Comparative Criminal Justice Systems

FOURTH EDITION

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3 Families of Law

Key Terms and Concepts

Canon Law	Hudud crime	public law
civil law	hybrid legal tradition	Sacred Law
Civil Law	indigenous law	secular law
commercial law	Islamic law	Shari'a law
Common Law	judicial independence	Socialist Law
Corpus Juris Civilis	ombudsman	stare decisis
criminal law	private law	tazirat crime
habeas corpus	procurator	writ of mandamus

According to the biblical Book of Exodus, Moses went up to Mount Sinai, where God gave him a tablet of stone listing 10 rules. These rules, called the Ten Commandments, are familiar to most of us; they include "Thou shalt not murder," "Thou shalt not steal," and "Thou shalt not commit adultery." The Ten Commandments have formed the basis of a code of ethics and, in some cases, a body of laws that has guided Western civilization for several thousand years. They are written rules that tell people what is and is not illegal and unethical behavior in the eyes of God. These rules also tell people what behavior will be punished by the state, in the many instances where governments have adopted religious traditions as part of their law.

Another prominent Jewish leader in ancient times, the wise King Solomon, made it his practice to settle disputes among his subjects by having them appear and present their cases to him in person. According to the famous biblical story, two women claiming the same baby appeared before Solomon so that he could decide who was the real mother. Solomon ordered his guards to cut the baby in half and give each woman half. One woman immediately spoke up and said that she would relinquish her claim to the baby, rather than have the child killed. Solomon awarded the baby to this woman, pronouncing that the true mother would be more concerned with the baby's welfare than with her personal claim.

The Bible presents this story to exemplify the wisdom of Solomon. In contrast to the Ten Commandments of Moses, which represent rules of conduct for people to follow, the story of Solomon and the baby reflects a different kind of rule-making, one based on responding to cases as they arise.

All legal systems of modern nation-states combine the kinds of rule-making that are typified in the stories of Moses and Solomon. In other words, all modern legal systems combine written laws that place limits on behavior (code-based systems), together with rules developed from decisions handed down in particular cases (case-based systems).

There is a difference in emphasis and historical traditions in code-based systems and case-based systems, which will be noted as we refer to the different legal systems of the world as "legal families" or "legal traditions." Although used interchangeably, these terms technically do not have the same meaning. *Legal system* is the term used to refer to the agencies, procedures, and rules that make up how a country makes laws, enforces laws, and dispenses justice. *Legal families* or *legal traditions* are broader terms used to understand the legal system as well as the cultural and historical foundations of that system (Glen, 2000; Merryman, 1985). These terms allow us to place specific systems within a family or tradition and make general statements about the law and process of justice in a country.

Unfortunately, any classification scheme conceals individual differences. Since each nation in the world has its own distinct family or tradition, and none rely solely on the elements of a single tradition, it is possible to claim that there are really no clear-cut or "pure" Common Law, Civil Law, Socialist Law, or Sacred Law legal traditions present in the world today. For example, a country may incorporate elements of the Civil Law with Common Law or Civil Law with Socialist Law. The most typical form of borrowing is to combine some aspects of the Common Law and Civil Law systems. Because many countries borrow from others, we could add a fifth legal tradition to our classification scheme and say that all countries have a **hybrid legal tradition** or one that combines different aspects of more than one legal tradition.

Technically, the hybrid legal tradition is the most common of the legal traditions because most countries borrow some aspects of criminal justice from other countries or from multiple religious traditions. For our purposes, however, we restrict using the term *hybrid legal tradition* only to countries that have not historically or politically developed one clear or primary legal tradition. For example, the legal traditions of many former colonized nations in Africa and elsewhere can be easily called hybrids because they do not fall into one of the more common legal families. Among the countries whose traditions are considered hybrids of this form are Japan, Egypt, Scotland, the Philippines, and

TABLE 3.1 Examples of Countries Representing the Four Major Families of Law

Family of Law	Representative Countries
Civil law legal tradition	Belgium, France, Germany, Luxembourg, Portugal, Spain
Common law legal tradition	Canada, England, India, Australia, USA
Socialist law legal tradition	China, Cuba, North Korea, Vietnam
Sacred law legal tradition	Iran, Nigeria, Pakistan, Saudi Arabia, Sudan

South Africa. Japan may offer the best example of this hybrid form. The Japanese began to inculcate Roman Civil Law into their legal tradition in the late 1800s, were strongly influenced by German law in the early 1900s, and added elements of Common Law after World War II. Less obvious are the other hybrid combinations in countries such as China and India that combine the ancient sacred traditions of Confucianism and Hinduism, respectively, into their current legal traditions.

In subsequent chapters, we will discuss the development of a hybrid legal tradition in Japan in more detail. In this chapter, however, and throughout the book, we will concentrate on four major traditions or families: Civil Law, Common Law, Socialist Law, and Sacred Law. We have chosen to describe the legal families in this common form although we acknowledge that others are present in the literature (for example, Glen, 2000). Table 3.1 lists several nations within the four main legal families.

ANCIENT AND LESSER-EMPLOYED LEGAL TRADITIONS

This chapter cannot include all the different kinds of legal traditions in history, or even all those practiced in the world today. Many legal traditions that were used for centuries or that exist today in few places will be mentioned briefly. We refer to some legal traditions as *ancient* because they originated centuries ago and are now extinct. *Lesser employed* describes legal traditions that are currently used somewhere in the world but are specific to only one or a limited number of countries and geographic regions.

Ancient and Historical Legal Traditions

Many ancient and now extinct legal families have been recorded in history. According to John Henry Wilmore, who conducted the most comprehensive study of the evolution of the different legal families, there have been 16 major forms of legal systems in the world; Table 3.2 lists these ancient and historical legal systems. Four of these ancient systems—Egyptian, Mesopotamian, Chinese, and Hebrew—are discussed here because they helped to form much of the foundation for our modern legal families.

The oldest known formal legal system was the Egyptian system, which is believed to date back as far

TABLE 3.2 Ancient Legal Systems in History

Egyptian
Mesopotamian
Chinese
Hindu
Hebrew
Greek
Roman
Maritime
Japanese
Mohammedan
Celtic
Germanic
Slavic
Ecclesiastical
Romanesque
Anglican

SOURCE: Wilmore, 1936.

as 4000 B.C. Egyptian rulers developed an extensive system for handling legal procedures that included codes to direct citizen behaviors and a judicial system to handle disputes (Wilmore, 1936).

Around the same time, the Mesopotamian system emerged in the Near East; it lasted until approximately the time before the birth of Christ. The Mesopotamian system is best known for the development of the Code of Hammurabi, king of Babylon. Hammurabi's code sought to prevent the strong from oppressing the weak. The code contained 282 laws covering such matters as property rights, renting, and medical treatment. The most famous passage in the code was the law stating "an eye for an eye, a tooth for a tooth," which was later included to the Old Testament (Grove, 1997).

Some 1,500 years after the Egyptian legal system began, the Chinese developed their own legal system, much of it rooted in the philosophy of a man popularly known as Confucius (c. 551–479 B.C.). Confucianism is, in fact, more of a moral system, which stresses the development of individual moral virtue (through duties owed to family members and friends) as an alternative to the coercive power of the state in producing good behavior. It has influenced Chinese governmental and educational practices, and individual attitudes toward correct personal behavior and duty to society.

Hebrew law, also called Talmudic law, is rooted in the word of God as revealed to Moses. Developed around 1200 B.C. as a result of the birth of Judaism around 2000 B.C., Hebrew law is found in the first five books of the Hebrew Torah (constituting the Christian Pentateuch—Genesis, Exodus, Leviticus, Numbers, and Deuteronomy). Hebrew law includes the Torah and the Talmud, which is a guide to both civil and religious laws, as well as from other writings. Judaism began before the time of Christ with Moses receiving the two tablets of stone and the subsequent recording of the first five books of the Bible.

Indigenous Law

In addition to religious laws practiced in religious communities, many forms of indigenous law are observed throughout the world. **Indigenous laws** are native laws of persons who originate from or live in a particular area. Although the term *indigenous* is the most common term used when describing persons or laws that originate from a certain area, other common terms used to describe them are *native, aboriginal*, or the more recently adapted term *chthonic*. The latter term, rooted in the Greek word *kthonos*, or earth, describes people who live ecological lives and live in close harmony with the earth (Goldsmith, 1992).

Approximately 200 million persons, about 4 percent of the world's population, are included in the three thousand indigenous nations present in the world today (Rosen, 1992; Lauderdale, 1997). There are literally thousands of indigenous laws that have influenced legal systems throughout the world. In some isolated areas, indigenous laws have contributed to the formation of small, private legal societies. Just as we speak of Common (U.S.), Socialist (Chinese), or Sacred-Islamic (Saudi Arabian) law, anthropologists speak about Tongan, Tiv, or Zapotec law in the South Pacific islands, African bush, and Mexican mountains, respectively. In each of these societies, the definition of what is a crime and how to settle disputes and punish criminals varies considerably (Lubman, 1983).

In the United States, indigenous law is practiced by Native Americans on reservations. One example is the Navajo nation, which calls for traditional justice to be swift, direct, personal, and to emphasize restoration of harmony and reacceptance to the community rather than punishment and ostracism (Armstrong, Guilfoyle, & Melton, 1996). Similarly, indigenous laws are practiced by the aboriginal populations of Australia, New Zealand, and Asia, throughout the Americas, and in many regions of Africa. In Nigeria, the most serious crimes are tried in federal courts that are run according to the British-imposed English Common Law. However, all other offenses are still heard by tribal (indigenous) courts of justice based on native laws and customs. In southern Nigeria these laws are unwritten, while in the northern regions they are available in written form (Ebbe, 1996).

CLARIFYING TERMS: PUBLIC, PRIVATE, CIVIL, AND CRIMINAL LAW

Before proceeding with the discussion of the main legal families present in the world today, a few terms that will be used with some frequency from now on need to be explained. These are *public law, private law, civil law,* and *criminal law.*

Public law is law developed by modern states in their legislatures or through their regulatory processes. It deals largely with the relations between governments and citizens. It includes constitutional law, criminal law, tax law, environmental law, and the myriad other laws that bodies like Congress pass each year. Most statutory law today is public law, designed to regulate the relationship between citizens and agencies of the government.

Private law, by contrast, is the law that regulates behavior between individuals that involves no large public interest. It involves contracts, torts, inheritances, wills, marriage and family matters, and private property matters. Although private law is promulgated and enforced through the state either in codes or in case law, it tends to evolve slowly and in general does not have the political dimensions or implications of public law, because it involves disputes between private parties.

Another term for private law is **civil law**, especially in Anglo-Saxon legal systems. It is distinguished from criminal law because, at least in modern times, **criminal law** is defined as an offense against the state rather than a dispute between individuals. In all criminal cases, whether major or minor, the state, and not the victim, is technically the aggrieved party, and it is the state that has the obligation to see that justice is done. So a theft or robbery involves an individual victim, but these offenses are crimes because they pose a threat to the social order, and are therefore part of the criminal law. They represent more than private disputes between individuals. In this way, the state fulfills its obligation to maintain the public order and to minimize episodes of private vengeance. Because of the potentially severe consequences for an accused person convicted of a crime (denial of liberty), standards of proof and details of procedure in criminal cases are usually more stringent than in civil cases, where only monetary compensation is usually at stake.

The distinction between civil law and criminal law, which exists in all modern systems of law, creates a certain amount of confusion when one is talking about families of law. The confusion arises because one major family of law is known as the Civil Law family. Although there are some historical reasons this family of law has the same name as the branch of law that is distinguished from criminal law, the term *Civil Law family* is used to denote the entire legal culture of a nation that uses that tradition, not just the noncriminal aspects of that nation's law. These terms may seem confusing at present, but their meaning will become clearer as we consider issues like criminal procedure in Civil Law systems.

The Civil Law family is sometimes called the Continental, Romano-Germanic, or Roman Law because its origins are in the old Roman Code of Justinian and the laws of the Germanic tribes, such as the Franks and the Bavarians, that bordered the Roman Empire in central Europe and eventually conquered most of Europe (David & Brierly, 1978; Ehrmann, 1976). Although the terms other than Civil Law avoid the problems of confusion between the Civil Law family and civil law in general, they present another problem, because most texts and histories continue to use the term Civil Law to distinguish that family of legal systems from the other major families. To make the matter less complicated in this book, we will capitalize *Civil Law* when it denotes the family of law and lowercase *civil law* when it refers to noncriminal law.

Historically, the Civil Law, Common Law, and Sacred Law developed over the course of centuries, whereas Socialist Law was a twentieth-century phenomenon. As a result, the Civil Law and Common Law have changed quite radically over time, whereas Socialist Law did not undergo major transformations until recently. With the collapse of communist governments in Eastern Europe and the Soviet Union, and the efforts to modernize

the economy in China, major changes are occurring in Socialist Law in the twenty-first century.

Similarly, Sacred Law, largely practiced as Islamic law, is based on the Qur'an, the holy book of Islam, but it has also been extended by the commentaries of major schools of Islamic scholars. In the remainder of this chapter, we will examine how these major legal systems arrived at their current place in history.

THE CIVIL LAW

The Civil Law tradition is the most pervasive legal tradition in the world. It is found throughout Western Europe, in Latin America, and in parts of Africa and the Far East. Indeed, it was historically the basis of law in socialist countries, and Socialist Law, although classified separately, has many elements of the Civil Law. As noted earlier, the Civil Law is sometimes called Romano-Germanic, Roman, or Continental law because of its historical roots.

The **Civil Law** is code-based law. A centerpiece of the Civil Law tradition is codification, or the absolute primacy of written codes of law (Friedrichs, 2001). Civil Law is like the Ten Commandments of Moses, which were published so that all people could know and follow them. Four major codifications of law, each building on the previous one, are involved in the history of the Civil Law. These are the Roman Law of the emperor Justinian, the Canon Law of the medieval Catholic Church, the Napoleonic Code of early nineteenth-century France, and the German Law of the People (*Buergerliches Gesetzbuch*), which was compiled under Otto von Bismarck after the German Empire was established in 1870. In each case, the legal code derived from earlier laws, customs, and informal regulations (David & Brierly, 1978; Ehrmann, 1976; Glendon, Gordon, & Osakwe, 1985; Merryman, 1985).

Writing a set of laws is not as simple as it may sound. As in writing constitutions, the framers must be concise, must cover all contingencies, and must not depart radically from accepted custom. The laws must be at once general enough to allow for particular cases to fit into the scope of legal rules, and also specific enough to provide adequate guidance for those whose job it is to administer the law. The different incarnations of the Civil Law met these requirements with varying degrees of success.

Roman Law

In the sixth century A.D., the Byzantine emperor Justinian arranged for the compilation and codification of the law then in force in the Roman world. The result was the **Corpus Juris Civilis**, also known as the Institutes of Justinian. Included in this code were laws pertaining to family, property, torts, and contracts.

Justinian's goal was to simplify the massive amounts of legal materials, understood only by legal counselors and often contradictory or unclear, that made up the laws of the empire. After the code was compiled, Justinian ordered that all previous works of legal commentary and all previous law be disregarded. He also forbade commentary on his own code by legal scholars. (Obviously, lawyers who obfuscated the law and made themselves indispensable through their specialized knowledge of different branches of the law were a problem in Justinian's time as well as our own.) Although learned commentaries by legal scholars are very important in Civil Law countries today, the judicial tradition of referring to the law itself rather than to precedents established in prior cases remains an essential part of the Civil Law tradition and an important feature that distinguishes it from the Common Law.

The Institutes of Justinian, although gradually modified through contact with local legal traditions, especially Germanic tribal law, remained enormously influential. In fact, it became both the basis of legal study in medieval universities and the backbone of some national legal systems during the period of the development of nation-states in the sixteenth and seventeenth centuries. Even today, law students in countries that use the Civil

Law must take a course in the Corpus Juris Civilis, or Roman law.

Canon and Commercial Law

Although Roman law remained a source of law throughout Europe for many centuries, the Roman Catholic Church developed its own law, **Canon Law**, which dealt with church and spiritual matters. The origins of Canon Law go back to the fourth century, claiming its roots in divine law as decreed by the Pope and other church authorities and administered by ecclesiastical or church courts. Church officials, usually priests with training in Canon Law, preside over these courts. Canon Law includes provisions regulating family life and morals, as well as rules for church governance. Over the years it has been influential on Western laws related to marriage, inheritance, property, contracts, crimes of torts, and judicial procedure (Berman, 1983). Today, Canon Law is still used to govern matters within the Catholic Church; one of the most common usages of the law is the granting of marriage annulments (Friedrichs, 2001).

It is hard for us today to realize that two systems of law, claiming authority over different matters and running separate court systems, could have coexisted in medieval Europe. In truth, however, this is no stranger than the dual court systems (state and federal) and the sometimes overlapping state and federal laws that exist in the United States. Although there were jurisdictional disputes in specific cases, and the church tended to assume simultaneous jurisdiction in some matters regarding family relations, this dual court system seems to have worked quite well overall.

As trade and commerce among nations became more complex, an important new body of law, commercial law, developed in Europe during the Middle Ages. **Commercial law** is a body of legislation that deals with the exchange of goods between cities or nations. This law developed initially in the large merchant cities of Italy, but it was soon adapted by other countries and became, like Roman and Canon Law, a kind of internationally accepted law in Europe.

With the rise of nation-states, the Protestant Reformation, and the seemingly endless wars that wracked Europe in early modern times, much of the commercial law fell into disuse or was practiced only partially, in conjunction with local customary law. Various rulers made more or less successful efforts to codify the laws of their countries. It was not until the early nineteenth century, however, that a legal code rivaling that of Justinian in terms of influence and comprehensiveness was drawn up. This was the famous French Civil Code of 1804, or Napoleonic Code, named after the French emperor Napoleon who ordered its development.

The Napoleonic Code

The revolution of 1789 was a major turning point in French history. The revolutionaries abolished the hereditary monarchy, executed King Louis XVI and Queen Marie Antoinette, and proclaimed a republic based on the principles of liberty, equality, and fraternity. A period of turmoil and confusion ensued that featured several attempts toward republican government during the 1790s. Napoleon Bonaparte, a Corsican by birth, gradually rose to power due to his military and administrative genius, his ambition, and his ability to take advantage of the deteriorating political situation in France. Eventually, Napoleon made himself the first emperor of France and enacted a series of governmental reforms that significantly changed the administrative and legal structures of that country. After numerous military adventures, Napoleon's career ended at the famous Battle of Waterloo in 1815. His governmental reforms, however, including the civil code, the administrative court structures, and the local governmental structures of France, have survived.

The case of Napoleon and the civil code exemplifies what often happens when a post-revolutionary or post-conquest government takes over in a country. One of the best ways to discredit previous governments, and to consolidate the power of the new government, is to throw out the old laws and create new ones. Legal and judicial personnel,

those with a major stake in the prevailing system, are usually purged at the same time. As we will see, this is what happened in England at the time of the development of the Common Law. It is also what happened in the twentieth century in communist countries such as the former Soviet Union, China, and Cuba. Often, these radical changes eventually accommodate themselves to existing traditional practices and rules.

The Napoleonic Code was drawn up by legal experts and went into effect in 1804. These experts brought together in one code much of the law that was practiced in various parts of France—some based on Canon Law, some on Roman law, some on commercial law, and some on the feudal practices in existence before the revolution. But the code-makers went much further, also incorporating into this code many of the new ideas about private property and relations between people fueled by the Enlightenment. Therefore, this code was the first set of truly modern laws.

The Napoleonic Code consisted of 2,281 rules, or articles, covering a variety of subjects: persons (including marriage, divorce, and family law), property, torts, and contracts (Schwartz, 1956). This body of law was to supersede all law that had been in use in France prior to the Revolution. Since part of its objective was to create a body of law that would not depend on interpretation by lawyers, the code-makers aimed to create law that was simple, easy to understand, nontechnical, and accessible to the masses. In this they generally succeeded, and the Napoleonic Code has come down to us as a paradigm of a spare, well-written, well-conceived, and comprehensive code that somehow typifies the vaunted French spirit of rationalism. As Merryman observes:

> The French Civil Code of 1804 was envisioned as a kind of popular book that could be put on the shelf next to the family Bible. It would be a handbook for the citizen, clearly organized and stated in straightforward language, that would allow citizens to determine their legal rights and obligations by themselves. (1985, p. 28)

Of course, women today would find many of the provisions of the French Civil Law to be unacceptable. Husbands were given authority over their wives, who owed them obedience. Wives could not sell or buy property, or even receive free property, without their husband's permission. Husbands had control over community property and could administer any property a wife brought to a marriage (Tunc, 1956, p. 36).

Napoleon's influence on the criminal law was even more extensive than on the civil law. He fostered the Code Penale of 1810, a truly harsh criminal law. Napoleon had little sympathy for lawbreakers and believed in the deterrent effect of severe penalties. Post-revolutionary France was going through a period of lawlessness and high crime rates, and the French people were inclined to support a stern criminal code (Wright, 1983, Ch. 2). Throughout the nineteenth century, the Napoleonic Code exerted a major influence on other countries that sought to codify their laws.

The earliest countries to adopt the French code were those that were conquered by Napoleon: Belgium, the Netherlands, Poland, and part of Germany. France also exported its codes to its colonies in Africa and the Near and Far East, and even to its former colonies in North America, including Quebec (in Canada) and the State of Louisiana (in the United States). Louisiana, because of its direct influence from a French legal heritage, retained many elements from the Napoleonic Code, including elements of contract law and marital property law. Over time, however, Louisiana law has been revised to conform with the principles of the Common Law tradition (Friedrichs, 2001).

The German Civil Code

Almost a century passed between the time that the Napoleonic Code went into effect and the time that Germany developed its own civil code. Whereas the French code was a model of simplicity, the German code was long, academic, and complex. In addition, the French code had been drawn up in the course of a few years, but it took 20 years to put together the German code.

Although both the German and French codes represented attempts to pull together and control new nations, the unification of Germany took place in 1871, but the code did not actually go into effect until 1900. The German code was the end result of a massive scholarly effort to study previous law, develop a philosophy of law, and provide a rational basis for legal development. Much local (indigenous) law was incorporated into the German code. It shared with the French, however, roots in Roman law and post-feudal ideas about property and personal rights (Glendon, Gordon, & Osakwe, 1985).

The Importance of the French and German Civil Codes

Both the French and the German codes have been enormously influential in the development of law over the past two centuries. First, both codes were developed during a time of increasing industrialization and expansion of worldwide commerce and trade. Common rules governing contracts and property, as well as individual obligations and rights, were needed to facilitate trade and were crucial in the development of modern industrial society. In addition, imperialism was at its height, fostering cross-national adaptation of laws and legal structures. Further, as new countries formed and older countries sought to modernize in the post-colonial era, and as revolutions and political changes created a need for rules of development, the importation of a full code of laws simplified the process.

Common legal codes also helped to unify new nations, just as they did in post-revolutionary France and post-unification Germany, and perhaps will do so in the newly formed Russian republics. The development of indigenous (local) codes, or gradually defining the law through case precedents, as in the case of Common Law, takes many decades. Therefore, unified civil codes provided an umbrella of legal rules, which were adapted to some degree according to local circumstances and local traditions.

Even Iran, which had previously adopted the Civil Law but in 1979 rejected the system in favor of a return to Islamic Law, continues to be influenced by the Civil Law in some areas of endeavor, especially with regard to trade and commerce. It is probably no exaggeration to say that the Civil Law is a kind of common denominator for international private law transactions throughout the world today. Thus, the Civil Law will tend to grow in influence as multinational economic cooperation grows and as trade barriers fall in Europe and other parts of the world.

THE COMMON LAW

The **Common Law** is more ancient, more complex, and more difficult than the French or German Civil Codes. In Anglo-Saxon countries, the Common Law's peculiarities have shaped not only the legal tradition but also a good part of the legal education, criminal procedure, and general approach to law and government. To understand the nature of the Common Law system, we need to look at a few major landmarks in the history of its development.

The King's Court

When William the Conqueror, a French (Norman) nobleman, defeated the English (Saxons) at the Battle of Hastings in 1066 and became king of England, he faced the usual problems of trying to rule a conquered nation. William insisted that French be spoken, but the Saxon language persisted throughout his new kingdom. In general, William found that it was easier to conquer the English than to rule them.

We must remember that this occurred in the eleventh century, some 800 years before Napoleon decided to strengthen his hold on the French people by developing a code of law that they would all have to follow. In William's time, the feudal system was in full sway on the Continent, and the law itself was a peculiar amalgam of Canon Law, feudal customs, and remnants of Roman law that existed

throughout Europe. In this era, the civil codes did not have the importance that they would assume in the Enlightenment Europe of Napoleon's time. Therefore, William could not simply call for a new code of laws to usurp the power of the local gentry. He had resources and imagination, however, and he found ways, including taxation and use of the French language, to impose his will on his subjects.

One of the ways that William and his Norman successors consolidated power was to set up courts, known collectively as the King's Court, or Curia Regis. The kings appointed the judges of these courts, and the judges traveled around the countryside, ruling on disputes that had not been settled in the local courts or hearing appeals from the local courts. King Henry II, known as the Father of Common Law, was the most prominent of the twelfth-century judicial pioneers.

Thus, England was the first European country to set up a centralized system of courts available to all free men in the kingdom. This system of courts actually built upon an English tradition of centralized kingly authority that existed before William's time and that contrasted with the prevailing system in Europe, consisting of many competing regional powers (Plucknett, 1940; Van Caenegem, 1973).

Like Solomon, however, the judges of the English courts did not refer to a specific body of laws as a standard for deciding cases. Presumably, they decided crucial political cases in a way that would benefit the king. For conventional cases, however, the judges typically based their decisions on a combination of common sense and local norms and laws.

Although the law itself was not previously defined, the jurisprudence of the King's Court came to be characterized by common procedures, or rules for handling cases. (To this day, procedural matters are crucial to the Common Law.) Over time, a body of law developed that was based on the decisions of the judges of the King's Court. As new cases arose, the judges referred to similar previous cases as authority for their decisions. This established the importance of the precedent as a way of deciding cases. The Latin term **stare decisis** (literally, "it stands decided") is used in Common Law countries to signify the legal force of precedent. Adherence to precedent resulted in the gradual development of rules that were uniform throughout the kingdom. These rules came to be known as the Common Law because they were common to all Englishmen, and thus distinguished from other rules and laws that existed in each local region.

The early kings set up the King's Court as a way to strengthen their power. But over time (after William's and Henry's time to be sure), the force of the rules and precedents which were developed in the Common Law courts was so great that a tradition of **judicial independence** arose. In other words, judges of the Common Law courts saw themselves as bound by the law rather than by the desires of the ruler. Judicial independence is something that we take so much for granted these days, but we forget the long history of political regimes in which absolute rulers made rules, enforced them, and decided cases that arose under them.

Equity Courts

Judicial independence was not really a welcome development to William's successors on the English throne. In addition, the Common Law itself became increasingly cumbersome and rigid in application. Therefore, the practice arose of appealing directly to the king to rule on cases that did not fit well into the Common Law structure. By the fifteenth century, a new set of courts, known as chancery courts, or equity courts, had developed.

As the name implies, equity courts and the law that they administered dealt with efforts to obtain justice, or fairness. The courts did this by developing a set of practices known as equity procedures that helped people bring their cases to court without hazarding the use of the complex Common Law system. Some equity procedures are familiar to us even today. For example, the **writ of mandamus** orders public servants to perform the duties that are part of their jobs. Injunctions are court orders designed to prevent harms that would occur before a case could work its way through the regular court systems.

The United States and England no longer have separate equity courts to handle equity cases; instead, equity cases are now handled by the regular courts. Originally, however, these equity courts were a major innovation, once again making the king more powerful in legal matters. As the equity courts became entrenched, however, they became as rule-bound as the Common Law courts. Further, the judges of the equity courts developed the same inconvenient habit of judicial independence that their Common Law brethren had before them. Thus, English kings again had to set up new courts to do their personal bidding. Star Chamber courts and Courts of High Commission became notorious in the seventeenth century for their ruthless persecution of the kings' enemies (Prall, 1966).

The Modern History of the Common Law

With the decline in the power of the monarchy and the ascendancy of Parliament, the English court system stabilized. Judicial independence was now taken for granted and no longer considered a problem by the English rulers. Even Oliver Cromwell and his Puritan followers, who overthrew the Stuart kings and established a commonwealth in England between 1648 and 1660, feared the possible destabilizing effects of sweeping changes in the law. Cromwell thus made no major effort to supersede the Common Law (Prall, 1966). The English legal system remained a complex system of rules and precedents, interpreted with small shades of meaning and requiring a body of legal experts to deal with it. These legal experts had to serve long apprenticeships to become familiar with the vast number of cases and precedents that would govern their decisions.

The Development of Criminal Procedure. The fact that the Common Law is based on precedent does not mean that this law is not written down in one place. In the eighteenth century, William Blackstone set out to compile all the laws in effect in England up to that time. His monumental work, *Blackstone's Commentaries*, constituted a major step forward in English legal history. Since Blackstone's time, the Common Law has continued to be compiled and brought up to date in various collections.

For most of its existence, the Common Law addressed all matters likely to need settlement in court—not only private concerns such as contracts, property disputes, family questions, and torts against individuals, but also criminal offenses (Holmes, 1923). More important than the actual delineation of criminal offenses was the development of Common Law criminal procedure. Most of the criminal procedure rules that are set forth in the Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution, as well as the rules about bringing the accused before a judge to question his incarceration (**habeas corpus**), were adapted from Common Law rules and from Parliamentary decrees based on the Common Law. The concern in U.S. courts with detailed criminal procedures, which often seems excessive to people in Civil Law countries, has its origin in the English Common Law criminal procedure. As we will discuss in Chapter 6, the development of criminal procedure in England was a slow process that paralleled the development of the adversarial trial system.

The Definition of Crimes. The definition of crimes themselves, as opposed to the procedure for adjudicating those accused of crimes, has gradually become part of public statutory law rather than case law. For example, when we say that murder is a crime in the state of New York, this is as a result of a law passed by the legislature of that state making murder a crime and prescribing a penalty for the commission of this crime. Of course, murder was also a crime under the Common Law, so it may seem unnecessary to have a statute that outlaws the act. The chief difference is in the penalties attached to various crimes. Thus, when New York passes a law outlawing murder, it has prescribed different penalties at various times in its history, and these penalties are not the same as those that were usually imposed under the Common Law. Therefore, the statutory law is used to both update and codify the case-based results of Common Law.

With the rise of legislative democracy in both England and the United States, the actual rule-making power of the Common Law (through case decisions) was eclipsed by the rule-making power of the legislatures (through codifying laws and penalties). Indeed, in a constitutional system such as that of the United States, the very fact that all laws must be in conformity with state or federal constitutions suggests that a "pure" Common Law, in which judges make the law, no longer exists. Criminal law has been codified for many years, and much lawmaking is concerned with administrative agency regulations, and also formerly private regulations such as those dealing with marriage, divorce, and other family concerns.

The Current Status of the Common Law. Does this mean that the Common Law is dying out or dead in the modern world? To answer this question, we need to consider the continued importance of judge-made law in the United States. Constitutional law, in which judges interpret the Constitution based on the precedents of previous interpretations of this document, is a good example. The U.S. Supreme Court, in the 1961 case *Mapp v. Ohio*, interpreted the Constitution's guarantee against unreasonable searches and seizures to mean that evidence obtained by state authorities through an illegal search may not be used at trial. This decision meant that the Exclusionary Rule, formerly required in federal cases, was extended to the states. Subsequent to that decision, the Supreme Court handed down many further interpretations of the dimensions of illegal searches, in each case building on its previous decisions—sometimes extending the scope of police power to search, and other times restricting it (Albanese, 2008). In effect, the judges are continuing to make law built on precedent, in the tradition of the Common Law, even though the source of this law is a fixed statutory or constitutional prescription.

In the Common Law countries, the traditions of the Common Law—its use of precedent, its historically developed procedural forms—continue to be a vital part of the legal process despite the fact that most law has become statutory in modern times. Ironically, the United States, with its need for constant interpretation of constitutional provisions to define the parameters of state and federal relations and of relations between individuals and the state, has become a nation that is more deeply wedded to the Common Law tradition of judge-made law than in England, where Parliament is supreme. U.S. judges have much more discretionary lawmaking power than do English judges.

The Common Law tradition also continues to have a major influence in legal education. In Common Law countries, legal education traditionally occurred through apprenticeship, with the budding lawyer learning large numbers of cases that formed the various precedents necessary for understanding the law. Law schools have largely replaced apprenticeships in the United States, but law school education focuses chiefly on the case law method, thus emphasizing the Common Law tradition and preparing the lawyer to operate within that tradition. In England, trial lawyers are trained at the Inns of Court, essentially continuing the apprenticeship tradition. Civil Law legal education is a less practical, more academic, course of study that includes a good deal of philosophy, history, and liberal arts education. Apprenticeships in Civil Law systems follow formal legal education. Case precedents will not be binding on the practicing lawyer and are thus not emphasized in legal education.

Table 3.3 compares and highlights major attributes of the Civil Law and Common Law legal traditions. It can be seen that both now rely heavily on statutory rule-making, although case precedents remain an important part of Common Law systems. In addition, the adjudication process in Common Law systems includes public participation as jurors, a feature absent from Civil Law systems.

THE SOCIALIST LAW

Socialist Law has its origins in socialism, which is a system characterized by the absence of classes and by common ownership of the means of production and livelihood. The political, economic, and social

TABLE 3.3 Major Features of the Civil and Common Law Systems

Civil Law Characteristics	Common Law Characteristics
Law and procedure governed by comprehensive codes of rules to anticipate all situations.	Law and procedure governed by both law and case precedents, which use past cases to guide future decisions.
Legal codes developed through scholarly analysis.	Laws and precedents based on the experience of practitioners from past cases.
Appellate courts apply law according to legal codes with little interpretation.	Appellate courts develop law through their interpretation and decisions.
Adjudication process designed to establish the truth.	Adjudication process designed to culpability only within rules of evidence.
Adjudication process run by lawyers and judges.	Citizens have direct input in their grand jury and trial jury roles.
No presumption of innocence for the accused.	Presumption of innocence towards the accused.

term used to describe socialism is communism. Karl Marx (1818–1883) was the major proponent of communist ideology. Marx believed that the current economic system (capitalism) was one that exploited the masses (the proletariat) and supported those who controlled the economic resources (the bourgeoisie). Eventually, Marx predicted, the proletariat would revolt and eliminate the bourgeoisie, and socialism would replace capitalism as the economic system of choice.

Marx addressed the issue of crime when he stated that, after a true communist society was established, the state would "wither away" and there would be no further need of criminal law or sanctions to deal with lawbreakers. In this ideal society, cooperation and concern for community welfare would replace individualism and competitiveness. Property would belong to all, thus eliminating the incentive to rob or steal, and people would not be subject to the pathological urges that make them criminal in conventional societies.

Although Marx's utopian vision has not been realized in any country of the world, communist countries have adhered to one or another version of what is known as Socialist Law (Berman, 1963; David & Brierly, 1978; Glendon, Gordon, & Osakwe, 1985). The former Soviet Union was for decades the most prominent of the Socialist Law nations. By the end of the twentieth century, Cuba was the country most committed to the principles of communism. Other nations that currently retain major aspects of Socialist Law are North Korea, Vietnam, and China. Socialist Law needs to be considered in any study of comparative criminal justice because it has enough distinctive characteristics to warrant separate consideration as a family of law.

The Historical Background of Socialist Law

To understand Socialist Law, we must take a look at legal developments in the former Soviet Union following the Russian Revolution of 1917—a post-revolutionary government dedicated to the destruction of the institutions and laws of the hated old order. As in France, a king and queen (in this case Czar Nicholas and his wife Alexandra) were executed to break the bonds with the past and symbolize the destruction of the old ruling class. And as in France, where the revolution, despite its atrocities and excesses, came to represent the triumph of a new ideology of enlightenment and rationalism, the Russian revolution represented the triumph of a more recent ideology, that of Karl Marx.

It is important to note that Socialist Law is historically grounded in the Civil Law. For centuries, eastern European countries, including Russia, used recorded codes as a means to rule the populace. Prior to the revolution, Russia's legal system had combined elements of the Civil Law, Canon Law, and traditional Russian customs. Imperial Russian law, however, was chiefly statute-based law that had gone through various phases of codification.

The major influence on imperial law was the Germanic law of the Middle Ages, the same Germanic law that had had such an important influence on the two great nineteenth-century codes: the Napoleonic Code and the German Civil Code.

After the revolution, Russia went through a chaotic period in which there was no formal legal structure and revolutionary tribunals dispensed revolutionary law. Vast discretion resided in the judges of these tribunals. However, these judges were not legally trained, since the lawyers and judges of the old regime had been eliminated along with the law. Ultimately, however, with the realization of the need to make the Soviet Union into a viable trading partner and the relaxation of revolutionary fervor during the time of the "New Economic Policy," Russia moved again to develop a code of laws. The result was the "new" Russian Civil Code, which drew from the earlier Russian code, the German Civil Code, the French Civil Code, and the Swiss Civil Code (Glendon, Gordon, & Osakwe, 1985, Ch. 13).

With the rise to power of Joseph Stalin (1879–1953) in the late 1920s, a new period of communist zeal began. Stalin tried to institute a "pure" communist approach, without great concern for legalism. He soon decided, however, as had William the Conqueror and Napoleon before him, that the law could be used to consolidate and strengthen his power. The Soviet Union entered into a period of "Socialist legalism," rule-making that tried to encompass every aspect of the Russian citizen's home and work life. A huge bureaucracy and a highly developed legal system became part of the Soviet state apparatus.

Although the Russian legal system continued to owe much to the civil codes of Western Europe and could easily be identified with them through an examination of rules of procedure, especially criminal procedure, it gradually became such a distinctive system that it is now possible to speak of a Socialist Law family, as distinguished from the Civil Law or the Common Law. With the breakup of the Soviet Union, major changes in the Socialist Law governmental form and ideology have taken place in Eastern Europe. Many countries such as the former East and West Germany have now adopted the Civil Law system. However, this does not mean the total demise of all remnants of Socialist Law for two key reasons.

First, even the countries that have renounced socialism as their main political ideology will surely retain some principles of the legal system. History tells us that, when countries encounter political upheaval and significant change in their legal system, they often find it difficult to totally eschew all aspects of the previous form of law. This is understandable, because basic principles often remain in the collective psyche of the citizens who lived under the previous legal system. In the case of the former Soviet Union, citizens lived under the auspices of Socialist Law for more than 50 years.

Second, Socialist Law will undoubtedly remain as a significant legal and political system because it is still practiced by the most populous country in the world—the People's Republic of China. Although China has adopted some free-market commercial law reforms, it still has many features of the socialist legal system. For this reason, we chose China as a model country to be discussed throughout this book.

Socialism and the People's Republic of China

To understand the formal origins of Socialist Law in China, one must first learn about the history of the country immediately prior to the implementation of socialism. For over 4,000 years, China was ruled by a series of feudal dynasties, which limited any significant attempts to modernize the political, economic, or social structures in the country. The majority of people who lived in the vast regions of China were poor peasant farmers.

The most recent dynasty, the Qing dynasty, was overthrown in 1911. In 1912, the democratic ideals of the Kuomintang (Nationalist party) dominated. However, between 1911 and 1949, the Chinese political situation was chaotic and prone to warlords, corruption, civil war, and invasion by Japan.

It was during this tumultuous time that the ideals of socialism were introduced into Chinese

society. Under the direction of Mao Zedong (1893–1976) who was influenced by the ideas of Karl Marx and Vladimir Lenin (1870–1924), the Communist Party in China was formed in 1921. Mao's major contribution was to adapt communist principles to the Chinese political, economic, and social situation. By gaining the support of large numbers of peasants throughout agrarian China and confiscating the land of wealthy farmers, he was able to develop an army and mobilize the masses, thereby furthering the objectives of communism (Terrill, 2003).

The Chinese socialist government, called the People's Republic of China, was officially established in October 1949 when Mao Zedong and his fellow Communists gained full control of the government over the Nationalist party. The Communist government abolished all laws of the Nationalist regime, claiming that these laws represented only the interests of the bourgeoisie, landlord classes, and feudal society (Situ & Liu, 1996).

During the first 30 years of communism under Mao, the government replaced the Nationalist laws with a combination of statutes, rules, and regulations based on the ideals of the ruling party. Large, bureaucratically structured courts were held in disdain, so whenever possible, local lower-level courts and ad hoc tribunals made legal decisions. This rather informal method of settling legal disputes eventually led to the creation of an extensive committee system in China. Committees were set up in neighborhoods, communities, and workplaces to act as systems of surveillance, control, and sanctioning. Also during this era, while more consideration was given to developing a formal legal system, legal decisions in China were made based solely on political needs and ideals.

After Mao's death in 1976, the new leader Deng Xiaoping (1904–1997) promoted new goals for China that centered around modernization in four key areas: agriculture, industry, defense, and technology. His idea was to develop a special kind of "socialism with Chinese characteristics" (Franz, 1988) that, contrary to Mao, was against isolationism and anti-intellectualism. The People's Republic of China is currently in the process of attempting to develop a legal and criminal justice system that will accommodate its needs as a socialist nation, a nation with a long Confucian tradition, and a modern commercial power. An informal committee system of justice dispensed by relatives, friends, colleagues, or workplace and community leaders remains today in coexistence with a more formal legal system. In the next chapter and throughout this book, we will continue to discuss more about the background and current structure of the legal system in China.

Socialist versus Civil Law

How does Socialist Law differ from a conventional legal system such as exists in other Civil Law countries? Six characteristics of Socialist Law distinguish it from Civil Law:

- The public law/private law distinction
- The importance of economic crimes
- The educational or "social engineering" function of law
- The distinctive role of the procurator
- The distinction between political and nonpolitical justice
- The mitigated independence of the judiciary

The Public Law/Private Law Distinction. Laws regarding private property, inheritance, and personal relations between individuals continue to be important in Socialist Law systems. The ideal of collective ownership of property and of the major means of production by the state, however, has resulted in great importance attached to public law—that is, to statutory laws and regulations of the state. The amounts and kinds of rule-making that are involved in centralized, noncompetitive economic production are tremendous, and the socialist state is often choked with bureaucratic regulations because so little of economic life is left to open market competition. To be sure, governmental regulation of the economy through laws controlling trade, production, banking, and other economic matters is familiar in all Western societies today, but socialist and nonsocialist systems continue

to place a primary emphasis on public versus private law.

Economic Crimes. In nonsocialist systems, managers and employees are driven to a certain extent by a "bottom line" mentality. Workers who are chronically late for work, who abuse valuable machinery, and who fail to achieve a reasonable level of production usually will lose their jobs, and an enterprise that consistently fails to produce a profit will go out of business. By contrast, in a socialist system where all enterprises are owned by the government and full employment is guaranteed, failure to live up to working standards cannot be handled by dismissal of employees or bankruptcy of organizations. Without these kinds of private punishments (such as job loss or business bankruptcy), the criminal law becomes a means for punishing unacceptable work behavior in socialist systems. Thus, the concept of economic crimes—obstruction of socialist production—is a peculiar aspect of socialist as compared to nonsocialist law.

The Educational Function of the Law. A legal system in which the people have no knowledge of the law would be an absurdity. How can one obey the law if one does not know what it is? But the reality is that most of us do not have much knowledge of the law to which we are subject. We tend to learn those parts of the law that affect us: basic criminal law, traffic law, tax regulations, and simple rules about property and contracts. Entrepreneurs or government administrators learn about the specific laws that affect their enterprises. For the most part, however, we have only a rudimentary knowledge of even the most basic criminal laws of our own states, and we depend on specialized attorneys to interpret the law for us.

In post-revolutionary societies, in which the laws may have changed drastically, there is some urgency about having the citizens learn the new law. The Napoleonic Code was famous for its accessibility. It was relatively short, simple, and direct, without obscure phrasing and indecipherable language. The emperor Justinian, upon promulgating the new code of laws developed in his regime, abolished all previous law and refused to allow commentaries on his new law to be published. In this way, he hoped to negate the insidious influence of the lawyers who previously had been indispensable as mediators between the people and the law.

We might expect, therefore, that the Chinese government after 1949 would have made efforts to familiarize the people with the laws of the new regime. In fact, in post-1949 China, the masses did learn about the ideals of the Communist Party through statements reported to the tightly controlled media and campaigns intended to popularize and implement certain policies. However, formally stated criminal and procedural laws were unclear and tenuous, depending on various shifts in political (Communist) philosophy. In many cases, unwritten and internal rules guided the police, courts, and ruling party in defining crimes and punishments (Lubman, 1983).

The educational or "social engineering" aspects of Socialist Law are another method of familiarizing the people with the new law. One of the basic tenets of communist ideology is that socialism is a transitional stage on the way to a true communist society in which people will no longer be predatory and competitive in nature. Since coercive law is supposed to cease in a true communist society, it is especially important that those who are judged under the present law agree to its reasonableness and justice. In order to achieve this communist society, people need to become reeducated, and one of the prime agents of this reeducation must be the government and the legal system (Berman, 1963).

The Role of the Procurator. The procurator in Civil Law systems is roughly equivalent to the prosecutor in Common Law systems. The **procurator** works on behalf of the government, prosecuting crimes and making sure the proper indictments are served in the courts. However, in the Socialist Law family, the procurator is far more important than in either the Civil Law or Common Law family.

In the former Soviet Union, the head procurator general was actually one of the most powerful

individuals in the government, becoming far more involved in governmental reforms and administrative decision making than most ministers of justice. Local procurators also were generally more powerful than judges in the Soviet system. They served the regime in political cases and generally had final say in decisions to prosecute. Soviet procurators have been described as having nine roles: "criminal investigator, grand jury, criminal prosecutor, judicial ombudsman, executive branch ombudsman, general ombudsman, prison ombudsman, military ombudsman, and propagandist of Soviet law" (Glendon, Gordon, & Osakwe, 1985, pp. 819–820). An **ombudsman** in this sense is an individual who hears complaints and ensures that government agents are performing their functions correctly. As in the former Soviet Union, the procuracy in China is among the most important and powerful positions in the criminal justice system.

Located within a bureaucracy that contains different levels of influence, the office of procurator, according to the Chinese constitution, is "independent and not subject to interference by administrative organs, public organizations, or individuals." In fact, the office is a very complicated one in China because procurators must prosecute offenders, uphold lawfulness of prosecution, obey the law, and check the lawfulness of other security departments and the courts—while also following the leadership of the party (Organic Law, 1979).

Based on the Soviet model, Chinese procurators in the 1950s were also given the responsibility of prosecuting criminal offenders, supervising the entire criminal justice system, and ensuring that all citizens and state personnel carried out the laws and policies of the state. Since being redefined in 1978, the position now can be summarized to include supervisory, investigatory, and prosecutorial functions (Tanner, 1994). Table 3.4 summarizes the duties of the procurator in China.

TABLE 3.4 The Duties of the Procurator in the People's Republic of China

1. Investigate and prosecute treason and other criminal cases.
2. Review police cases and determine the appropriateness of arrest and prosecution.
3. Supervise the investigations of police to determine if they are in compliance with laws.
4. Conduct public prosecutions of officials.
5. Supervise judicial actions to determine if they are in compliance with laws.
6. Supervise judgments and court orders in criminal cases to determine if they are in compliance with laws.
7. Supervise all incarceration facilities to determine if they are in compliance with laws.

SOURCE: Organic Law for People's Procuracies. People's Republic of China Foreign Broadcast Service. July, 1979.

Political versus Nonpolitical Justice. To speak of "political justice" implies that it is possible to have a kind of justice that departs from a norm of impartiality and engages in some form of partiality that is determined by politics—that is, the influence of those in power. Although we know that political influence often affects the outcomes of legal cases in the United States, the norm or ideal of Western law is "equal justice under law." Therefore, a difficult aspect of Socialist Law is its duality—a distinction between typical cases and those cases in which the state has a particular interest that supersedes the interests of conventional justice.

These latter cases involve what is sometimes called *prerogative law*, under which standard legal procedure is subverted through the intervention of those in power. Prerogative law was actually legitimated in the old Soviet system and was justified by its defenders as necessary to the evolution toward an ideal Communist society. If we read the books of Aleksandr Solzhenitsyn, which describe the terror of life under Stalin, or various accounts by political dissidents in China, we might well find the concept of prerogative justice to mean no more than wanton disregard of matters of guilt or innocence under law. Instead, the overriding principle is the importance of the collective (the many or the state) as opposed to the individual, and it supposes that reasons of state may allow for setting aside normal criminal procedure to neutralize threats or enemies of the state.

The Independence of the Judiciary. Independence of the judiciary means that judges are free to decide cases in accordance with the law and cannot be pressured to rule for any reason other than legality. This principle is highly valued in Western law, although it is honored only in theory in many cases. In the United States, for example, judges in most state court systems are elected and must answer to the voters for their decisions on the bench. Others are appointed by elected officials. One of the reasons the Founding Fathers guaranteed a life term for federal judges (except in rare cases of impeachment) was their hope that these judges could thereby act with total independence and without fear of losing their positions. Again, in reality, a great deal of politics is involved in the appointment and decision making of federal judges; the norm, however, is one of independence.

In the United States, an independent judiciary is tied to the idea of separation of powers, whereby excessive power of government is thwarted by distributing power among different branches. Separation of powers is not considered a desirable governmental arrangement in all socialist countries, however, because it introduces an element of competition and conflict when promoting the public good should be the only goal. In socialist countries, the idea of a benevolent state that rules for the good of its citizens thus replaces the idea of a government that must be curbed, because of its tendency to become tyrannical and rule for the good of the rulers instead of the people as a whole. Therefore, even though in theory constitutional rights exist to protect individuals against governmental actions, in practice this ideal is often overshadowed by the primacy of the communist state over individual rights. Similarly, China does not idealize separation of powers or an independent judiciary. In fact, judges in certain courts in China are appointed by a standing committee of that court and can be removed or even replaced by a substitute assistant judge by that same committee.

In practice, this does not mean that judges in all socialist countries are tools of political leaders or that legal judgments in these countries are always arbitrary and determined exclusively by reasons of state. What it does mean is that in cases where the needs of the state conflict with the rights of individuals, the collective always wins.

THE SACRED LAW

The three families of law described thus far in this chapter—Civil Law, Common Law, and Socialist Law—are pervasive in every part of the world today. There is hardly a country, region, or even tribe that has not been brought under the influence of one or the other, at least with respect to certain aspects of social life. A distinguishing characteristic of each of these systems of law is that it is secular in nature. **Secular law** is law that does not pertain to religion or any religious body. None of the three major families of law claims to have the force of a religion behind it, despite the fact that many of the tenets of the laws are derived from religious teachings.

Throughout history, religion and religious texts have always been important sources of influence on the law. The teachings of the early Christian church, including the Canon Law and the Bible, have been incorporated into the Civil Law and Common Law, respectively. The country of India, although deeply infused with English Common Law principles, is rich in religiously based Hindu law, which dates back to about 100 B.C. Much of Hindu law has been influenced by early Hindu doctrine, which stated that adherence to the Vedas, or scriptures, was more important than adherence to the edicts of any king or ruler. Even today, devout Hindus believe that faithful adherence to correct behavior will help them in a new incarnation. The Confucian legal tradition, also based on morality, continues to influence the Chinese legal system.

In Israel, legal codes are influenced by English Common Law and by Israeli secular laws, but they also include Jewish and non-Jewish religious laws. Israeli religious laws generally apply in personal

matters such as marriage, divorce, and alimony. Different religious courts in Israel represent the various religious groups, including Rabbinical, Muslim, Christian, and Druze (Bensinger, 1998). Hebrew law, derived from the Old Testament, is the source of some of modern Israeli laws. As mentioned earlier, the story of Hebrew law is more than 3,000 years old, and it served as a foundation for the later development of the Bible. However, over the centuries there has been a general decline in the overt influence of religion on law. Countries in Europe that were strongly influenced during the Middle Ages by the Canon Law of the Roman Catholic Church later moved away from these influences. In the late eighteenth century, the separation of religion and law became common to many countries, including the United States.

Today, a few countries have retained religious teachings and documents as the dominant if not exclusive source of law. Primarily located in the Middle East, these countries can be classified as being members of the **Sacred Law** legal tradition. The Sacred Law tradition is one that is based on a sacred text or body of religious doctrine. In Sacred Law countries there is no clear separation between the religious and the legal (Friedrichs, 2001). Throughout this book, we refer to Saudi Arabia as the best example of a country rooted in the Sacred Law tradition. Saudi Arabia was chosen because that country uses secular laws closely intertwined with religious laws that have the full force of government behind them. In Saudi Arabia, as well in most Middle Eastern nations, and some Asian nations, the legal tradition is not actually called Sacred Law but **Islamic law**. Islamic law is based on the rules of conduct revealed by God with two primary sources: the Shari'a and the Sunnah. The Shari'a (literally, *the way*) is the term used to describe the actual law that is practiced in Saudi Arabia. The Sunnah are the practices, habits, and sayings of Muhammad, the prophet of Islam. For those who believe in Islam, it is important that the law be consistent with Islamic doctrine, because the religion is considered a way of life, not just a religious practice.

Islamic law has become increasingly important in recent years, remerging after a period of decline in the nineteenth and early twentieth centuries. Saudi Arabia has been an Islamic state, adhering to Islamic law, since its founding in 1926. In a few Islamic countries, including Iran, Pakistan, and Sudan, it is proclaimed as the basis for all law, including the harsh Islamic criminal law based on retribution. Even in these countries, however, certain concessions are made to modern exigencies of trade, banking (Islamic law does not allow the payment of interest), and industry. Today in Syria, Egypt, Iraq, Lebanon, and Kuwait, Islamic law forms a part of the legal system that most often deals with family law. In two other Islamic countries, Iran and Libya, part of a growing religious fundamentalism necessarily includes a push for greater incorporation of Shari'a into the national law (Freeland, 1997). For the remainder of this book, we will use the term *Sacred Law* to describe generally the legal tradition that uses sacred religious text to formulate or dispense law. The term *Islamic law* will be used to reflect any reference to the specific Sacred Law legal tradition of our model country, Saudi Arabia.

Sources of Islamic Law

Islamic law has two primary sources: the Shari'a and the Sunnah (or Sunna). **Shari'a law** may be defined as "the body of rules of conduct revealed by God (Allah) to his Prophet (Muhammad) whereby the people are directed to lead their life in this world" (Nader, 1990, p. 1). Nader lists six key characteristics of the Islamic law:

- It is not given by a ruler but has been revealed by God.
- It has been amplified by leading Muslim jurists like Abu Hanafi, Shafi, and Malik.
- It remains valid whether recognized by the state or not.
- It originates not in customs and traditions but in divine revelation only.

- It is so comprehensive and all-embracing that it covers every aspect of a legal system—personal law, constitutional law, international law, criminal law, mercantile law, and so on.
- It is not in the nature of "should be" but lays down what the law is.

This list of characteristics requires some amplification.

The most important source of Shari'a is the Qur'an, the Muslim holy book. The Qur'an, however, is not in whole or even in part a code of laws. From a total of about 6,000 verses in the Qur'an, only about 80 might be defined as legal rules (Amin, 1985a, p. 9). Therefore, other sources of law are included in Shari'a. Some of these are traditions derived from the statements and actions of the Prophet that were recorded in the Sunnah. The Sunnah (also called the Hadith), the second major source of Islamic law, contains those actions, sayings, and practices of the Prophet that deal with issues not directly addressed in the Qur'an (Moore, 1996). It is important to mention that in addition to the Sunnah and Shari'a there were, and remain, sources of law developed by different schools of Islamic law in the centuries after the death of Muhammad in A.D. 632. These were writings that state the common consent of Islamic jurists and judicial reasoning opinions.

The Prevalence of Shari'a

As you can see, Sacred Law, more specifically Islamic law, is truly distinctive among the families of law that we have considered. It does not represent the bringing together of traditions and customs into either a code law such as the Civil Law or a case law such as the Common Law. David and Brierly claim that Islamic Law is completely original "by its very nature," because it is based on divine revelation and is independent of all other systems that do not derive from that same revelation (1978, p. 429). At the same time, despite its basis in the Qur'an, Islamic law depends on the compilation of cases and traditions from its early centuries. Therefore, it has some of the characteristics of case law: complex rules dependent upon interpretation and local developments.

An important aspect of the history of Islamic law, which had been eclipsed by the laws of countries and of colonial powers in the nineteenth and twentieth centuries, is that it remains in force for devout Muslims within those countries. Because Islamic law is not the established law in many countries, and therefore lacks the power of government to enforce its sanctions, it depends on voluntary obedience. Turkey, for example, remains a predominately Muslim nation, even though it has pursued secular modernization aggressively.

India, with a large Islamic minority, presents a unique situation. The desires of the Muslim minority cannot be ignored, and concessions to their beliefs are sometimes incorporated into Indian law. In the famous Shah Bano case, for example, a Muslim citizen of India divorced his elderly wife, Shah Bano, according to Islamic rules, which do not call for alimony in the conventional sense. Shah Bano sued for and was granted economic support according to Indian law. This case caused a furor in the Muslim community, becoming a symbol of Hindu dominance and the repression of Muslims. In the end, the Indian Parliament passed the Muslim Women's Act, which provided for separate divorce regulations when the parties to the suit are Muslims. This law, in effect, acknowledges the power of Shari'a in a nation that otherwise practices separation of church and state (O'Donnell, 1990).

Crime and Punishment under Shari'a

There are four major schools of Islamic law, derived from religious leaders living in different areas and facing different problems in the two centuries following the death of Muhammad. These schools are Hanafi, Hanbali, Maliki, and Shafi'i. The main differences between these schools are in matters of emphasis, whether on tradition, judicial reasoning, or the elaboration of the Qur'an.

Different countries tend to follow different schools of Islamic law. Thus, for example, the primary legal tradition in Iraq is that of the Hanafi school, while in Saudi Arabia it is the fundamentalist Hanbali school, named after the great theologian and jurist Ahmad Ibn Hanbal (A.D. 780–855) (Amin, 1985b, p. 12).

In addition to the conventional issues of law, including property, contracts, and inheritance, Shari'a is concerned with many aspects of individual behavior, including dress, food, etiquette, and religious worship. For students of criminal justice, Shari'a presents an interesting contrast to Western systems. Crimes are categorized according to whether they are acts against God or crimes against others and society. Crimes against God (**Hudud crimes**) are very serious and also seen as violation of "natural law": They include theft, robbery, blasphemy, apostasy (voluntary renunciation of Islam or its rules), rebellion, and defamation, as well as drug offenses and sexual crimes such as adultery, sodomy, and fornication (Lippman, McConville, & Yerushalmi, 1988, p. 41).

All other crimes are private wrongs against individuals or against society and are called **tazirat crimes** or Tesar crimes (Souryal & Potts, 1994). Included in those crimes are murder, manslaughter, or assault. If the crime is one that threatens a family's livelihood, then *quesas* (retribution) or *diya* (compensation or fines) may be required. The blood money is given to the victim or the victim's family.

In the case of Hudud crimes, the state must initiate prosecution; in tazirat crimes, the victims or heirs must bring a complaint and serve as prosecutor. In practice, however, the state usually initiates these proceedings. The distinction between Hudud and tazirat crimes is not as great as it seems, therefore, since all criminal cases in Islamic countries are decided in government-run courts, and most punishments are fixed by the courts in accordance with religious or traditional rules (Lippman, McConville, & Yerushalmi, 1988).

It is not only Shari'a law that makes Islamic legal systems different from those of Western countries. Shari'a courts are also different in makeup, procedure, and effect. Sanctions are prescribed in the Qur'an and are often harsh, with the emphasis on corporal and capital punishment. Under Shari'a, imprisonment is the punishment of last resort. Theft is punished by imprisonment or by amputation of hands or feet, depending on the number of times it is committed. Crimes against God, including adultery and acts of homosexuality, are usually punished by death. Thus, the death sentence for apostasy imposed on the Muslim novelist Salman Rushdie (in absentia) by the late Ayatollah Khomeini was peculiar only because Rushdie, as a British citizen, was not subject to Iranian criminal law. As a Muslim, however, he was subject to the Qur'an, and this fact was used as justification for the death sentence.

Another example was the case of a Pakistan man, named Ranjah Maseih, who was sentenced in 2003 to life in prison for allegedly tearing down a billboard carrying verses from the Qur'an in Faisalabad, Pakistan. Maseih, a Christian, tore down the billboard during a demonstration following the suicide of Faisalabad's Roman Catholic Bishop John Joseph. (Bishop Joseph shot himself in the head after a judge convicted a Christian of blasphemy.) The convicted Christian was found guilty of defending Salman Rushdie, whose book, *The Satanic Verses*, infuriated radical Muslims. We discuss more about the Shari'a and punishment in the Sacred and Islamic law country of Saudi Arabia in Chapter 9.

Table 3.5 displays major features of the Socialist Law and Islamic law systems. It can be seen that the ideology of socialism undergirds the Social Law system, while the religious teaching and traditions of Islam underlie its legal system.

Equality and Islamic Justice

Islamic law makes a distinction between men and women in many matters. Although the Qur'an improved the status of women from what it had been previously, there are still aspects of Islamic

TABLE 3.5 Major Features of the Socialist and Sacred and Islamic Law Systems

Socialist Law Characteristics	Scared/Islamic Law Characteristics
Public law involving state interests supercedes private law concerns of individuals.	Two major sources of Islamic Law: Shari'a and Sunnah.
Economic crimes (obstruction of socialist production) are serious violations of law.	Crimes can be acts against God (Hudud crimes) or against other persons (tazirat crimes).
Government and legal system have responsibility for educating public about the justice of the socialist law system.	Shari'a court sanctions are prescribed in the Qur'an.
The procurator has extensive investigation and prosecution authority as well as oversight of judges and prisons.	Four schools of Islamic law alternately emphasize tradition, judicial reasoning, or elaboration of the Qur'an.
Similar legal attributes to Civil Law system but with ideology of socialist economic system.	Few countries are governed by Islamic law, but tradition depends on voluntary obedience. Divine law exists whether or not recognized by the state.

law that discriminate heavily against women. For example, women do not count as witnesses for certain crimes or may count only half as much as male witnesses (in other words, two women witnesses would be required where only one man was required). Laws relating to ritual religious practices, to finances and property, and to marriage and divorce also discriminate against women, although efforts have been made in some countries toward equality of women in some matters (Collier, 1994; Amin, 1985a, p. 36; Hirsch, 1998).

Islamic scholars assert that Islamic law shows great concern for human rights with respect to freedom of religion (only Muslims are required to follow the Muslim law), criminal procedure, and human development (Amin, 1985a, pp. 30–39). According to these scholars, while particular countries, such as post-revolutionary Iran, may treat people arbitrarily and curtail their human rights, this is in not in keeping with Islamic law. Other defenders of Islamic law claim that it can be flexible and adaptable to modern conditions and yet it is able to maintain its strong Islamic values despite growing influence from Western influences (Collier, 1994).

Female Circumcision

Female circumcision—or female cutting and mutilation—has existed for some 2,500 years and is practiced in some 40 countries, mainly in Africa. Over 100 million females are affected and about two million are at risk each year (Sussman 1998, p. 197). The principal objective of this practice is to diminish the possibility of female premarital sex and infidelity by removal of the clitoris and stitching together the genital lips. At least some of those who immigrate to the United States from countries where this practice is customary want to continue the practice in the United States. A small number of women have fled their native country to avoid genital mutilation and have sought political asylum in the United States on these grounds. In 1996, the U.S. Congress passed into law the Female Genital Mutilation Act, which criminalizes circumcision of females under 18, requires federal health agencies to educate immigrant communities about the harm of genital cutting, and imposes economic sanctions on countries that fail to take steps to prevent such practices (Dugger, 1996; Sussman, 1998). The difficulties of effectively enforcing such a law, which challenges deeply held religious or cultural beliefs, are great. Most Americans are in agreement with this law and regard female genital cutting, or mutilation, as barbaric.

SOURCE: From "Law in Our Lives" by David Friedrichs, 2001.

SUMMARY

Families of law have distinctive characteristics if seen as ideal systems. The Common Law places great emphasis on case precedents and fine distinctions of procedure. The Civil Law combines ancient Roman rules and the laws and customs of medieval Europe with regulations that address modern social and economic problems without the modifications of case law. Socialist Law espouses the idea that the law should be an instrument in the creation of a new socialist society rather than simply a way of settling disputes or dealing with criminal deviance. Sacred Law is used in countries where a sacred text or doctrine is the primary basis for law. Sacred Law is most commonly used in countries that employ Islamic law—where religious revelation is combined with the traditional rules that emanated from the society of faithful Muslims in the early centuries following the death of the Prophet Muhammad.

None of these kinds of law is practiced in its "pure," or ideal, form in today's world. Countries that practice Common Law are actually closely regulated by statutory law. In countries that practice Civil Law, attorneys are not unmindful of the decisions that higher courts have handed down in previous cases, although they are not bound by them. In countries that formerly or currently practice Socialist Law, the legal system resembles more closely that in the Civil Law countries as communism breaks down as an ideological force. Sacred Law, in the form of Islamic law, is unique among the families of law considered because it is actually expanding in its original form as religious fundamentalism spreads in the Middle East. Even Islamic law, however, must coexist with commercial and other laws required by modernization and industrialization. Indeed, worldwide, increasing transnational business, research, and other enterprises provide the impetus for increasing integration of laws as shown by the European Union and International Criminal Court, discussed later.

The very real tendencies toward integration and amalgamation among legal systems will become more apparent as we consider the criminal process in various countries. Nevertheless, it is a mistake to assume that the heritage of the families of law is breaking down in large part. The fact is that the legal heritage in any country is closely tied to the political and administrative culture of that country, and these cultures continue to be distinctive in many ways.

Comparative Criminal Justice at the Movies

Movies seek to entertain and inform the audience about a story, incident, or person. Many good movies also hit upon important substantive themes relevant to understanding crime and justice in comparative perspective. Read the movie summary below (and watch the movie if you haven't already) and answer the questions below to make the subject matter connections to comparative criminal justice.

Slumdog Millionaire (2008)

Danny Boyle, Director

Winner of an Academy Award for Best Picture, this adaptation of a novel by Indian author Vikas Swarup, *Slumdog Millionaire* tells the story of Jamal (Dev Patel), a young man from the slums of Mumbai, India, who appears on the Indian version of the television show *Who Wants to be a Millionaire?*, in which the contestant can win up to a million dollars by answering a series of random questions correctly. Contrary to expectations, he does very well on the show, so both the game show host and law enforcement officials are suspicious that he might be cheating.

During an intense interrogation, Jamal relates through flashbacks that he knew the answers because of events that happened in his life. These events included the death of his mother and how he and his brother, together with a young girl, Latika, survived as orphans by living from trash heaps. They later escaped from a man who used orphaned children to beg for money, becoming separated from the young girl, but they go on to make a living, travelling on top of trains,

selling goods, picking pockets, and cheating tourists. Jamal and his brother eventually locate Latika (Freida Pinto) a few years later, discovering that she has been raised by a pimp in order to become a prostitute whose virginity will sell for a high price. After a series of scary situations, Jamal locates the young girl again, finding she is a mistress to a gangster. He professes his love to her and tells he will wait for her, promising to be at the train station every day at 5:00 pm.

Jamal then tries out for the popular game show *Who Wants to Be a Millionaire?*, because he knows Latika will be watching. He makes it to the final question, despite the show's hostile host, who feeds Jamal a wrong answer during a break. Jamal guesses that he has been misled and picks the right answer. At the end of the show, Jamal has one question left to win the grand prize, but the host calls the police and Jamal is taken into custody, where he is tortured as the police attempt to discover how a simple "slumdog" could possibly know the answers to so many questions.

Questions

1. Although this story is fictional, does Jamal's interrogation involve an issue of public or private law? What is the legal tradition in India?
2. Extracting information from crime suspects through interrogation has been a significant issue in recent years. Do any of the principles from the major legal traditions offer guidance in determining what the limits of such interrogations ought to be?

Critical Thinking Exercise

Critical thinking requires the ability to evaluate viewpoints, facts, and behaviors objectively to assess information and methods of argumentation in order to establish the merit of an action, law, policy, or procedure. Please evaluate this scenario objectively, applying your knowledge of comparative criminal justice to the facts of the case presented, and answer the questions that follow it.

Equal in China?

Beginning in late 2009, a local regulation explicitly guaranteed a victim's right to report domestic violence in Beijing. It is women who are predominantly the victims of such crimes, and the regulation was hailed as one of the country's latest steps forward in protecting women's rights. The new rules are Beijing's implementation of China's 1992 Law on the Protection of Women's Rights and Interests.

China issued its first edict on the subject, the Marriage Law, seven months after the People's Republic of China was founded on October 1, 1949, which clearly stipulated that husbands and wives were equals. The 96th article of the Constitution, promulgated in 1954, said that women were to enjoy equal rights with men in all aspects of life, including in political, economic, cultural, and social spheres and in family life. In 1968, Chairman Mao Zedong announced one of his most famous sayings, "Women can hold up half the sky." But it did not become less difficult for a woman to leave an unhappy marriage until 1980.

According to the 1954 Marriage Law, when only one party desired to end the marriage, divorce was only permitted if government mediation between the husband and wife failed. In practice, though, the mediation process after an unhappy wife filed for divorce could drag on for years, except in extreme cases, such as the commission of a crime by the husband. A new Marriage Law, issued in September 1980, introduced the option to file for divorce when only one person wanted to end the marriage. According to statistics from the Civil Affairs Department of the Hubei Provincial Government, the province's divorce rate tripled immediately after the new law took effect.

An amendment to the Marriage Law in 2001 added clauses to protect the interests of women, children, and the elderly. Since extramarital affairs and domestic violence have become issues of serious social concern, the amendment included new clauses governing bigamy, domestic violence, and maltreatment or desertion of a family member. These have been prohibited and married people are not allowed to cohabit with others.

Since the dawn of the new century, more and more people have come to realize that sexual harassment is not a morality violation but a crime. The amendment to the Law on the Protection of Women's Rights and Interests, issued in 2005, was the first to clearly prohibit sexual harassment against women. In 2007, at a sexual harassment trial in Shaanxi Province,

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the judge cited clauses from the 2005 law and ruled that the accused harasser should apologize to the female victim and pay her 15,000 yuan ($2,200) for mental damages. It was the first ruling to cite the women's rights law. Legal experts say that the addition of "respect for and protection of human rights" to the Constitution was an important step that led to the creation of the new sexual harassment law.

Questions

1. Why do you believe it has taken so long for women in China to obtain these legal protections, given the facts above?
2. What characteristics of the Socialist Law system would contribute to this situation?

SOURCE: Li, Li. (2009). "Becoming Equal," *Beijing Review*, vol. 52, 20–21.

DISCUSSION QUESTIONS

1. What are the chief differences between the Common Law and the Civil Law families?
2. Are there common features in the historical developments of the Common Law, Civil Law, and Socialist Law families?
3. Do you believe it is possible to balance the sometimes competing interests between the Islamic legal tradition with the pressures posed by modernization?
4. How do you believe indigenous laws have survived in the United States, given the expansion of legal authority at the federal and state levels in recent years?
5. If you were a political leader in a Socialist Law nation, how would you legislate to educate people about the law? What kind of behavior would be made illegal?

FOR FURTHER READING

De Cruz, Peter. (2007). *Comparative Law in a Changing World*, 3rd ed. London: Routledge-Cavendish.

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Roberson, Clif, and Dilip K. Das. (2008). *An Introduction to Comparative Legal Models of Criminal Justice*. Raton, FL: CRC Press.

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WEB PAGES FOR CHAPTER

For an excellent resource on indigenous and aboriginal law, see http://www.bloorstreet.com/300block/ablawleg.htm#8

For more historical background on the Common Law legal tradition, see http://www.svpvril.com/comcivlaw.html

For a comprehensive source on Chinese law, see http://www.chinatoday.com/law/a.htm

For information on Islamic Llw provided by LexisNexis, see http://www.lexisnexis.com/infopro/zimmerman/disp.aspx?z=1586

For a source on world nations and their different legal traditions see the University of Ottawa's JuriGlobe (World Legal Systems Research Group) at http://www.juriglobe.ca/eng/index.php