think about human rights broadly as 'a set of principled ideas about the treatment to which all individuals are entitled by virtue of being human' (Schmitz & Sikkink, 2002: 517), it stands to reason that courts, judges, and lawyers play an essential role in upholding these principles.

In domestic legal systems, courts play multiple roles including dispute adjudication, administrative review,

<sup>2</sup> Extant research has shown that non-democratic countries are more repressive than democratic countries. State involvement in interstate and civil wars increases the likelihood that personal integrity rights will be violated (Poe & Tate, 1994; Poe, Tate & Keith, 1999). Repression is also more likely to occur in poor countries with high degrees of economic inequality (Mitchell & McCormick, 1988; Henderson, 1991; Poe & Tate, 1994; Poe, Tate & Keith, 1999).

criminal enforcement, and constitutional review (Alter, 2008: 37). Courts and judges serve as overseers of the entire political system, providing important checks on executive and legislative powers. However, legal systems vary considerably across countries, creating different expectations about the effectiveness of legal institutions in protecting basic human rights. This variation stems from differences in legal traditions (common law, civil law, Islamic law) and differences in the quality of the legal system, such as the extent to which the rule of law prevails, the degree to which the judiciary is independent from the state, and the manner in which the legal system was established.

To understand how legal systems influence repression, we focus on the major legal traditions in the world as defined by Badr (1978: 187): civil law, common law, and Islamic law (David & Brierley, 1978; Glenn, 2007). Major legal systems are those whose ‘application extended far beyond the confines of their original birth places and whose influence, through reception of their principles, techniques or specific provisions has been both widespread in space and enduring in time’ (Badr, 1978: 187). Systems that incorporate elements of two or more legal traditions are treated as mixed legal systems.<sup>3</sup> We provide a brief overview of the three major legal traditions and describe how the varying structures in these systems influence states’ human rights practices.

### *Major legal traditions*

The civil legal tradition originated in Rome, but quickly spread to continental Europe and beyond. The legal tradition developed as Roman jurists (*jurisconsulta*) gave advice (*responsa*) with respect to particular cases and disputes between Roman citizens (Glenn, 2007). *Responsa* and other forms of law were slowly incorporated into scholarly commentaries and imperial legal pronouncements (Shapiro, 1986). After the split of the Roman Empire, Roman law was eventually codified in the eastern part of the Empire governed from Constantinople, where under the rule of the Emperor Justinian (527–65), the *Corpus Juris Civilis* was created. Civil law was rejuvenated in Europe in the 11th to 13th centuries by legal scholars, culminating in the famous codes established in France and Germany by Napoleon and Bismarck (David & Brierley, 1978). Civil law became the dominant legal tradition in Western

Europe and spread throughout the French, Spanish, Portuguese, German, and Italian colonial empires. Approximately 53% of countries in the world today have civil law systems.<sup>4</sup>

Common law arose following the military conquest of England by the Normans (Glenn, 2007). The Battle of Hastings in 1066, won by the Norman invaders, destroyed the existing feudal system. Written sources equivalent to the codes that were developed elsewhere in Continental Europe were unavailable, thus the practice of *stare decisis* emerged (Seagle, 1946). Common law relied on oral argumentation rather than written procedural rules. English judges came to be bound by the precedents established by previous judgments. Great Britain actively sought to spread its legal system throughout its colonial empire, which is why a large majority of former British colonies currently practice common law. Around 24% of countries in the world today have common law systems.

Islamic law is based on the religion of Islam and the revelations of Muhammad. Islam arose in the seventh century CE in the Arabian Peninsula and in the lower part of Mesopotamia (Badr, 1978: 187). Like common law, Islamic law is not written law. There is usually no written record of judicial proceedings or decisions in Islamic law; Islamic judges are not required to justify their decisions in writing (Glenn, 2007). The four primary sources of Islamic law include the Koran, the Sunna, judicial consensus, and analogical reasoning (Vago, 2000). In Islamic law, the Koran (divine revelation) is the primary source of law. Unlike the elaborate codes established under civil law, only 190 of the 6,237 verses in the Koran (3%) contain legal provisions (Badr, 1978). If the Koran does not explicitly give direction for a particular case, the Sunna is consulted, which is a compilation of sayings from the Prophet, collected by reliable sources in the Hadith (tradition). Judicial consensus by historical legal scholars is the final source of Islamic law, along with analogical reasoning. The Islamic legal tradition spread throughout territories occupied by the Arabs and in parts of Southeast Asia and Africa (Badr, 1978: 188). Approximately 13% of states globally can be characterized as Islamic law states.

### *Legal traditions and human rights practices*

One defining difference between civil law and common law is apparent in the assumed social contract between

<sup>3</sup> Some states combine elements of civil law and common law (Botswana, Cameroon, Malta, Seychelles, South Africa, Sri Lanka, Thailand, and Zimbabwe), others combine civil law and Islamic law (Kenya and Morocco), while some systems incorporate elements from all three major legal traditions (Japan and Somalia). Overall, 10% of countries globally have mixed legal traditions.

<sup>4</sup> Our legal system typology comes from Powell & Mitchell (2007). We describe these data in more detail in the research design section. This percentage is reported for the last year of our dataset, 2006.

individuals and the state. According to Joireman (2001: 573), civil law systems 'begin with the idea of the state as supreme and the role of individual in obedience to it. Alternatively, common law systems have developed with the idea of the protection of individual rights from the state as a primary goal'. This feature of civil law reflects its historical development in the context of the Roman Empire, where the law was utilized 'as an instrument for expanding and administering the empire. It was, in effect, a tool used by the state to regulate its citizens rather than to protect them from the encroachment of the state' (Joireman, 2001: 574; Merryman & Clark, 1978). This also produced a sharp distinction between private law (governing relations between citizens) and public law (governing relations between the citizen and state) in civil law systems (Mahoney, 2001: 512). Islamic law systems are similar to civil law systems in the sense that the law is closely integrated to the state's power, so long as the state ties its legitimacy with Islamic religious traditions. 'The entire judicial structure is an instrument of state, which is designed to promote conformity to the will of those who govern' (Scully, 1987: 602). Islamic law takes one additional step, eschewing distinctions between the individual and the state; because the individual is part of the state and the Islamic community, there is no need to delineate individual rights (Arzt, 1990: 206).

The French civil law system provides a good example of the primacy of the state, as the French revolution was driven in part by conflict between Louis XVI and the *parlements*, courts that had partial veto power over royal legislation. A post-revolutionary law of 1790 prohibited the judiciary from reviewing executive acts (Mahoney, 2001: 509–510). Bismarck followed a similar path in Germany, unifying private law into a single code in 1900 as part of the overall strategy to weaken local autonomy and promote centralization, a move which strengthened the position of the state in the legal system (Beck, Demirgüç-Kunt & Levine, 2003).<sup>5</sup> The Ottoman Empire also privileged the role of the state through the creation of hierarchical and codified legal rules called the *majalla* between 1869 and 1877. While these rules were Islamic in content and consistent with *shari'a*, they were

based in form on the Napoleonic Code (Brown, 1997: 2). These moves towards stronger executive authority in civil and Islamic law systems stand in sharp contrast to the historical development of common law in England, whereby the Stuart kings' attempts to seize property fueled the land owners' conflict against the crown in the English Civil War and Glorious Revolution (Mahoney, 2001: 508–509). Human rights as a concept are arguably more consistent with the underlying social relationship defining common law systems because they emphasize the rights of the individual with respect to the state.

Another important difference between the major legal traditions relates to the doctrine of *stare decisis* or judicial precedent, which operates in common law systems, but is absent in civil law and Islamic law systems (Opolot, 1980; Darbyshire, 2001). Stated in a general form, *stare decisis* signifies that when a point of law has been settled by a judicial decision, it forms a precedent which is not to be departed from afterward. Judges in common law systems are constrained by past decisions, whereas judges in civil and Islamic law systems face fewer constraints. The main advantage of the doctrine of judicial precedent is that it leads to consistency in the creation and application of principles in each branch of law. Appellate courts, which have the power to reverse the legal judgments of lower courts, are also strong in common law systems. Legislatures generate the codes of civil law systems and are not bound by precedent (Mahoney, 2001). The use of precedent and the hierarchy of judicial decision-making create a mechanism for the protection of human rights in common law systems because anyone who faces a similar legal problem, such as mistreatment by the state, can expect a similar response from the courts (Keith & Ogundele, 2007). Civil law and Islamic law judges, however, are not legally bound by prior judgments, although deference to the written law of statutes and codes in civil law creates some legal predictability. There is no written record of Islamic law, which results in the absence of *stare decisis*. While Islamic law judges are constrained by written religious texts, their ability to render judgments without explanation creates greater potential for mistreatment of individuals by the system.<sup>6</sup>

<sup>5</sup> However, Beck, Demirgüç-Kunt & Levine (2003: 659) point out that the German code was much more flexible than the French code. The rigidity of the French system became extremely problematic in French colonies because it created great tension between civil law and customary law, it brought a norm of antagonism towards judges to the colonies, the clerk-like role of judges made the legal profession less attractive, and it failed to provide a culture for dealing with inconsistencies in the law.

<sup>6</sup> Scully (1987: 601) argues that any theologically rooted legal system will be 'indifferent to subjective rights'. Peerenboom (2004) makes a similar argument that Islamic fundamentalism constitutes the most radical theoretical and practical challenge to the international human rights regime today. He notes the difficulty of reconciling Islam with contemporary human rights, including *shari'a*-based punishments, which the international human rights regime condemns as cruel and inhumane.

The application of law also varies across legal traditions. Due to key differences between the roles of judges in each system, civil law systems are considered ‘inquisitorial’ (the judge is the main actor, who gathers evidence and asks the questions), while common law systems are deemed ‘adversarial’ (opposing parties are pitted against each other). In the adversarial system, judges are considered to be neutral arbiters between the plaintiff and defendant in civil trials, or between the defendant and the state in criminal trials (Carey, 2002: 6). This strengthens the position of lawyers in the common law system. The inquisitorial system is defined by a lack of separation of powers; judges represent the interests of the government (Scully, 1987). A civil law judge supervises the compilation of necessary evidence and asks most questions during the trial, while the role of the attorneys is to ‘argue the interpretation that the court should give to those facts’ (Reichel, 2008: 171). Because civil law systems are designed as instruments of the state, judges in inquisitorial systems are less able to provide legal protection of individuals’ human rights from the government. In Islamic law, the legal system is strongly controlled by the state through top-down judicial appointments: ‘Throughout its history Muslim judges have served those who govern. The theory of separation of powers is alien to Muslim tradition’ (Scully, 1987: 602).

One consequence of the adversarial system employed by common law states is the establishment of stronger, more independent judiciaries.<sup>7</sup> Because judges are able to shape the law through their judicial decisions and often granted the power of constitutional review, they stand in a stronger position vis-à-vis the executive and legislative branches. In many civil law and Islamic law systems, statutes are not subject to judicial review, which results in citizens depending on the goodwill of the state to protect their interests (Scully, 1987: 599). ‘In principle, judicial independence promotes both economic and political freedom, the former by resisting the state’s attempts to take property, the latter by resisting its attempts to suppress dissent’ (La Porta et al., 2004: 447; Powell & Staton, 2009).

Civil law systems are characterized by a series of codes, which some view as designed to limit judges’ power as much as possible (Scully, 1987; Levine, 2005). For example, the Napoleonic Code contained 2,281 articles, while the Prussian *Landrecht* of 1794 included some 16,000 provisions

(Scully, 1987: 599). ‘The Napoleonic Code strove both to eliminate jurisprudence – the law created by judges in interpreting statutes and adjudicating disputes – and to impose strict procedural formalism on court processes to eradicate judicial discretion’ (Levine, 2005: 63). Napoleon’s goals were similar to Emperor Justinian, who sought to make his proclamations the sole source of the law (Levine, 2005). These codes are still reflected in modern civil law systems, which limit judicial independence.

The procedural features of common law, such as the adversarial trial system, the reliance on oral argumentation, and *stare decisis*, provide citizens with greater security and human rights protections. Stronger judicial independence and lawyers’ roles in common law systems also help protect individuals against state repression. Islamic law states may experience the highest levels of repression given that the legal structure is intimately linked to the state and the Islamic religion, giving judges very few discretionary powers for protecting human rights.<sup>8</sup> Basic descriptive statistics on political terror scores (Gibney & Dalton, 1996) from the period 1976–2006 confirm these expectations. The mean repression score on a scale from 1 to 5 is lowest for common law states (2.45) and highest for Islamic law states (3.10).<sup>9</sup> This leads to our first hypothesis.

*H1:* States with common law systems should engage in repression less frequently than states with civil law, Islamic law, or mixed law systems.

## The quality of domestic legal traditions and human rights practices

Domestic legal traditions are stable features that stem from a state’s particular historical development. Yet there is considerable variation in the degree to which the rule of law operates inside each state. Common law may provide greater protection to individuals from encroachment by the state relative to other legal traditions, yet the manner in which the legal system is established is also relevant. Legal systems imposed by colonial powers may exhibit weaker qualities than those that evolved naturally in Europe or elsewhere. There is also variation in the

<sup>7</sup> This distinction has historical roots, as England was more peaceful when its legal system developed, which allowed for the development of a less centralized system, while France’s more centralized legal system arose under less peaceful circumstances (La Porta et al., 2004: 448).

<sup>8</sup> However, there is significant variation in the extent of judicial independence across Islamic legal systems (Brown, 1997). The extent to which Islamic state law is consistent with *shari’a* also varies significantly across states with Islamic legal traditions.

<sup>9</sup> The distribution of state-year cases across the five values on the political terror scale are as follows: 1 (12.44% – least repressive), 2 (31.59%), 3 (32.21%), 4 (16.89%), 5 (6.88% – most repressive). The mean for civil law is 2.69 while the mean for mixed law is 3.01. The F statistic for an ANOVA is 55.94 with a *p*-value less than 0.0001.

degree to which judges are independent from the state, even within the same legal family. The extent to which the rule of law is upheld in a state will also matter, as executives face fewer checks on their coercive power in corrupt legal systems.

First, we discuss why legal systems established through the process of colonization are weaker than those that evolved naturally. A majority of states in the world inherited legal systems from former colonial powers, such as Britain, France, Spain, Portugal, and the Ottoman Empire. Many of these colonized states retained the metropole's legal system at the time of independence. Arab states in the Middle East were perhaps the greatest exception, especially among former British colonies, as they reverted to their traditional Islamic law when achieving independence. Most African states, on the other hand, adopted the legal system put in place by the colonizing state (Joireman, 2001). Former Spanish and Portuguese colonies in the Americas similarly followed suit, often implementing the colonizers' system of civil law. These imposed legal systems are weaker than their colonizers' counterpart systems for a variety of reasons.

First, colonizing states often created dual legal systems that privileged the colonizers' subjects over indigenous populations. The Algerian *Code de l'indigénat* stratified the population and reinforced the power relationship between colonizers and the colonized (Ruedy, 2005: 89). The British operated mostly with a policy of *indirect rule*, which recognized local customary law and gave legal power to local chiefs (Hooker, 1975: 129–130; Mamdani, 1999). The day-to-day affairs of the colonies were managed by local elites. Even when introducing common law to indigenous populations, the British allowed for substantial exceptions in procedures and content in such areas as family law, property law, and criminal law (Hooker, 1975: 182). This approach followed naturally from the precedential and evolving nature of common law.

However, the tolerance of local customary law led to a bifurcated legal system based on patrimonialism. 'Two separate and incompatible forms of rule existed – one dominated by the colonial administration, the other by numerous chiefs' (Lange, 2004: 907). Lange (2004) finds that in colonies where the British relied more heavily on indirect rule, the resulting legacy was worsened political stability, a weakened rule of law, diminished bureaucratic effectiveness, and more government corruption (Lange, 2004; Mamdani, 1999).<sup>10</sup> This also had a

negative legacy effect on human rights practices. Taking Lange's list of British colonies (2004: 921) and creating a dummy variable for direct or indirect rule, we find a significant difference in the average political terror scores (Gibney & Dalton, 1996) of these two groups (1976–2006). States that were ruled *directly* by the British, such as the Bahamas, Guyana, Jamaica, and Singapore, have a much lower average repression score (2.1) than those colonies ruled *indirectly* (2.95), such as Botswana, Fiji, Gambia, Ghana, and Nigeria (difference of means,  $t = -10.25$ ,  $p < .0001$ ).

France also created dual legal systems in its colonies, establishing separate laws for French citizens (*statut civil français*) and colonial subjects (*statut personnel*). This occurred in part because it was difficult for French law to allow the coexistence of multiple legal systems in their colonies without 'running the risk of a denigration of national sovereignty' (Hooker, 1975: 247). The law was designed to protect expatriate rights over native rights and provided a legal instrument to legitimate the seizure of land (Keith & Ogundele, 2007: 1068). The French also implemented the *indigénat*, which gave colonial officials the ability to circumvent the courts entirely in dealing with minor infractions. Agents of the state had the right to punish subjects on the spot, with cash penalties and up to two weeks' jail time (Ruedy, 2005). This practice endured until World War II when it was replaced by the *code indigène*, 'which was supposed to protect African customs while promoting the advancement of "evolution" of the African legal system' (Joireman, 2001: 579–581).

Second, colonizing states maintained different practices with respect to the degree of central control over the day-to-day operations of the colonized territories. One of the most centralized colonial systems was established by Spain, a country which brought the Roman legal tradition to its colonies. As a civil law state, Spain was strongly influenced by the Napoleonic Code in its own legal development, whereby it created legal structures in Spanish colonies similar to French colonial systems (Levine, 2005: 64). At the top of the colonial administrative hierarchy stood the king of Spain and the Council of the Indies, which had supreme jurisdiction over all colonial matters. In the Americas, power was divided among the viceroys, governors, and courts (Phelan, 1960: 50–51). The courts, or the *audiencias*, were created by the Spanish king in the 16th century and were governed by a series of codes that limited the power of the courts' judges (Merryman & Clark, 1978: 154–156).

Reflecting the hierarchical legal system at home, legal systems established by France in its colonies were also closely tied to the state. Only the government in Paris

<sup>10</sup> Colonies ruled by direct rule had large police forces and courts modeled closely after the British legal system (Lange, 2004: 907).

had the power to enact legislation for the colonies and Parliament held a veto power over colonial legislation (Hooker, 1975: 201). Administration of the colonies was carried out through the Ministry of the Colonies which dealt with specific subject matters, such as land disputes. The French adopted an assimilation approach when dealing with their colonies, integrating colonial peoples into a 'Greater France', and making colonial subjects French citizens in 1946 (Blanton, Mason & Athow, 2001: 478; Hooker, 1975). The Ottoman Empire also maintained a very centralized colonial structure, establishing a centralized set of codes in the *majalla* between 1869 and 1877. Centralized forms of colonial rule weakened the development of local bureaucracies, which diminished the capacity of colonized states to deal successfully with post-independence state-building (Bernhard, Reenock & Nordstrom, 2004).

Another problem with legal systems established through the process of colonization was the lack of legal training provided to local citizens. State-wide courts established by the British in their colonies were not well staffed. The colonial governments often exacerbated this problem by preventing Africans from receiving scholarships for law training, while at the same time requiring British law degrees for colonial lawyers. The consequence was that only a very small number of indigenous lawyers were well versed in the British common law system at the time of independence, which allowed the newly established executives to consolidate power, increasing the chances for autocratic rule (Joireman, 2001: 576–581).

British and French colonial legacies put into place weak legal institutions, which in turn empowered the elites that took control of the states after independence. The British refusal to provide legal training created weak judicial systems lacking in trained specialists to implement the law (Joireman, 2001: 581). Cross (1999) finds that as the relative number of lawyers increases, states are more likely to respect political rights. Access to legal education was also uneven in French colonies, being given to some ethnic groups but not others. This created patterns of inequality that carried over into the post-independence regimes (Blanton, Mason & Athow, 2001: 478–479).

Fourth, some scholars have pointed to differences in transplanting legal traditions due to the structure of the legal system. It is more difficult for colonized states to implement civil law than common law or Islamic law (Joireman, 2001). Civil law is a system with very detailed procedures and codes, requiring a strong bureaucratic structure for implementation. The procedural nature of common law relies much more on oral proceedings, which requires a less well-developed bureaucracy to

operate efficiently, something that hindered the development of civil law in less economically developed colonies (Joireman, 2001: 576). The centralized administration imposed by colonizing states like Spain, France, and Portugal did little to develop local bureaucratic capacity, which placed limits on the ability of the newly independent states to maintain a functioning legal system and led to weaker protection of citizens' human rights.

*H2: States with colonial legacies should engage in repression more frequently than states without colonial legacies.*

An initial look at our data supports this hypothesis. From 1976 to 2006, states with a colonial legacy scored significantly higher on measures of state repression than states with no colonial legacy. The mean repression level is 2.35 in the non-colonial group and 2.82 in the colonial group (difference =  $-0.46$  (0.05),  $t = -9.98$ ). Even within the colonial legacy sample, however, common law states still exhibit the lowest average levels of repression, a pattern consistent with our first hypothesis.<sup>11</sup>

One posited mechanism for the superior human rights performance of common law states is the development of strong, independent judiciaries. However, there is considerable variance in judicial independence across states within the same legal family. Germany's constitution protects the independence of judges more strongly than the French constitution, even though both states grew out of the civil law tradition (Mahoney, 2001: 513). Among Islamic law states, some states like Egypt and Kuwait have relatively strong, independent judicial branches which limit the authority of the executive (Brown, 1997). Among common law states, some have strong, independent judiciaries (United States, Canada, Australia, and New Zealand), while others have weaker judiciaries (Liberia, Sierra Leone, Ghana, Bhutan, and Bangladesh).

In many authoritarian states, judges might be afforded independence based on the structure of the domestic legal tradition, but ultimately serve as tools of the ruling regime or operate in fear of the regime (Helmke & Rosenbluth, 2009). In Argentina in the late 1970s, the Supreme Court dismissed writs of habeas corpus. The Chilean Supreme Court refused to challenge the Pinochet government on human rights issues between 1973 and 1980. Even though Taiwan's 1947 constitution established independent judicial review, the Council of Grand Justices had little power

<sup>11</sup> The average repression score among states with colonial legacies is 2.46 for common law states, 2.81 for civil law states, 3.05 for Islamic law states, and 3.13 for mixed law states.

under the KMT regime. A similar pattern emerged in Mexico under the PRI's 70-year rule, where judges were denied access to politically salient cases (Helmke & Rosenbluth, 2009: 355–356). This relates to a broader point about the rule of law. In order to understand how domestic legal traditions influence states' human rights practices, we must take into consideration whether the legal system is fully functional and reasonably independent from the ruling executive. This produces two final hypotheses about the quality of the legal system.

*H3:* States with more independent judiciaries should engage in repression less frequently than states with less independent judiciaries.

*H4:* States with legal systems characterized by strong rule of law should engage in repression less frequently than states with a weak rule of law.

## Research design

To test our hypotheses, we employ a global sample of state-years from 1976 to 2006. Consistent with previous human rights research, we are concerned with the subset of rights referred to as personal or physical integrity rights, which can be defined as the rights individuals possess to be free from extrajudicial killing or disappearance, torture, and political imprisonment at the hands of their governments. The dependent variable comes from the Political Terror Scale (Gibney & Dalton, 1996), which ranges from 1 (little to no political terror) to 5 (large-scale political terror).

We operationalize states' legal systems with four indicator variables: common law, civil law, Islamic law, and mixed law. These data are taken from Powell & Mitchell (2007). Because states with Islamic law systems should tend to have the worst human rights records, Islamic law is used as the omitted baseline category. We also report the robustness of our results using common law as the omitted category.

We use three different variables to capture the quality of the legal system. The first variable captures whether a state has a colonial legacy as coded by Hensel (2009).<sup>12</sup> In our sample, 83% of all cases occur in the colonial legacy context.<sup>13</sup> Our second indicator is a dummy variable capturing whether a state has an independent judiciary (31%) or not (69%). These data are coded by Henisz (2000) and made available as part of the Quality of Government Institute's dataset.<sup>14</sup> The final variable is a measure capturing rule of

law. While a variety of measures are employed in the literature, including the ICRG law and order measure and the IMF's Contract Intensive Money (CIM) measure (Powell & Staton, 2009), we employ a measure compiled by the Heritage Foundation that records the extent to which states are free from corruption; this is converted to a 100-point scale (mean = 40.3, standard deviation = 26.4).<sup>15</sup> This indicator is also taken from the Quality of Government dataset. This doubles the number of cases available for analysis and this indicator is correlated at 0.70 or higher with other rule of law measures, making it a good proxy for the underlying rule of law concept.

We include a number of important control variables based on studies of repression in the human rights literature. Factors that improve human rights practices include democracy and economic development; factors that hinder good human rights practices include a large population, military regime, internal and external conflict, and prior experience with repression (Davenport & Armstrong, 2004). To capture the notion of procedural democracy, we employ the Polity IV composite index (Marshall & Jaggers, 2007) which ranges from -10 to 10 (mean = 0.6, standard deviation = 7.5). The level of economic development is measured as the natural log of gross domestic product per capita (mean = 8.4, standard deviation = 1.1); this is taken from Gleditsch's (2002) dataset.<sup>16</sup> We also include the squared polity scale in some models to evaluate if there is more repression in the middle of the scale. Data on population size come from the Correlates of War project; we employ a natural log transformation of this measure (mean = 1.4, standard deviation = 2.2). An indicator for military regime is taken from the World Bank's Database of Political Institutions, with a dummy variable indicating whether or not the chief executive is a military officer (21%).<sup>17</sup> State involvement in interstate wars (4%) or civil wars (16%) is taken from the UCDP/PRIO Armed Conflict Dataset.<sup>18</sup>

Due to the nature of the data being analyzed, it is necessary to include lagged repression as a statistical control; a one-year time-lag is included. In addition to the

<sup>12</sup> These data are available online at <http://www.paulhensel.org/icow.html#colonies>.

<sup>13</sup> The non-colonial sample is small because one of the few regions where legal systems evolved outside the colonial context is Europe.

<sup>14</sup> These data are available online at <http://www.qog.pol.gu.se/>.

<sup>15</sup> The Quality of Government Institute obtains this information from Transparency International's Corruption Perceptions Index (CPI), converting the original 0–10 scale into a 0–100 scale.

<sup>16</sup> These data are available online at <http://privatewww.essex.ac.uk/~ksg/exptradegdp.html>.

<sup>17</sup> These data are available online at <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:20649465~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>.

<sup>18</sup> These data are available online at <http://www.prio.no/CSCW/Datasets/Armed-Conflict/>.



Table I. Ordered logit estimates, political terror scale

<i>Variable</i>	<i>Model 1 baseline model</i>	<i>Model 2 with corruption</i>	<i>Model 3 with democracy<sup>2</sup></i>	<i>Model 4 with state age</i>
<b>Legal traditions</b>				
Common law	-0.63 (0.13)***	-0.59 (0.23)**	-0.63 (0.13)***	-0.65 (0.14)***
Civil law	-0.21 (0.11)**	-0.55 (0.20)***	-0.22 (0.11)**	-0.25 (0.11)**
Mixed law	-0.18 (0.16)	-0.09 (0.29)	-0.19 (0.17)	-0.24 (0.17)
<b>Other legal characteristics</b>				
Colonial legacy	0.46 (0.12)***	0.39 (0.20)*	0.42 (0.12)***	0.79 (0.13)***
Judicial independence	-0.56 (0.11)***	-0.22 (0.15)	-0.55 (0.11)***	-0.52 (0.12)***
<b>Control variables</b>				
Repression <sub>t-1</sub>	2.00 (0.06)***	1.74 (0.10)***	1.97 (0.06)***	1.98 (0.07)***
Democracy	-0.02 (0.01)**	-0.03 (0.01)**	-0.02 (0.01)**	-0.03 (0.007)***
ln GDP per capita	-0.22 (0.04)***	-0.12 (0.08)	-0.15 (0.04)***	-0.25 (0.05)***
ln Population	0.19 (0.03)***	0.29 (0.05)***	0.19 (0.03)***	0.15 (0.03)***
Military regime	-0.03 (0.10)	-0.27 (0.20)	-0.06 (0.10)	-0.06 (0.10)
International war	0.02 (0.09)	0.06 (0.29)	0.05 (0.09)	-0.002 (0.09)
Civil war	0.63 (0.05)***	0.80 (0.10)***	0.62 (0.05)***	0.66 (0.05)***
Freedom from corruption	-	-0.015 (0.003)***	-	-
Democracy <sup>2</sup>	-	-	-0.007 (0.001)***	-
ln State age	-	-	-	0.21 (0.04)***
<b>Cut points</b>				
$\tau_1$	0.20 (0.47)	-0.12 (0.80)	0.23 (0.47)	0.82 (0.49)
$\tau_2$	3.73 (0.47)	3.41 (0.80)	3.81 (0.47)	4.41 (0.50)
$\tau_3$	6.83 (0.50)	6.26 (0.83)	6.91 (0.50)	7.54 (0.53)
$\tau_4$	9.70 (0.52)	9.54 (0.86)	9.77 (0.52)	10.42 (0.58)
Sample size	3,083	1,224	3,083	2,829
Proportion reduction in error	52.06%	50.98%	51.94%	53.52%

\*\*\*  $p < 0.01$ , \*\*  $p < 0.05$ , \*  $p < 0.1$ . Robust standard errors in parentheses.

important statistical reasons for inclusion, Keith & Ogundele (2007) argue that lagged repression is substantively important; repression begets more repression.<sup>19</sup> The model is estimated using an ordered logit (Long, 1997) with robust standard errors clustered on the state.

## Empirical results

The results of several ordered logit models are presented in Table I. The standard explanatory variables found in the human rights literature perform as expected. A history of repression, a large population, and civil war create further repression, while democracy and wealth inhibit violations of physical integrity rights. Only military regime and international war are insignificant, attesting to the mixed results these variables have received in previous research.

The models provide strong support for Hypothesis 1, whereby common law states exhibit the lowest levels of

repression. Model 1 demonstrates the negative effect of common law on state repression relative to Islamic law systems. Civil law states also experience less repression than Islamic law states; mixed law states are not significantly different in repressive behavior than Islamic law states. If we utilize common law as the omitted baseline category, we find that the coefficients for civil law, Islamic law, and mixed law are all positive and statistically different from zero, showing that common law systems have better human rights records than civil law systems. These results hold when controlling for colonial legacy (Model 1), judicial independence (Model 1), and the rule of law (Model 2).

We calculate the first difference substantive effects for all independent variables at each category of the Political Terror Scale in Table II. The baseline model is calculated for Islamic law states with all other variables set at their mean or mode, showing the probability of cases for each category of the Political Terror Scale. All of the values in rows further down in the table are reported as first differences. Positive values indicate increases above the baseline value, while negative values show drops from the baseline;

<sup>19</sup> Given the ordinal nature of the variable, we also estimated models with categorical dummy variables for the lagged political terror scale values. The results are similar to what we report herein.

Table II. Substantive effects for Model 1

	<i>Best human rights practices</i>	→	→	→	<i>Worst human rights practices</i>
% of all cases	12.44%	31.59%	32.21%	16.89%	6.88%
<b>Baseline model</b>	Pr(Y=1 X)	Pr(Y=2 X)	Pr(Y=3 X)	Pr(Y=4 X)	Pr(Y=5 X)
Islamic law	.0103 (.0016)	.2496 (.0204)	.6256 (.0159)	.1072 (.0114)	.0073 (.0012)
<b>First differences: Change from baseline</b>					
Common law	.0088 (.0021)*	.1273 (.0269)*	-.0863 (.0195)*	-.0464 (.0106)*	-.0034 (.0009)*
Civil law	.0023 (.0011)*	.0401 (.0186)*	-.0224 (.0100)*	-.0186 (.0093)*	-.0014 (.0007)*
Mixed law	.0021 (.0020)	.0357 (.0316)	-.0205 (.0186)	-.0161 (.0143)	-.0012 (.0011)
Colonial legacy	-.0062 (.0020)*	-.0936 (.0243)*	.0606 (.0196)*	.0365 (.0083)*	.0027 (.0007)*
Judicial independence	.0077 (.0020)*	.1137 (.0248)*	-.0758 (.0195)*	-.0425 (.0092)*	-.0031 (.0008)*
Democracy	.0036 (.0018)*	.0627 (.0276)*	-.0320 (.0171)*	-.0318 (.0128)*	-.0025 (.0010)*
ln GDP per capita	.0105 (.0025)*	.1790 (.0344)*	-.0844 (.0215)*	-.0973 (.0238)*	-.0078 (.0024)*
ln Population	-.0185 (.0039)*	-.2940 (.0395)*	.1252 (.0305)*	.1725 (.0327)*	.0147 (.0038)*
Military regime	.0004 (.0011)	.0065 (.0182)	-.0034 (.0095)	-.0032 (.0092)	-.0002 (.0007)
International war	-.0003 (.0027)	-.0081 (.0464)	.0002 (.0226)	.0076 (.0260)	.0006 (.0021)
Civil war	-.0088 (.0013)*	-.2008 (.0183)*	-.1358 (.0406)*	.3059 (.0332)*	.0394 (.0078)*

Predicted probabilities for the ordered logit model are generated with Clarify, version 2.1 (King, Tomz & Wittenberg, 2000). Values in parentheses are standard errors; \* indicates the first difference is statistically significant at the 95% level. The baseline model sets all continuous variables at their mean and all discrete variables at their mode. Islamic law is the baseline domestic legal system. First differences are calculated by changing discrete values from 0 to 1 or by increasing a variable from its minimum to maximum value.

we include asterisks to show if the first difference is statistically significant at the 95% level.

Civil war has the largest effect among the variables, increasing the chances of being in the most repressive categories (4 or 5) by one-third. Population size is also substantively important, with the most populous states being one-third less likely to be in the least repressive categories (1 and 2). Domestic legal traditions are also substantively important. Common law states are 0.13 more likely to exhibit the best human rights practices (values of 1 and 2 on the Political Terror Scale), while reducing the probability of the most repressive behavior by 0.05. The effect of the common law tradition is one-third as large as the factor most likely to alter repression (civil war), a sizable effect. Civil law states also have significantly better human rights practices than Islamic law states, although the substantive effect is much smaller. Civil law states are 0.04 more likely to exhibit the best human rights practices (values of 1 and 2) than Islamic law states.

The variables capturing the quality of the domestic legal tradition are also statistically significant. Hypothesis 2 finds support in Model 1, as states with colonial legacies have significantly higher levels of repression than states without colonial legacies. Colonial legacy reduces the probability of being in the least repressive categories (1 and 2) by 0.10, while increasing the chances for high levels of repression (categories 4 and 5) by 0.04. The quality of a

state's legal system also influences human rights practices. Judicial independence has a negative and statistically significant effect on repression, supporting Hypothesis 3. States with independent judiciaries are 0.12 more likely to exhibit best human rights practices (categories 1 and 2) in comparison to states without independent judiciaries.

Hypothesis 4 relating to the rule of law is evaluated in Table I, Model 2. We include the freedom of corruption measure from the Heritage Foundation, which reduces our estimation sample by two-thirds (from 3,083 cases to 1,224 cases). Yet even in this reduced sample, common law states still show significantly better human rights practices than Islamic law states.<sup>20</sup> Colonial legacy also retains a

<sup>20</sup> The differences between common law and civil law are not significant in this reduced sample if common law is used as the omitted baseline. However, the distribution of legal system types is not the same in the two samples. In the larger sample, the distribution is civil law (53%), common law (24%), Islamic law (14%), and mixed law (9%). In the more limited sample for which we have corruption data, the distribution is civil law (58%), common law (20%), Islamic law (14%), and mixed law (9%). Civil law states are more heavily represented in the smaller sample relative to common law states, which could reduce the differences between these subgroups in the analyses in Model 2. Many of the missing common law states in the more limited sample are island countries with decent human rights records, thus we are also concerned that the data are not missing at random.

positive and significant effect on repression in the smaller sample. States that experience more freedom from corruption are significantly less likely to engage in repression. The effect of judicial independence is insignificant in this model, yet this reflects the high bivariate correlation between the quality of legal system indicators (0.54).<sup>21</sup>

We checked the robustness of our findings in several ways. First, we employed an alternative dependent variable, the physical integrity index, from the Cingranelli-Richards (CIRI) Human Rights Database (Cingranelli & Richards, 1999). Like the Political Terror Scale, this is also an ordinal index (0–8), although higher values indicate better human rights practices. These results (available from the authors) are quite similar to the findings reported in Table I. Consistent with Hypothesis 1, common law states have better human rights practices than civil law, mixed law, and Islamic law states. States with colonial legacies are more likely to violate their citizens' human rights, while states with independent judiciaries and better rule of law exhibit improved practices.

Second, in Model 3 we include a squared term for democracy. This specification better reflects arguments in the human rights literature about the non-linear relationship between regime type and repression (Regan & Henderson, 2002; Davenport & Armstrong, 2004) with extremely democratic or extremely autocratic states repressing citizens less often than states in the middle of the democracy scale.<sup>22</sup> We see that the results supporting our primary hypotheses about legal system types and characteristics are unaltered. There is also evidence for a non-linear relationship, as indicated by the negative sign and statistical significance for the squared democracy variable.

Third, we control for state age in Table I, Model 4.<sup>23</sup> This is a measure taken from the Powell & Mitchell

(2007) study. Older states engage in higher levels of repression than newer states. Inclusion of this variable does not alter the findings for other variables. Finally, we also wanted to ensure that our findings were robust across different levels of economic development. We split our sample into two groups: those with logged GDP per capita scores below the mean and those with scores above the mean. We re-estimated Model 1 in Table I for these two groups. In the less developed group, we find the same effects reported in Model 1; civil law and common law states have lower repression scores than Islamic law states. In the more developed group of states, we find a difference in repression scores between common law states and Islamic law countries, but no differences between civil law, mixed law, and Islamic law. The common law system shows the lowest levels of repression in both groups, but stands in sharpest contrast with other systems in the less developed group of states. In terms of the quality of legal system variables, we find that colonial legacy has a stronger effect for increasing repression in the more developed group of states, while judicial independence significantly reduces repression in both subsamples. Taken together, the empirical results show that legal traditions, colonial legacies, and the quality of legal institutions have important effects on states' human rights practices.

## Concluding remarks

The social science literature suggests that common law states enjoy higher levels of economic growth, greater protection of property rights and investments, and superior protections of individual political and civil liberties. We examine the effect of domestic legal traditions on another important indicator of government quality, human rights practices. Using a global state-year sample from 1976–2006, we show that common law states are significantly less likely to engage in repression of their citizens than Islamic law, mixed law, or civil law states. We also show that legal traditions imposed through colonization are weaker than those that evolved naturally. States with stronger judicial independence and rule of law also exhibit systematically better human rights behavior than states with more coercive and corrupt leaders and courts. These results are important given that previous studies have focused on specific regions like Africa and have found mixed results with respect to the superiority of common law systems for promoting best human rights practices (Joireman, 2001; Keith & Ogundele, 2007).

Our results suggest that a state's legal system provides the context within which international human rights norms can

<sup>21</sup> We estimate the effect of legal traditions independently from the quality of legal system variables. This is a reasonable assumption, given that the largest correlations between these variables are less than 0.15. We also considered interaction terms between legal systems and judicial independence, finding that the only significant interaction was between common law and judicial independence. This is consistent with our argument that judicial independence is a primary mechanism for the protection of individual human rights in common law systems.

<sup>22</sup> However, states on the high end of the autocratic scale are more likely to engage in repression than those on the high end of the democracy scale; we may also have difficulties observing human rights violations in the former group.

<sup>23</sup> We include this measure to control for the possibility of differences in time since the colonial era with, for example, states with Spanish colonial legacy being older states than most former French colonies.

develop into a greater respect for human rights at the domestic level. Scholars suggest that one way to improve human rights practices is to strengthen the enforcement mechanisms of human rights treaties. However, they also argue that those efforts 'must be supplemented by creative efforts to ensure that treaty norms are internalized in the domestic legal and cultural system, and that they are enforced on that level' (Heyns & Viljoen, 2001: 488). We believe that common law states are better suited to this task than countries with other legal systems because common law systems are more effective at checking government power with respect to individual rights. Due to their institutional design, common law systems are relatively effective producers of independent judiciaries and ultimately the rule of law. Our findings can be extended to other forms of domestic violence and repression as well; common law states should be more effective at avoiding civil wars than civil law or Islamic law states, although states with colonial legacies will be more prone to domestic violence.

It is not easy for states to change their domestic legal systems or their colonial legacy histories. However, once states reach the highest level of the rule of law, differences among legal systems may become less acute, as civil liberties can theoretically be protected equally well in common law and civil law systems. The negative influence of colonial legacies on human rights practices can also be overcome with time, as states can actively strengthen legal institutions left in place by the colonizers. The extent to which international courts and human rights regimes can assist in this process remains to be seen.

### Replication data

The dataset, codebook, and do-files for the empirical analysis in this article can be found at <http://www.prio.no/jpr/datasets>.

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