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6

Criminal Procedure

Key Terms and Concepts

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Chapter 6 Learning Objectives

Explore the major differences in criminal procedure among the various families of law.

Analyze the differences between adversarial systems and inquisitorial systems.

Explain the different types of constitutional review.

Describe how convergence has become the norm in criminal procedure in the legal systems around the world.

Identify the general forms of supranational court that deal with issues of human rights and international crime and criminals.

In 2010, an organization called the Trans-Border Institute in California reported that the criminal justice system in Mexico had recently introduced a series of constitutional and legislative changes to its criminal justice system. The changes included changes to criminal procedure law calling for new oral, adversarial procedures in the courts and a greater emphasis on due process rights for defendants, including the presumption of innocence and adequate legal defense (Trans-Boarder Institute, 2010).

Recognizing that legal aid is an essential element of a fair, humane, and efficient criminal justice system, the United Nations in April 2012 passed a resolution forming the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. This resolution includes 18 guidelines calling for improvements in criminal procedure law particularly related to right to counsel. Drawing from international standards, the guidelines "invite" member nations to address legal aid for defendants at all levels of the criminal justice process from arrest to sentencing, special legal aid measures for women and children, and nationwide legal aid systems and oversight (UN Economic and Social Council, 2012).

These two legal developments, both of which address the issue of legal defense, are examples of how criminal procedure rights are now finding a place of importance all over the world. They also reflect how certain ways of handling legal issues are being internationally accepted regardless of historical and cultural differences in how countries approach justice. Another term used to describe this sharing of procedure is *convergence*—a concept we will explore in more depth later in this chapter.

But for now let us explore why you should concern yourself with criminal procedural rights. Consider if you were accused of a serious crime in your country or even while abroad. Removed from home, family, and friends, you might be subject to humiliating, confusing, and painful treatment. Spending time in a jail or prison cell can have its particular horrors. Worst of all, when
accused you are fundamentally helpless to ac
whole power of a coercive, armed, authoritati
ment aligned against you. If you are innocent
crimes charged you may be especially vulnerab
you then are a threat to the superior power o

To mitigate this kind of situation in whi
duals have been treated unjustly by the gove
most legal systems have developed criminal
rules designed to redress to some extent the
imbalance of power between the accused an
In effect, the authorities are supposed to "pl
rules" rather than assert naked power when
with an accused person.

Protecting the rights of accused persons i
only reason that governments have rules of cr
cedure. Rules are necessary to guide the man
engaged in the criminal justice process, to co
certain predictability to the process, and to le
government's effort to maintain a criminal jus
In the highly bureaucratized society of today,
are a familiar way to frame legal processes an
discretionary power of law enforcement offi

Many criminal procedure rules are fami
icans because they are listed in the Constitu
cially in certain provisions of the Bill of Righ
past excesses against accused people, espe
and religious dissenters, the Founding Fath
ensure that the fledgling national governm
United States would not arbitrarily arrest, in
those accused of crimes without giving the
prove their innocence.Most of the America
accused actually existed in England prior to
ment of the American republic, and many
been incorporated into state constitutions.
procedure rules found in the Constitution i
right of habeas corpus, according to which
inform accused persons of the charges aga
justify their imprisonment. The rules also in
to be free from illegal searches and seizure
an attorney at trial and at various pretrial st

not to be tried twice for the same crime, the right to trial by jury, the right not to testify against oneself, and the right to reasonable bail. Many of these rights have been incorporated into laws in other countries and into international documents such as the United Nations Covenant on Civil and Political Rights or the European Convention of Human Rights.

In this chapter we examine the three major systems of legal procedure that historically and currently influence how defendants are treated in our model countries and throughout the world. These three systems are the adversarial, inquisitorial, and popular (mixed) systems of criminal procedure. We will also address how these systems apply to criminal procedure rules in our model countries and in international courts of law. Finally, we will discuss how governments decide on the legality of criminal procedure laws and the behavior of agents in the criminal justice system.

THE ADVERSARIAL SYSTEM

The **adversarial system** is a set of legal procedures used in Common Law countries to determine the truth during adjudication whereby the prosecution and defense counsel compete against each other while the judge ensures fairness and adherence to the rules. In the adversarial system, it is assumed that the truth will arise from the free and open competition over who has the correct facts (Reichel, 2013). The adversarial system, inspired by the Enlightenment period, was developed in the late 16th and 17th centuries when a series of treason trials in England led to calls for changes in the way the accused could defend themselves against the Crown. Allowance of defense counsel was actually the first step away from private vengeance and toward a trial system that would eventually come to be lawyer-dominated ("lawyerization") versus the prior lawyer-free system (Langbein, 2003; Volger, 2005). In European legal parlance, the adversarial system is also referred to as the *accusatorial system*.

The adversarial system is often compared to a game or contest in which both sides are trying to win and a neutral umpire decides two things: (1) whether they are playing by the rules and (2) which side wins. Often, the judge acts as umpire for both of these aspects of the contest. In some cases, the judge's chief responsibility is to make decisions that ensure a fair contest, while a jury declares the actual winner.

The analogy to a game is appropriate when describing an adversary system. Not only is the accused not obligated to cooperate with the government in a case, but the government may fail to disclose crucial elements of its case against the accused. This does not mean that the government has the right to ignore or suppress evidence that would help the other side in the case—only the accused has that right. But it does mean that the prosecutor, who represents the government, is expected to devote his or her efforts to proving guilt rather than potential innocence once an individual has been indicted and is moving toward trial. In the adversarial system, most of the procedural advantages are on the side of the accused. The right to an attorney, the right to remain silent, the right to be free of unwarranted searches and arrests, the right to compel witnesses to appear for the defense, the right to confront one's accuser, the right to appeal—these and other rules of criminal process help keep the prosecutor from automatically winning a case. These rules have been developed over centuries as a response to abuses of citizens by monarchs and governments in dealing with their citizens, and these rules recognize that arbitrary government action remains a real possibility.

Critics of the adversarial system are concerned that correct criminal procedure has become so extreme that predatory criminals who learn to manipulate the rules of the system are likely to win the game despite their obvious guilt. This problem has led to two major criticisms of the adversarial system. The first is called the *combat effect*. The combat effect allows for truth-impairing procedures to suppress and distort the truth, with the goal being to "win" the courtroom struggle. The second is the related problem of the *wealth effect*, which is the enormous advantage held by those who can afford to hire skilled attorneys and pay for investigators (Langbein, 2003).

However, critics of the adversarial system often do not take into consideration mitigating factors that counteract excessive manipulation of criminal procedure. In the first place, a vast majority of cases that occur in many Common Law countries such as the United States, Canada, India (since 2005), and England and Wales are settled through guilty pleas rather than through court trials. Students of criminal justice in the United States are well aware of the importance of **plea bargaining** and sentence bargaining in the settlement of criminal cases. In these cases, the accused agrees to plead guilty in return for various concessions, such as a lesser charge or a reduced sentence.

Another way to understand the adversarial system is to compare it to its philosophical opposite—the nonadversarial or inquisitorial system. Advocates of the adversarial systems of justice believe that the competition between the two parties is the best process for obtaining truth. Advocates of the inquisitorial system believe that judicial control of the investigative process is the best way to uncover the truth. These fundamentally different beliefs create the differences in the roles of witnesses, attorneys, and judges found in the Common and Civil Law systems (Spader, 1999, p. 119; Hodgson, 2005, p. 26).

THE INQUISITORIAL SYSTEM

The **inquisitorial system** has been a main model of criminal procedure for over 700 years and, although it is most commonly associated with Civil Law systems, it also has touched every legal system in the world. Without it, criminal justice professionals would be unable to conduct any serious criminal investigations.

One myth that has been propagated about the inquisitorial system as a major contrast between Common Law and Civil Law criminal proc
is that in the former the accused is innocent
proven guilty whereas in the latter the accu
guilty until proven innocent. This is indee
necessarily true, since both kinds of procedu
theoretically based on a presumption of inno
Nevertheless, the extensive pretrial investi
that characterizes Civil Law systems gives
the feeling that defendants who actually are b
to trial are most likely to be guilty.

Criminal procedure in Civil Law coun
characterized as inquisitorial, as opposed to
sarial, in nature. This characterization evokes
tunate images of the Inquisition, that notorio
cruel institution that persecuted alleged
during the 16th and subsequent centuries in
and other Catholic countries, extorting conf
through brutal tortures and executing its
often by burning. In fact, however, conf
resulting from torture were the norm i
England and continental Europe for sec
well as religious crimes until the right to
silent became the distinguishing character
the adversarial system of procedure.

What is closer to historical fact is t
inquisitorial system was actually developed
tect defendants against being wrongly conv
was believed that to protect defendants fro
wrongly convicted it was necessary to cond
guilty only if he confessed or if there was
dence of two eyewitnesses. The result
development of a complex body of laws t
ated an impediment to justice. The system
and tried to circumvent the laws by allowin
dants to be tortured as encouragement to
and the reputation of the inquisitorial syste
of torture began to grow (Delmas-Ma
Spencer, 2002, p. 9; Ambose, 2003). T
in modern Civil Law systems, the inq
system refers not to any legacy of the In
but to the extensive pretrial investigation a
rogations that are designed to ensure that
cent person is brought to trial. The inc
process can best be described as an officia
in contrast to the contest or dispute tha
terizes the adversarial process (Damaska, 1

The trial in the inquisitorial system is less like a petition and more like a continuing investiga- . As stated eloquently by Reichel (2013):

> The parties in the (inquisitorial) case must provide all relevant evidence to the court. The judges, not the attorneys for the plaintiff or the defendant then call and actively examine witnesses. In this way the inquisitorial system assumes that the truth can be—in fact, must be—discovered in an investigative procedure. (p. 130)

Like the adversarial system, the inquisitorial sys- s not without its critics. The main issues with the n arise from the extreme power of the judge at the investigative and the trial levels. Because of xtensive pretrial investigation, which the judge y oversees, the inquisitorial system is often criti- for delays in the system, including very long l detention for suspects. Another issue is that g the trial the judge must also balance previous ledge gained through the investigation that he guided with the need to maintain impartiality. out impartiality, the trial becomes merely a and affirmation of the pretrial investigation. problem is exacerbated by the fact that the in the inquisitorial system must actively guide al proceedings by protecting the interests of the ution and the defense (Van Kessel, 2002).

THE POPULAR (MIXED) SYSTEM

hird form of administering criminal procedure world is the **popular system**, or mixed sys- of justice. It is called "popular" because it is a that calls for the popular participation of s who are not necessarily criminal justice pro- als. Popular justice is the oldest of the proce- systems of justice, practiced long before the tion of modern societies, and it probably has ts in the magical as well as group resolutions mmunity disputes (Vogler, 2005, p. 197). nte groups, such as those that proliferated in the western United States in the 19th century and the south in the early 20th century, are infamous examples of this kind of unsanctioned justice. In most countries, popular justice has evolved to a fully acceptable system that has been integrated into the adversarial and inquisitorial systems. The best example of popular systems is the Anglo-American jury trial system; other, lesser-known examples include the *gacca* courts in Rwanda, the mass line in China, and the South African township courts (Vogler, 2005). The most recent advent of the popular system is the newly formed mixed jury system instituted in Japan (BBC News, 2009).

Currently, the popular or mixed system is a variation of criminal procedure that is used primarily in Civil Law countries but is also found in Socialist and Common Law legal systems. It is a method of adjudication in which one or more lay judges help the professional judge come to a decision. Lay judges are typical citizens, not professional legal personnel. They are usually elected (on the local level) or chosen by the government agency responsible for monitoring the courts. The lay judges either work as volunteers a certain number of days each year or serve a term prescribed by law. Their numbers vary depending on the seriousness of the case, the court level, and the laws of the country; they range from at least two to six.

In effect, the lay judges replace the full jury, providing the balance between the state, which acts against the accused, and the peers of the accused in considering the interests of justice and the community at large. It is possible in many systems for the lay judges to overrule the professional judge. However, in practice, lay judges often defer to the professional judge's knowledge and rarely muster a majority that overrides the professional judge's vote. Their main function seems to be a restraining one, to keep the judge from acting in an arbitrary or unreasonable manner.

The popular (mixed) system in Civil Law countries developed in the 19th century when some European countries attempted to imitate the Anglo-American criminal jury system. Such changes reflects the importance that Civil Law countries place on nonprofessional participation in the court process (Spader, 1999, p. 122).

Examples are present throughout the globe. In addition to Japan, Germany uses lay judges, called **Schöffen**, extensively in courts of appeal for cases of limited jurisdiction (minor offenses) and for first-level cases of general criminal jurisdiction (criminal offenses). Some countries employ all-lay tribunals. In this form, the courts usually have one person who is legally trained to work with and provide advice to laypersons in matters that are considered less serious or during administrative or arbitration hearings. China also employs lay judges, called *lay assessors*, in its people's courts to serve as adjudicators in serious criminal cases of first instance. Lay assessors in China must be 23 years of age and eligible to vote; they are either elected or temporarily invited to sit on the court. The United States and England also use a derivation of this method in their lower courts. Many small towns in both countries utilize a person called a **justice of the peace**, who carries out many legal functions, including adjudicating traffic violations, some misdemeanors, small civil claims, and some domestic matters. In England, in the lower magistrates' court, at least two lay judges must hear all summary (minor) offenses.

COMMON LAW CRIMINAL PROCEDURE

Although there is some variation from country to country, the core practices of criminal procedure in Common Law countries are very similar. Among the most common and important procedures are those related to the pretrial investigation and the rights to counsel, to remain silent, to bail, and to a trial by jury. Table 6.1 provides a comparison list of these criminal procedures for the United States and our other model countries. In the following section, we discuss these criminal procedures, using England as the primary example and, when applicable, the United States as a comparison country. But first we must refer to a larger procedural movement that seems to be occurring at least in Common Law countries.

That movement is called the "int
human rights revolution" that we
briefly in Chapter 3. From Canada
Kong, from New Zealand to Norther
Common Law and mixed legal systems (
Africa) around the world have taken se
call to reform how they protect and
criminals and support victims from a
sources. The models for such reforms
from the adoption of new and improve
evidence and procedural law based
rights–inspired innovation (Roberts an
2012). Individual countries, including
States, have provided the impetus for
ment along with international docu
have produced criminal procedure
such at the *International Covenant on Civ*
cal Rights, the *European Convention on H*
and more recently the various courts on
tional level that we will introduce later i
ter. The human rights movement has
ironically, from some of the same facto
caused the rise in transnational crime
opening of the borders and the vario
technology that allow us to know wha
ing on the other side of the world in s

Criminal procedure in England ha
some significant changes over the last 2
changes in the 1980s were the result
brought about to address the issue of
gation and detention related to terrorist
were prevalent in Northern Ireland dur
period. More recent changes are t
England's entrance into the European
their promise to meet the procedural
European Convention of Human
European Convention, like the U.S.
consists of a series of articles that addr
and freedoms evident in democra
Because of England's participation in
Union, England is obliged to follow th

The Right to Counsel

The 1586 trial of Mary Stuart, Q
clearly illustrates why denying the

TABLE 6.1 Essential Criminal Procedures for Model Countries and United States

	United States	England	France	Germany	China	Saudi Arabia	Japan
Investigation	Police send crime information to federal, state, or local prosecutor	Police or, in rare cases, individuals send charges to Crown Prosecution Service	Minor crimes and misdemeanors handled by police and prosecutor; felonies handled by the procurator and the *juge d' instruction*	Police investigate and give information to local judge or *Shöffen*	Public Safety Office or procurator or local court can initiate investigation, then give case to procurator	Private citizen or investigator can initiate then hand over prosecutable case to *quadi* (judge)	Police transfer cases to prosecutor for investigation; prosecutor can dismiss case before trial
Right to Counsel	Allowed at point where suspect is taken into custody	Legal advice is provided for all held suspects	Defendant required to have counsel at pre-investigation stage; can choose, or appointed if indigent	Allowed during detention or pretrial investigation	Allowed from the day case is transferred to procurator; indigent offenders provided with council (not guaranteed)	Allowed during investigation and trial stages; public defender appointed if needed; right to defend oneself or appoint counsel	Right to counsel; counsel provided to those who cannot afford it at point where suspect is taken into custody
Right to Remain Silent	Accused can remain silent throughout all steps of process	Can refuse to speak, but silence can be held against suspect	Accused can remain silent throughout all steps of process but expected to answer questions during trial	Accused can remain silent throughout all steps of process	Accused can remain silent, but silence is treated as admission of guilt	No right to remain silent; however, accused does not have to tell the truth	Accused can remain silent, but judicial system relies on confession
Right to Trial by Jury	Right to trial by jury in all felony cases	Right to trial by jury in indictable offenses	Right to trial by jury of nine or by judge and two lay assessors	No trial by jury; trial is by panel of judges	No trial by jury; trial is by panel of judges	No trial by jury	Lay assessors with professional judges for important cases
Right to Bail	Bail allowable but can be refused by judge	Bail allowable but can be refused by judge	Bail allowable at any time, but can be refused by examining magistrate	Bail allowable at any time, but can be refused by examining magistrate	Bail, at discretion of police, is allowable but not a right	Bail is granted for less serious crimes	Bail allowed for some offenses, but can be denied by judge at request of procurator
Kind of Procedural System	Adversarial and popular (justice of peace)	Adversarial and popular (magistrates)	Inquisitorial and popular (lay judges in assize courts)	Inquisitorial and popular (*Shöffen*)	Inquisitorial and popular (people's courts)	Inquisitorial	Inquisitorial and popular (new lay jurors as of 2009)

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counsel in a criminal case can lead to dire consequences for any defendant coming before a court of law. Queen Mary was charged with treason for allegedly conspiring to assassinate Queen Elizabeth I. Mary asked for the assistance of counsel, stating that "the laws and statutes of England are to me most unknown; I am destitute of counsellors … and no man dareth step forth to be my advocate." Her requests were denied, and Mary was convicted and executed by decapitation.

Events of this kind led to the Right to Counsel Clause, which served as a defense against the English practice of denying the assistance of an attorney in serious criminal cases and requiring defendants to appear before the court and defend themselves in their own words. Although some defendants were allowed counsel if they could afford it, not until the passage of the Prisoners' Counsel Act (1836) did felony defendants have the formal right of being represented by counsel in English courts. It was believed that the presence of defense counsel would only interfere with the arrival at the truth. Ironically, this rationale is closely aligned with the inquisitorial system of justice.

In the United States, the framers of the U.S. Constitution thought it essential that right to counsel be included as a basic right for all citizens in a democracy where the burden is on the prosecution to establish guilt of the defendant. For 150 years the right to counsel was interpreted to mean that a defendant had the *right* to retain a private attorney. That meant that an indigent defendant did not have the right to counsel. This changed in 1930s after the U.S. Supreme Court began to reverse this interpretation in *Powell v. Alabama* (1932), and was later refined more clearly in a flurry of cases in the 1960s, including the cases of *Gideon v. Wainwright* (1963), *Escobedo v. Illinois* (1964), and *Miranda v. Arizona* (1966).

The difference in the right to an attorney during the pretrial process illustrates how English criminal procedure is not as highly developed as American procedure. In England, with the passing of the 1999 Access to Justice Legislation, legal advice and representation are provided for all persons held for questioning (Joyce, 200
United States, the 1966 Miranda rulii
Supreme Court requires that a person b
into custody be informed of his or he
remain silent and to have an attorney.

To obtain some perspective on the
legal counsel around the world, we
Table 6.2 the most recent results from a
ducted by the World Justice Project (
WJP studied 66 countries on a variety
related to how they apply the rule of la
purposes we extract one category, Acce
Justice, because it includes, among nine
ables, the access to and affordability of
and representation. Our table includes
model countries included in the Project
ber of other selected countries. Take t
the WJP website to compare other
between countries at http://worldju
.org/sites/default/files/wjproli2011_0.p

The Right to Remain Silen

The right to remain silent provides the
for the adversarial system of criminal p
in Common Law countries. Although
back to the early years of the Comm

TABLE 6.2 **Access to Civil Just parison: Selected C**

Country	G
Norway	
Germany	
Japan	
United Kingdom	
France	
Canada	
United States	
South Africa	
China	
Pakistan	

SOURCE: Agrast, M., Botero, J., Ponce, A., (2011) *WJP R*
2011. Washington, D.C.: The World Justice Project. Our
Italics.

ght to protection against self-incrimination hieved its real definition during the period of reli- ous conflict in the 16th and 17th centuries. At t time, those accused of crimes were required take an oath to tell the truth without having en informed of the charges against them or of identity of those who had accused them. Reli- us dissenters called on to take the oath faced a ous problem. If they acknowledged their reli- n, they were subject to state sanctions. If they nied their religion, they were going against their science and, in their view, risking eternal ishment.

Some dissenters chose to deal with this emma by refusing to take the oath and refusing testify, claiming that the authorities had no right require individuals to testify against themselves. fortunately, many of them suffered severe pun- ents as a result of their refusal to take the oath. of the most famous of these dissenters, the an John Lilburne, defied both King Charles I Oliver Cromwell and became a popular hero ugh he was tortured and spent a large part of ife in prison or in exile.

Gradually, over many years and through the ge of many brave dissenters who incurred wrath of the authorities by their intransigence, custom of refusing to testify at all became com- and was finally legitimized by Parliament in latter 17th century. This hard-won right was cially precious to the American colonists, so many of them were the progeny of reli- dissenters, such as Quakers and Puritans, who made a new home in the American wilderness y, 1969).

Since passage of the Criminal Justice and Public er Act in 1994, the status of the right to silence England has been altered. Previously, the accused not be required to incriminate him- or her- and silence could not be taken to imply guilt. the passage of the act, however, it is now le to infer guilt from silence, so there is pres- on the accused to waive the right to silence being questioned by police (Philips, Cox, Pease, 1999; Delmas-Marty and Spencer, p. 25). To view the complete list of 2012 criminal procedure laws in England and Wales, see the website http://www.justice.gov.uk/courts/procedure-rules/criminal.

The right to remain silent remains at the heart of Common Law criminal procedure. The Fifth Amendment to the U.S. Constitution puts it this way: "No person … shall be compelled in any criminal case to be a witness against himself." Thus, the state must prove its case without the help of the accused if the accused chooses not to give that help. At its most basic level, the right to remain silent is designed to protect individuals against forced confessions obtained through torture, threats, or other undue pressures. It also means, however, that the accused can remain silent throughout the pretrial or trial phase of his or her criminal proceedings. In other words, the state must prove that an individual is guilty without the help of that individual.

The Right to Trial by Jury

Although the right to remain silent is the most basic element of the adversarial system, trial by jury is the most venerable of the Common Law procedures and is sometimes seen as the major English contribution to systems of justice worldwide. The origins of this right to be judged by a jury of one's peers (*judicium parium*) goes back at least to the concessions made by King John I to his nobles in the Magna Carta of 1215.

Trial by jury today is used less than previously in Common Law systems. On an aggregate basis, it is estimated that over 90 percent of criminal cases are settled through plea bargains in the United States, even though all felony cases are allowed to be tried by a jury. In England, 58 percent of defendants in Crown court cases plead guilty and 88 percent of those in magistrates' courts accept such a plea (Terrill, 2009). People accused of indictable offenses in England have the right to trial by jury in Crown courts, while summary offenses are heard in magistrates' courts without a jury. In reality, trial by jury remains only a small part of the English criminal justice system (Delmas-Marty and Spencer, 2002, p. 171).

In Common Law jurisprudence, a prosecutor has the obligation not to accept a guilty plea if there is no evidence to support it. However, once a guilty plea is accepted and made before a judge, no further trial is held. Most cases in other Common Law countries are also settled through guilty pleas, despite the claims of legal system personnel that no plea bargaining exists.

The Right to Bail

The right to bail is an interesting aspect of Common Law procedure. When the English Parliament in 1689 called upon the Dutch prince and princess, William and Mary of Orange, to assume the throne of England, it made the offer contingent upon their acceptance of a bill of rights that included, among others, the idea that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (Laing et al., 1950, p. 14). These words, which were echoed a hundred years later in the Eighth Amendment to the U.S. Constitution, exemplify the importance of bail to the concept of fair criminal procedure in Common Law history.

As stated in the Bail Act of 1974, bail in England is allowed for anyone who is not a fugitive from the law, who is accused of a crime that would not require imprisonment, and whose prior record or history of absconding are not an issue. In 1994, under the Criminal Justice and Public Order Act, the police were empowered to set bail and provide conditions of bail prior to the first appearance of the accused in court. Similarly, judges in the United States will deny bail if the suspect is a flight risk, has a prior record, or has committed a serious current offense.The possibility that bail could be discriminatory toward the poor has been cited as a potentially serious problem for Common Law systems. In Civil Law systems, the criteria for arrest are more stringent than in Common Law systems, but arrestees may be released "when the risk of release is worth taking … ; when the risk cannot be taken, release will not be ordered" (Mueller and LePoole-Griffiths, 1969, p. 24). In all systems, there is concern about the number of individuals who are detained "on remand" pending a trial. As
see, however, this is a greater problem in C
systems because of the long periods of
investigation.

CIVIL LAW CRIMINAL
PROCEDURE

Civil Law is the most common of all the
ditions, but there are numerous variations
nal procedure practiced within that
throughout the world. Here, we will us
as our model nation because French crim
cedure presents us with a characteristic C
process.

Criminal law procedure in France, r
that in England, has been under close sc
recent years and has undergone son
changes. Interestingly, some of the cha
been repealed either prior to coming int
immediately thereafter because they wer
to excessively increase the rights of crimi
dants and also to contribute to the increas
in France (Elliott, 2001; Delmas-M
Spencer, 2002, p. 220).For more about
of defendants in criminal proceedings
see the following (in English) web pag
e-justice.europa.eu/content_rights_of_d
in_criminal_proceedings_-169-en.do.

The Investigation

As mentioned in Chapter 4, the Fre
criminal offenses into three categories:
(felonies), (2) delits (serious misdemea
(3) contraventions (minor crimes). This
important to remember because the cate
offense affects the kind of investigatio
level of involvement by police and t
Minor crimes and misdemeanors are h
police investigators and prosecuting atto
onies, however, are handled through th
process of pretrial investigation (called i
that characterizes Civil Law systems. In t

we trace the process for the more serious felony category.

After a crime has been committed and a preliminary investigation has been undertaken, a suspect can be brought in for questioning called the **garde à vue**. This process was modified in 2011 after the Constitutional Council in France ruled it partially unconstitutional. The current process now states that any person can be held "who is suspected of having committed or attempted to commit a crime or offence punishable by imprisonment for one or more plausible reasons." Offenses punishable only by fines will no longer justify *garde à vue*, and only under special circumstances can a suspect be detained longer than 24 hours (International Law Office, 2011). After the *garde à vue*, the suspect must be released unless the judicial police officer (a member of the criminal investigation branch of the French police) believes there is enough evidence against him or her.

Once it is determined that the evidence is sufficient, the suspect is arrested and formally charged for the offense and then is bound over to judicial authorities. At this stage, the judicial police, the procurator, and the *juge d'instruction* proceed with the investigation. The **juge d'instruction** is the examining magistrate who is responsible for a complete and impartial investigation of the facts.

The pretrial investigation in France involves the calling of witnesses on both sides, extensive gathering of facts and testimony, and careful questioning of the accused prior to a final decision to bring the case to trial. Judicial philosophy in France demands that the accused be part of this process from the outset. In other words, suspects are not investigated by a prosecutor and then faced with charges to which they have not had an opportunity to reply in depth, as in the adversarial system.

In France, as in many Civil Law systems, this pretrial investigation is conducted *in camera* (in secret) by the *juge d'instruction*, with the help of police investigators and the procurator. The reason for secrecy in these proceedings is to protect the accused from adverse publicity prior to the determination that the government has a strong case for prosecution.

In some ways, the investigation is analogous to grand jury hearings in the United States, which are conducted in secret and in which evidence is weighed to decide whether the accused should be indicted. Grand jury hearings are usually short, however, dominated by the prosecutor, and designed to make sure that the prosecution will not be frivolous or willful. Thus, they are really quite different from the careful and lengthy pretrial investigation that occurs in France. After the investigation, the *juge d'instruction* forwards his or her findings to the Indicting Chamber of the Court of Appeals and then, if warranted, to the **courts of assize**, which are the courts of original jurisdiction in criminal matters.

It is in the courts of assize where the dossier becomes important. The **dossier** is actually a complete record of the pretrial proceedings, and it informs the judges, the defense attorney, and others about the testimony of key witnesses and the evidence to be presented. The judge who reads the dossier ahead of time knows fairly well what is going to happen during the trial. The accused, who has participated at each stage of the development of the dossier, also knows what is likely to happen at trial.

The purpose of the inquisitorial proceedings is to protect the accused against unwarranted accusations and trials. However, the potential for abuse in lengthy, secret pretrial proceedings is obvious. In effect, the accused may spend long periods of time in detention, often without possibility of bail, while these proceedings are going on. The power of individual magistrates to work in secret and to keep people incarcerated for long periods of time has come under increasing fire in France. In 2000 the French added a new "liberty and detention" (*juge des libertés et de la detention*) judge to help determine whether a suspect should be released prior to trail. A major change in the role of the *juge d'instruction* was proposed in [illegible] by then French President Sarkozy when he suggested that the role of the judge be turned over to the procurator (Terrill, 2009). This caused much consternation in France, and the matter is still not decided. It is now necessary in serious [illegible] the examining magistrate to present the charges to a Chamber of Instruction, which is now a permanent feature of the Courts of Appeal. Each of these reforms was designed to create greater oversight of magistrates' work and greater shared responsibility for arrest decisions.

The role of the investigation judge in France is not common among other Civil Law countries, especially in continental Europe. In fact the French have received much criticism from the European community about the length of pretrial investigations and the possible abuse of the office of the *juge d'instruction*.

The Right to Bail

The accused or the defense counsel can apply for bail at any time during the case, and the examining magistrate decides whether bail will be granted. The magistrate can order the suspect to pay a cash security. This serves two purposes: (1) to ensure that the suspect will appear in court and (2) to pay fines or damages if he or she is found guilty. The problem with bail in France is that it is so infrequently granted that most suspects spend a considerable amount of time in pretrial detention.

The Right to Counsel

Since 1897, French law has required that an attorney (advocat) represent the accused during the process of detention or pretrial investigation, with a modification in 1994 that now restricts access to an attorney if suspects are involved in terrorist activity. If the suspect cannot afford one, then one is appointed. The *juge d'instruction* may not ask questions of the accused unless this attorney is present, and the accused may not refuse assistance of counsel. Prior to June 2011, the suspect was allowed to see a lawyer for 30 minutes from the start of the detention, but under recent amendments to the law that have come into force, the lawyer may be present during the entire *garde à vue*, including during interrogation of the suspect. The right to counsel is even more stringent in Germany. As of January 2010, any suspect who is in pretrial custody must
be provided with counsel. For a 2011 deta
German criminal procedure laws (in En
the web page http://www.gesetze-im-in
englisch_stpo/index.html.

The mandatory representation by a
in Civil Law countries is actually contr
spirit of pretrial investigations in the i
process. Originally, the preliminary in
was to be an informal process that wou
the need for further system intervention.
argued that mandatory counsel has onl
lengthen and add unnecessary formality
cess, especially in France. This contrary
another example, however, of how Co
and Civil Law criminal procedure have
are in reality often more similar than di

The Right to Remain Sile

In addition to requiring the presence of
French law requires that the accused be
his or her right to remain silent durin
proceedings. Since reforms made i
police must also inform suspects that
either to talk or to remain silent. De
have the right to withdraw any pretri
This right, so integral to the adver
represents another modification of th
procedure. However, it does not ha
that the similar right has in Commo
tries, and the presumption on the par
is that the accused will cooperate in
tion by answering questions and raisi
might help in the defense. If the accu
make a statement later at the trial, he
under oath, as in Common Law pro
not subject to cross-examination.

Any confession in the pretrial or
treated as part of the evidence includ
sier. This is a major difference from m
Law countries, especially in the Unite
plea bargaining is the norm. In fa
Europe even if the defendant admits
is expected to examine the evidenc
Although this would appear to creat
uncontested cases, different mechani

loped in Civil Law countries to ensure the swift essing of cases. For example, since 2004 in e there has been a procedure of plea bargaining d the *ordonnance penale)* whereby the defendant appear in court following a prior admission of that may only be made with the assistance of a er. The presiding judge reviews the genuineness facts and their legal classification before regis- the declaration of guilt made by the defendant he penalty suggested by the prosecutor (*procur-* The judge cannot alter the suggested sentence must accept or reject it. The procedure is only le in respect of cases with a maximum sen- of five years imprisonment. The French equiv- of plea bargaining.

The Germans have created a process called *fehlsverfahren* in which the prosecutor gives suspect a proposed penalty—a kind of nego- settlement—which is imposed unless the ant objects. Plea bargaining in this form is on practice in 20 to 30 percent of German l cases and in 2011 was incorporated into rman Code of Criminal Procedure. (Dubber, p. 550; Turner, 2011).

Right to Trial by Jury

most other Civil Law countries, including ny, France has not abandoned trial by jury. French jury concept was borrowed from on Law systems and has been used in felony the Courts of Assize since the 19th century. er, the jury trial is modified to allow for interchange between the judge and the ry members. In this way it is like most w systems because it allows for considerable ment by lay assessors.

e trial judge in France (called the *president*) is referee than in adversary systems and more icipant with a responsibility to discover the t the court of assize level, in addition to the judge, there are two **assessors**, profes- dges selected from other courts to sit in on Judges question witnesses and defendants, further investigation if necessary, and ask dditional witnesses. Jurors can also question witnesses and the accused if they ask permission from the president. While judges have many of these powers in Common Law systems, the tradition in these systems is for the judge to be disengaged and impartial, rather than proactive and involved as in Civil Law systems. One should remember that use of jury trials is unusual in Civil Law countries. What is more likely is the model used in Germany, in which all adjudication is handled by a judge or a panel of judges, consisting of professional judges or a combination of professional and lay judges.

The major variation on the French procedure that is not found in other Civil Law countries is the extensive use of an examining magistrate, or *juge d'instruction*. A second difference between French criminal procedure and other Civil Law countries is the use of jury trials. As mentioned earlier, the French use jury trials in the courts of assize. By contrast, Germany has no jury trials.

SOCIALIST CRIMINAL PROCEDURE

Criminal procedure in most Socialist Law countries is similar to, and derived from, criminal procedures in Civil Law systems. Thus, criminal procedures in these countries have generally reflected the Civil Law and inquisitorial systems in that state procurators investigate crimes, thorough pretrial inquiries are the norm, and judges take an active role in the trial process. However, there are many differences in the way criminal procedure is practiced in Civil Law and Socialist Law systems. To understand these differences in context, we turn to our model country of the People's Republic of China.

Chinese legal culture, like that of Japan, traditionally has been heavily influenced by Confucian philosophy, stressing informal means of settling disputes and valuing social harmony above individual justice. For years, therefore, China had little or no concern for individual rights, which would have limited the rights of the group or the power of the state (Baker, 1982). Given this philosophy, China operated without a code of criminal procedure for the first 30 years following the Communist takeover. However, the political upheaval of the Cultural Revolution forced the Chinese government to implement changes.

During the Cultural Revolution, the legal system was in shambles and the Ministry of Justice was abolished. Many people, including Communist Party officials, were arbitrarily harassed, punished, and even executed. To control the excesses—and also make the legal adjustments necessary to accommodate a new economic vision—the National People's Congress (NPC) adopted its first Criminal Procedure Law (CPL) in 1979. The CPL, developed over two decades, contained 164 articles covering all stages of the criminal process, from initial detention through investigation, prosecution, trial, appeal, and execution of sentence.

During the 1980s and early 1990s, it became increasingly clear to the Chinese that the 1979 CPL was an ineffective law. Despite three *yanda* campaigns and compromises in the 1979 CPL that lead to reductions in procedural rights, crime continued to increase. The economic reforms and opening to the outside world created new kinds of crimes and complex legal needs that were not addressed in the current criminal laws and criminal procedures. At the same time, international criticism of the Chinese relative to their human rights policies began to mount, especially after the events at Tiananmen Square in 1989. In 1996, the NPC addressed the issue by developing a new Criminal Procedure Law of the People's Republic of China (revised CPL). The law became effective in 1997. The 225 articles in the document contain amendments and additions to the 1979 CPL (Trevaskes, 2007).

In March 2012 the Chinese revised their Procedural Law to reflect what we described earlier as the "human rights revolution." More specifically, the legislature revised the CPL to include the phrase "respecting and protecting human rights" in its first chapter on basic principles as well as other modifications to follow in areas related to the right to remain silent and to legal aid (Judicial News, 2012a, 2012b). These changes do reflect a new move for the Chinese toward the acceptance of international treaties and the "human rights revolution" that we described earlier. In this section, we will examine sor
major elements of the criminal procedure
China as they relate to the major procedural
in the Common and Civil Law traditions.
should keep in mind three things. First, it is
whether the rules listed in the CPL have in
implemented throughout the criminal justi
and are available for all Chinese citizens.
keep in mind that the criminal procedures
tries that employ the Socialist Law traditio
China, North Korea, and Cuba, may vary
ably due to changing economic and politica
And finally, we do not yet know how
changes in the CPL will impact the Chinese
and their government's approach to the ru

Pretrial Investigation

Once a crime is committed or alleged, it i
to the public service agency (police), the p
or the court. After a brief preliminary inves
it is determined that the matter warrants fu
involvement, the case is filed and an in
conducted by the police or the procura
police investigate, they submit an opi
whether to prosecute or to exe
prosecution.

They then transfer the case to the
who reviews it and decides whether to
In the revised CPL, victims can ask the
to file the case if the police neglect to do
can choose to privately prosecute if the
refuses to accept the case (Articles 83 and
latter situation, the victims, legal represe
close relatives have the right to prosecute
the people's courts.

The Right to Bail

Bail is more restricted in China than in
countries. The revised 1996 CPL prov
detained suspect can apply for and r
but he or she is not entitled to this right.
maintain complete discretion over
approve the application for counsel, an
sory measures can be placed on defe

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trial out of custody. The CPL does state that ent suspects in criminal cases are to be provided with legal aid (Lawyers Committee, 1996, ; Terrill, 2009).

The issue of bail is a very important one to re in China because it is related to pretrial tion—an area in which China has gained a derable amount of unwanted attention in the ational community. The 1979 CPL autho- five forms of pretrial detention, each of has come under fire as illegal or improperly mented. However, the main problem over ars has not been with those five, but with a f detention unauthorized and unstated in the alled "taking in for shelter and investigation." and investigation was originally developed 1960s as a policy to round up migrants and them to rural areas. However, over the years, lice have greatly expanded its use to detain kinds of criminals and those suspected of l subversion. Reportedly, persons have detained under this policy without formal r procurator approval for months and even The most infamous example of people d under this policy was the arrest and detain- f over 2,000 citizens for their involvement in 89 Tiananmen Square demonstration. More , the April 22, 2012, escape of blind legal defender Chen Guangcheng from 19 months wful detention in Shandong province, and equent temporary relocation to the United highlighted the alleged abuse of the legal to persecute those seeking redress for rights abuses. During his detention, Chen family—including his wife, Yuan Weijing, elderly mother—were targeted with physi- nce by local government officials and secu- rces and denied their constitutionally ed rights of freedom of movement, expres- d association (Human Rights Watch, 2012).

1996 CPL addressed all five forms of pre- ention and also led indirectly to changes in of shelter and investigation. In short, there en some positive advances in curtailing the area of pretrial detention in China. r, the changes in the revised CPL leave some gaping holes, and in practice they apparently fail to meet various international standards (Lawyers Committee, 1996).

The Right to Counsel

The modified 1996 CPL stated that all defendants have the right to defend themselves or to appoint someone to defend them, and that for indigent criminal offenders, "economic difficulties" are grounds for the "optional appointment of a defender" (Article 34). Another important modification is the time at which counsel is allowed to enter the case. The current law states that the defendant is allowed counsel from the day when the case is transferred to the procurator for a decision to prosecute (Article 22).

Although these changes seem significant, they have some serious limitations. One problem is that the terms "economic difficulties" and "optional appointment of counsel" lack clarity, and implementation can be left to the discretion of those with the power to permit and provide free counsel. Further, counsel at the investigation stage is limited and can be blocked if it is determined that the case may involve "state secrets." As a result, many Chinese may be unable to exercise this important right.

Unfortunately, the limitations stated within Article 34 that pertain to the right to counsel cause it to fall short of the UN Basic Principles on the Role of Lawyers, adopted in 1990 (Lawyers Committee, 1996, pp. 41–43). The UN document clearly states that all persons are entitled to a lawyer of their choice to protect them at all stages of criminal proceedings.

The Right to Remain Silent

Article 35 in the Chinese CPL reads that the defender shall present, according to the facts and law, materials and opinions proving the innocence of the criminal suspect or defendant, as well as any need for a mitigated punishment or exemption from criminal responsibility. Article 93 states that when interrogating a criminal suspect, the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and let him state the circumstances of his guilt or explain his innocence; then they may ask him questions. The criminal suspect *shall* answer the investigators' questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case [emphasis added]. These two articles make it clear that in China it is extremely important that criminal defendants provide and protect their own rights and interests. Further, it would appear that to remain silent during criminal proceedings in China would not be the best way to secure freedom and in fact could lead to a longer period of incarceration or in some cases the penalty of death. At the same time, the CPL also states that it is a prosecutable offense not to give evidence where one has knowledge about the circumstances of the case (Article 38). So then there is some responsibility on the part of the defense lawyer and even the prosecutor to assist in the verification of evidence.

We should keep in mind, however, that the May 2012 changes in the CPL do include amendments relative to the right to remain silent and right to legal counsel. Time will tell us more about when and how these changes will be implemented.

The Chinese Trial and Judicial Fairness

At the standard Chinese trial, the procurator represents the interests of the state and the defendant or legal counsel represents the interests of the defendant. Most cases of first instance are heard in public unless the case involves state secrets or private disputes. Because jury trial does not exist, a panel of judges, whose number is determined by the court level, comes to a verdict. Judicial decisions are determined by majority rule. There is no separate sentencing phase to a proceeding; sentences are handed down immediately after the verdict. The judge or judges have access to material about the defendant's previous criminal history and his or her life situation.

In the trial, more emphasis is placed on the confession of the defendant than on the testimony of witnesses. Witnesses usually do not even have to appear before the court and thus are unavailable for challenge from the defense. Instead, witnes
submit written testimony prior to the tria
issue has been addressed but not changed
revised CPL (Articles 42–47). The judge c
an active role in questioning and guiding tl
the prosecutor and the defendants or thei
representative can present material and deb
their own behalf, and the decision is mad
panel of judges. In a review of the steps
typical Chinese trial, we can see a number
larities to other Civil Law countries. A full lis
trial steps in the typical Chinese trial is gi
Table 6.3. Take some time to peruse thes
and compare them with what you know
trials in the United States.

According to the revised law (Article 1
subsequent interpretations by the Supreme F
Court, the trial judge(s) can only conduct a
dural review prior to the trial. As a result, the
tigative duties of the judge now apply durin
than before the trial. The goal here is to elin
major problem with Chinese criminal prc
prior to 1997—the determination of guilt
the trial even begins. A common phrase
explain this process was "decision first, trial

According to the revised CPL (Artic
and 162), trial judges and the collegial pan
have the authority to determine the verd
sentence based on majority rule except in
or important cases, which are decided by th
cial Committee. This amendment was cre
promote an essential system of checks a
ances. However, we must remember t
members of the Judicial Committee are ap
by the NPC and nominated by the presi
the court, who is usually a member of the
munist Party. As a result, the independenc
court system is in question because ultima
sensitive political decision will be contro
the party (Liu and Situ, 1999).

The criminal procedure elements d
here are just a few of the key issues and
that have been promulgated by the revis
of 1997. Even with the improvements
CPL, critics argue that the Chinese are f
meeting international standards when it c

, witnesses c
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changed in t
judge can ta
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TABLE 6.3 Steps in a Typical Chinese Trial

1. The procurator reads the bill of prosecution in court.
2. The defendant replies to bill of prosecution.
3. The victim can make a statement about the charges in the bill of prosecution.
4. The procurator can question the defendant.
5. With the permission of the presiding judge, the victim, as well as the plaintiff and defender in an incidental civil action, can question the defendant.
6. Judges can question the defendant.
7. With the permission of the presiding judge, witnesses and then expert witnesses are questioned by the procurator, parties, defendants, or defense counsel. The presiding judge may halt the line of questioning if he or she deems it irrelevant to the case. The parties and defendant have the right to request that new witnesses be summoned to the session, that new material evidence be collected, that a new expert evaluation be conducted, or that another inquest be held. The collegial panel rules on the merits of each request. If the request is granted and the hearing postponed, the procurator is granted one month to complete the supplementary investigation.
8. Judges can question witnesses and expert witnesses.
9. Procurators and defendants present material evidence in the court.
10. The statements of witnesses who are not present in court are read. If the court has any questions about the evidence presented, it can adjourn in order to verify the evidence.
11. The procurator, victims, defendant, or defense counsel present their opinions, which are heard by the judges. They all can debate the quality of the evidence and facts in the case.
12. After the presiding judge has declared the debate concluded, the defendant has a right to present a final statement.
13. The presiding judge announces an adjournment, and the collegial panel begins its deliberations. Potential decisions include these:
    - a. If the facts are clear, the evidence adequate, and the defendant guilty by law, the court should pronounce a verdict of guilty.
    - b. If the defendant is found not guilty by law, the court should pronounce a verdict of not guilty.
    - c. If the evidence is insufficient, the defendant cannot be found guilty. The court would pronounce a verdict of not guilty on the grounds that there was a lack of evidence or that the charges were not substantiated.
14. Judgments are pronounced publicly in court. The judgment indicates the time limit for appealing the decision and the appellate court to which the appeal should be directed.

Adapted from Terrill, 2009.

actual implementation of procedural law (Lu and Miethe, 2002). For a full English version of the criminal procedure laws in China, see the link http://en.chinacourt.org/public/detail.php?id=2693.

Distinctive Aspects of Socialist Law Procedure

What is it that distinguishes Socialist Law criminal procedure from Common and Civil Law procedure? In Common Law and most Civil Law systems, the tendency is to be protective of individual rights. In Socialist Law systems, by contrast, the major emphasis is on the public's interest. This is clearly reflected in Article 1 of the 1996 Chinese CPL, which states:

> *The Criminal Procedure Law of the People's Republic of China is formulated in accordance with the constitution of the People's Republic of China in order to correctly carry out the criminal law to punish crimes, protect the people,*

> *safeguard the state security, ensure the public safety, and maintain the social order of socialism.*

In other words, the collective is more important than any one individual, and individual rights are tempered by the need to further the cause of communism. As a result of this philosophy, the concept of separation of powers, with an independent judiciary, is subordinate to the ideal of the sovereignty of the state. Guarantees regarding rights of the accused are always subject to the needs of the state. Further, as we discussed earlier, in socialist China there are much broader pretrial detention possibilities, defendants have limited rights to counsel, and procurators enjoy extensive discretion. Even so, with the 2012 revisions to the CPL there will soon be, at least in theory, some significant changes in how defendants are treated in China.

Finally, another major difference is that in Common Law and traditional Civil Law systems all kinds of crimes are dealt with in the same procedural fashion. By contrast, in China, cases seem to be handled differently depending on whether they are political or criminal cases. Political cases, which are often the only ones publicized in the West, appear to lack many procedural standards, giving the impression that the accused have few rights and that the criminal justice system in China is highly political. Even though this may be true, conventional criminals, those who commit violent and property crimes, typically are processed according to rules that are largely similar to those used in Western Civil Law–type systems.

SACRED (ISLAMIC) CRIMINAL PROCEDURE

As we discussed earlier in this book, there are some countries that base their legal tradition on some form of sacred text or principles and are referred to as Sacred Law countries. Most of these Sacred Law legal traditions are located in the Middle East, where some deference is made to Islamic law. We choose to focus here on the Islami
tradition, more specifically that of Saudi
because that tradition and that country pro
with the best method of understanding c
procedure within the Sacred Law legal tradi

Islamic law is most visible in Iran, Saudi
Sudan, Pakistan, and Afghanistan. Of those
tries, only two (Saudi Arabia and Sudan) ca
ally say that their criminal justice systems a
on Islamic law, while a few others (Iran, P
and Afghanistan) try to retain vestiges of Isla
despite the social and political forces that are
the convergence with other forms of law.

The question of rights of the accused in
law has been debated by both Islamic an
Islamic scholars. Saudi Arabia's reaction to i
tional criticism and to documents such as t
Universal Declaration of Human Rights is t
that the universal principles of the Qur'an
humans better than international treaties a
ventions. The prevalent opinion amongst c
porary Muslim lawyers is that "traditional
law affords human rights protections to cr
accused comparable to those recognized in
international law" (Amin, 1985a, p. 35).

Organizations such as Humans Right
would disagree. They have regularly
yearly reports stating that Saudi Arabia has
a number of international standards relative
inal procedure, including the use of arbitra
the use of detention without trial, a secreti
nal justice system, and a number of violati
tive to cruel punishment. Abuses ha
exacerbated by the Saudi antiterrorism
and some blamed on al-Qaida sym
Women also continue to face severe discri
although there is some evidence that wo
gaining some political rights in Saudi Arab
specifically, women will be able to vote in
elections in 2015 (Anderson and Togeli
Human Rights Watch, 2012b).

There are really three sources of p
laws in Saudi Arabia: those implied in th
(Shari'a) law, those implied in the 1993 B
and those more clearly stated in the 2001
Law of Criminal Procedure.

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The Islamic or Shari'a law is, in theory, used as form of criminal procedure before the Shari'a urts. Technically, the Shari'a does not provide a tailed list of procedures for the courts to follow t instead offers general principles as stated in the ur'an. Such phrases as "God commands ... if you dge between people, to do so with justice" (4:58) d "in your devotion to God ... bear witness partially; do not let hatred of others lead you ay from justice" (5:8) are examples of how procedure is in theory applied from the Qur'an. The amic (Shari'a) law also sets penalties and provides dance for developing proof of the commission of mes (Belal, 1993; Crystal, 2001). How the details criminal procedure are actually implemented in ctice is left to the particular jurisdictions and r court systems. As long as the decisions by inal justice officials are informed by Qur'anic ciples and the Islamic (Shari'a) law, it is felt by y traditionalists that there is no need to have a iled list of procedures to protect criminal ects.

The second source of procedural protections suspects is the 1993 Basic Law. As we discussed Chapter 4, this law with its 53 articles serves as an mal constitution and spells out the government's rights and responsibilities. It is grounded in idea that the government of Saudi Arabia is d on the premise of justice, consultation, and ity in accordance with the Islamic Shari'a" le 8). The Basic Law provides some broad meters for criminal procedure, such as Article which declares that the government should ect human rights in accordance with the a," and Article 36, which states that "no one be arrested, imprisoned, or have their actions cted except in cases specified by statutes."

To fill the holes in the Shari'a and the Basic , in 2001 the Saudi government enacted the formal Law of Criminal Procedure (LCP). law, originally described in a document called Protection of Human Rights in Criminal Proe and in the Organization of the Judicial Sys- contains 225 articles, laying out the process for itiation of criminal action; rules of collecting preserving evidence; conditions of arrest and pretrial detention, including bail; and the jurisdiction of courts and their proceedings (Ansary, 2008; Royal Embassy of Saudi Arabia, 2012). It also includes a judicial code of law that regulates procedures for the licensing and appointment of lawyers, and their rights and duties. These laws gave Saudi citizens and residents a clearer definition of their rights in detention and at trial and laid out the procedures the investigators and courts must follow. For a detailed view of criminal procedure law in Saudi Arabia, see the web page http://www.wipo.int/wipolex/en/text.jsp?file_id=214810.

We will now describe how Sacred (Islamic criminal procedure addresses some of the same key procedural issues as our Common, Civil, and Socialist Law countries.

Investigation

Similar to the processes in many Common Law and Civil Law countries, there are two common ways to initiate a criminal investigation in Saudi Ara As stated in Chapter 1, in the Law of Cr Procedure a victim or his heirs may initiate cr action to a competent court. The *quadi* (judge then use his judgment whether to formally pro cute the matter. The second is for any one of range of government agencies to conduct a cr investigation with the assistance of the inv If the investigator deems the evidence aga accused to be sufficient, he will refer the m the respective court and *quadi*, who issues a mons for arrest if the suspect is not already d

The Right to Bail

Islamic jurists have argued at length about the of guarantees that should be allowed for accused and then detained for crimes. A preventive detention is recognized by Islam as legitimate if circumstances call for it, at the time judges generally respect the right of vidual to be free (Awad, 1982, pp. 102–103). is essentially the same standard that is ap Civil Law nations. In short, there is a bai in Saudi Arabia, but it is generally only ap those accused of less serious crimes. A number of articles in the Law of Criminal Procedure, especially in Chapters 8 and 9, deal with length of detention prior to formal accusation or trial. For example, if a suspect is detained, notification of the reasons for detention should be prompt: "Whoever is arrested or detained shall be promptly notified of the reasons for his arrest or detention, and shall be entitled to communicate with any persons of his choice to inform him (of his arrest or detention), provided that such communication is under the supervision of the criminal investigation officer" (Article 116). In practice however, and as documented in many instances by international organizations, procedural laws related to bail and pretrial detention are often violated in Saudi Arabia (Human Rights Watch, 2012b; 2008).

The Right to Counsel

The right to counsel may be the best example of the difference between what is theoretically possible and what really occurs in the Saudi criminal justice system. Historically, the accused was expected to take charge of his own legal defense. But with the passing of the new Criminal Procedure Law, this was supposedly modified. According to Chapter 1, Article 4, "Any accused person shall have the right to seek the assistance of a lawyer or a representative to defend him during the investigation and trial stages." However, it appears that not everyone involved in the Saudi system enjoys the benefit of right to counsel. Two stories anecdotally support this position:

> On January 9th, 2009, Saudi Arabia's Supreme Court ordered a retrial of Mohammed Kohail, a Canadian who had been sentenced to death over the accidental death of a Syrian man in a schoolyard brawl. The judge of the Jeddah court that condemned Kohail to death had prevented his lawyer from appearing to defend his client during proceedings and had not allowed the defense to present evidence at trial.
>
> On November 9th, 2009, a courtin Medina sentenced Ali Sibat, a Lebanese
> Shi'a, to death for sorcery, based on Sib
> prior work in Lebanon as a fortunetell
> on a satellite TV station. Sibat had no
> lawyer. (Human Rights Watch, 2010)

In these two cases, it appears to inter
observers that foreigners are at a particular d
tage in Saudi courts. They often have no
secure legal counsel and are themselves oft
rant of the substance of charges against th
lack knowledge about the arguments an
dures taking place inside the courtroom.

However, despite the many negativ
about the fate of suspects who unsuccessf
counsel in Saudi Arabia, there is some good
speak of. In early 2010 the legislative *Shur*
in Saudi Arabia approved the establishm
public defender program. The program
court-appointed lawyers at the state's e
be made available to any criminal defen
cannot afford one (Human Rights Watc

The Right to Remain Silent

The Saudi Law of Criminal Procedure
provide a person with the right to be sil
has been documented that suspects wh
participate actively in their investigatio
may be subject to poor treatment a
(Human Rights Watch, 2008).

Interestingly, when testifying, the ac
not have to tell the truth. Further, if an
confessed, he or she may retract the co
any time, and it cannot then be used as
a court. These procedures approximate
in Civil Law nations. Here again, howev
situation is not always clear, since
obtained by force or by deceit ma
(Awad, 1982, pp. 106–107).

The Right to Trial by Jury

No lay assessors are used in trial pro
Saudi Arabia. The Law of Criminal P
Saudi Arabia does call for trials to be
public. However, this is often the exce
than the rule in Saudi justice. The *quadi*

to justify exclusion of outsiders—they may be excluded if it is deemed necessary to determine the truth, to protect the privacy of the parties, or for the sake of morals (Moore, 1987; Terrill, 2009). This is in obvious contrast to Common Law and Civil Law systems, in which it is common for the trials to be public.

In summary, while the Saudi system does include many protections for those accused of crime in a variety of legal documents, it does not emphasize this aspect of the justice process to the extent found in most Common Law or Civil Law legal systems. In light of the constant criticism from the international community about abuses within the criminal justice system, Saudi Arabia is apparently making some efforts to improve, at least on the surface, its treatment of alleged criminal offenders.

JAPAN: THE HYBRID SITUATION

As we explained in Chapters 3 and 4, the Japanese system of criminal justice is distinct in that it has been so largely influenced by the Civil Law, Common Law, and Chinese Confucian traditions but at the same time has retained a distinctly Japanese flavor. This flavor reflects a Japanese society that is characterized by strong adherence to patterns of deference, group norms, and group loyalties, as opposed to individualism and legalism. These patterns are reinforced in the justice process through extensive use of discretion that diverts cases from the process, development of informal methods of resolving disputes, and pressure on individuals to avoid the formal justice system in dealing with their problems. Therefore, describing the formal rights of the accused in Japan does not convey the full picture regarding these rights. For example, even though the right to remain silent is present in Japan, confessions are essential to system functioning and correctional rehabilitation. As a result, there is a wide range of tools for obtaining confessions in Japan for both police and prosecutors (Foote, 2002). Bail can be requested by the accused, by his or her counsel, or by the relatives of the accused. But the judge may seek the opinion of the procurator before approving bail. Also, a variety of categories of suspects are excluded from bail (Terrill, 2009, p. 354). These examples of the difference between theory and practice do not negate the fact that the formal law as stated in the Code of Criminal Procedure still guides most of the Japanese criminal process.

> The Japanese Constitution of 1946 contains important provisions regarding criminal procedure. Articles 31 through 40 give the impression that Japanese citizens have all the constitutional rights of the accused that exist in the United States. Indeed, the language of several of these articles is very similar to that found in the U.S. Constitution. The differences indicate in some cases the different procedural practices that existed in Japan prior to the war and in other cases the progression of thought that has occurred in the more than two centuries since the U.S. Constitution was written.

Article 37 of the Japanese Constitution covers much of the same ground as the Sixth Amendment to the U.S. Constitution but includes the proviso that counsel will be provided for those who cannot provide it for themselves. In the United States, this right to counsel for the indigent exists only through interpretation. It was not incorporated into the meaning of the Sixth Amendment until [illegible], in the case of *Gideon v. Wainwright* (372 U.S. [illegible]). Article 37 reads:

> *In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.*
>
> *He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense. At all times the accused shall have the assistance of competent counsel who shall*

> *if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.*

Another point worth noticing in the language of Article 37 is that it makes reference to an "impartial tribunal" rather than an "impartial jury." This difference reflects the fact that trial by jury was abandoned in Japan in 1943. However, this is not the end of the story when it comes to trial by jury in Japan. In 2001, a report by the Criminal Justice Reform Council created a stir by recommending that Japanese justice look to increase citizen involvement. The result in 2009 was the formation of a new "mixed" system in Japan that was to include lay assessors in the criminal trial process by May 2009. These lay assessors, called **saiban-in**, assist the professional judges in serious cases in which there is considerable public interest. The judges and the *saiban-in* make up a panel and hear witnesses, examine evidence, and eventually decide whether a suspect is guilty. A three-year review of the new lay-judge system has received positive reviews, and it now is being considered for inclusion into civil trials in Japan (Wilson, 2012).

Aside from having no full jury, trials in Japan are very similar to those in the United States. They are open to the public, and after the judge provides the defendant with his or her rights, the procurator and the defense present their cases. After the trial is concluded, both parties (procurator and defense) have the right to appeal to a higher court. The vast majority of trials in Japan end up with a guilty plea by the defendant.

Plea bargaining does exist in Japan even though defendants in Japan can technically neither plead guilt nor waive their right to trial. Plea bargaining happens in the following way and is likely to happen even prior to any formal trial. First the prosecutor and the suspect or his attorney discuss the options. If the suspect accepts the "deal" made by the prosecutor, he will then confess. Finally, the prosecutor does as promised. Plea bargaining in Japan is unlike that in America in several ways. First, there are far fewer plea bargaining cases in Japan. Second, plea bargaining is more consensual in Japan. Japanese prosecutors are also far less like
to try to significantly increase the punishment if t
offender goes to trial. Finally, the attitude of t
offender in Japan is more likely to be remors
than in the United States (Johnson, 2002, p. 2

Vestiges of inquisitorial procedure re
despite the elaborate American-style proce
rights found in the Japanese constitution and i
1948 Code of Criminal Procedure. The judge
tinues to be actively involved in questioning du
the trial stage, and the prosecutor continues to
duct a detailed pretrial investigation of the case.
Japanese prosecutor, however, has considerably
discretionary powers to dismiss cases than his c
nental European counterparts. This power, simil
the power of the American prosecutor, act
allows for affirmation of the Japanese norm of a
ance of formal judicial processes. To mitigate
discretionary power of the prosecutor however,
Japanese made another significant change to
criminal procedure system in 2009 when
adopted a new grand jury system called the *Ke*
Shinsakai, or Prosecutorial Review Comm
(PRC). Like the *saiban-in* system, the PRC a
for more citizen participation in the system thr
the formal criminal prosecution of a suspect w
prosecutor previously decides not to indict (Hi
2011). To see a full version of the Japanese Cri
Procedure Law, last revised in 2006, see the fo
ing web page: http://www.wipo.int/wipole
text.jsp?file_id=214810.

Japan's ability to borrow from the differen
traditions of the world while retaining its own
mores appears to have resulted in a very suc
criminal justice system. But it is possible that Ja
criminal procedure, and the Japanese criminal
system in general, will undergo some changes
the next decade. Some research has shown th
concern for individual rights is beginning t
greater acceptance in Japan (Upham, 1987). In
tion, there is a movement afoot to restore th
system in Japan. Some scholars and lawyers fe
adding a jury will better protect the assump
innocence, improve human rights, and "inject
of the community's common sense into the

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, 2002, p. 24
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CONSTITUTIONAL AND SYSTEM REVIEW

> "Laws of justice which Hammurabi, the wise king, established ... That the strong might not injure the weak, in order to protect the widows and orphans ..., in order to declare justice in the land, to settle all disputes,and heal all injuries."

quote from the Hammurabi (Babylonian) Law e of 1772 BC illustrates that the movement to ect the rule of law and those under the hand of imate governments is not a new phenomenon. t least 4,000 years, the importance of the rule of and justice for the less empowered has been the and not the exception around the world. ortunately, however, not all countries and cery not all public criminal justice officials subscribe is ideal. So what happens, then, if there is some tion as to whether a country's criminal process or the behaviors of those in the criminal justice m are valid?

Countries use a variety of methods to deal with question. For example, in the United States the er to make such decisions falls on the Supreme rt. In general, however, we can conclude that are four methods used in the world today: dicial review, (2) no review, (3) nonjudicial w, and (4) judicial review with legislative val. In this section we describe the four ways briefly describe how the model countries han- his issue of constitutional and system review. a summary of the constitutional review procedures in our model countries, see Table 6.4.

Arrangements for Constitutional Review

first method used by governments to decide constitutionality of procedural laws and the macy of actors in the system is through the use of judicial review. **Judicial review** is of a court to review actions and legal made by those in the criminal justice sys cial review truly can be described as an institution that, because of its success, adapted by many other nations of Much of the push toward adoption review came after World War II, as many nations broke away from the colonial had controlled their governments and l up systems of their own. In countries preoccupied with governmental reforms, institutions provided a particularly attra Judicial review is the most commonly form of review in the world today, 40 percent of political systems using th

TABLE 6.4 Constitutional Review Procedures in Model Countries

Country	Forms of Constitutional Review	Constitutional Review Institutions or Arrangements
England	Judicial review	Supreme Court of the United Kingdom has judicial review powers and serves as highest court of appeals.
France	Abstract review	The Constitutional Council, not a court, reviews on request the constitutionality of legislation
Germany	Judicial review	The Federal Constitutio Court has review powe for constitutional issue review of division of powers.
Japan	Judicial review	The Supreme Court judicial review pow
Saudi Arabia	Judicial review	High Court will ha appeals on proced lower courts.
China	Nonjudicial review	The National Peo Congress and Sta Committee perfo judicial review of People's Court.

In our model countries, Germany and Japan have been using their own form of judicial review for 60 years. England and Saudi Arabia have also recently moved toward judicial review with the formation of new high-level "supreme"-type courts.

No Review

The most obvious alternative to conventional judicial review is no constitutional review. Historically, many systems based on written constitutions, such as the series of French constitutions from 1792 to 1958 and the constitution of Germany's Weimar Republic, have not provided for constitutional review. Another historical example is the former Soviet Union.

How do countries without provision for constitutional review address possible problems with criminal process and behavior of those in the system? In effect, it is not a large problem because a certain respect for basic constitutional arrangements exists in most democratic governments, even those without a written constitution or one that specifically mentions judicial review. For example, in Australia judicial review has become a de facto reality, although it is not provided for in the constitution. This is, of course, also the case in the United States.

In nondemocratic regimes, the matter is moot, since there is little concern for constitutionality in any case. An example of a nondemocratic country without constitutional review is China. Actually, the Chinese have developed formal mechanisms to serve the functions of judicial review. At the apex of that system is the Supreme People's Court. This court is responsible for administration of justice by lower courts, and it handles major criminal cases of national importance and cases on appeal from lower-court levels. In reality, however, the Supreme People's Court does not have the power to conduct any serious form of judicial review of constitutional issues or inappropriate behavior of those in the system. This responsibility is solely the bailiwick of the National People's Congress (NPC) and its Standing Committee. The NPC was discussed in earlier in Chapter 4. It elects and oversees all major officials in the government, approves the budget, develops economic and social development, makes laws, and amen
enforces the constitution. However, beca
the short time the NPC is in session—onl
weeks—the Standing Committee of the NP
dles the full-time governmental responsibilit

The Standing Committee consists of abo
full-time members, including the leading g
ment officials and influential members of the C
Communist Party. The NPC and Standing C
tee can annul any law or court decision if th
them to contravene the constitution, legal stat
administrative rules and regulations. Althou
may seem rather benign, the fact is that all m
of the Standing Committee are subordinate
Chinese Communist Party and all initiatives p
by the NPC and Standing Committee mu
been previously endorsed by the party. T
role of the NPC and Standing Committe
implement party policy. In summary, then,
say that the Chinese practice most resembles
judicial form of constitutional review.

Nonjudicial Review

Another alternative to judicial review is th
lishment of a nonjudicial constitutional
agency to resolve issues of constitutionality.
adopted this alternative in its 1958 Cons
which provides for a nine-member Consti
Council. The French system is known as a
constitutional review because the council
on issues of constitutionality without hearin
cases that have arisen under specific laws.
review essentially means that the council gi
sory opinions rather than judgments in cas
it is not a court, it seems logical that the
would be engaged in abstract review.
review may also be practiced by a court
hears concrete cases, as is the case in Gern

Judicial Review with Legislativ Approval

Another form of judicial review is to have
tional decisions by a supreme court su
approval by a legislative body. This arra

amends an
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he NPC ha
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ists in India, where constitutional amendments y be passed with the approval of two-thirds of th houses of parliament. Thus, an unpopular or acceptable decision of the Indian Supreme Court garding the constitutionality of legislation may be llified with relative ease (McWhinney, 1965; ppelletti, 1971).

In theory, it would be possible to set up other ngements for constitutional review. For exam-, subcommittees of parliaments, committees of er statesmen, representatives of the various nches of government sitting as a constitutional nmittee—all are possible agencies for constitu- al review. These bodies can practice merely ract review, or it might be possible to let them case-based review with respect only to the con- tional issues in particular cases. The fact is, vever, that such agencies do not exist.

THE CONVERGENCE OF SYSTEMS

country develops its own code of criminal pro- ure at least partially as a result of its own history, we would have to scrutinize them all to identify he differences among them. The classification adversarial and inquisitorial systems, however, s to be increasingly a matter of style and history r than one of major differences in procedure. l Law countries, even those in Latin America have in the past held tightly to the principles nquisitorial justice, have adopted many of the of procedure that protect the accused from rary action by the state (Vogler, 2005, p. 173). y Civil Law countries have also begun to show ncreasing prominence of attorneys during trials, concomitant diminishing of judicial authority, a in emphasis from the pretrial to the trial phase, the reduced reliance on the accused as a source estimony (Van Kessel, 2002). Common Law ntries have modified the excesses of the adver- system by allowing for pretrial investigations, llowing judges to participate more actively in s, and by making various arrangements for avoiding trial through the use of plea bargains an various forms of mediation.

Convergence can also be seen in Sacred an Socialist legal systems. In Saudi Arabia, Islamic la reflects the inquisitorial system through stron cooperation between the judge (*quadi*) and th investigator. In addition, the defense attorney less adversarial than in Common Law trials. At th same time, Islamic law includes provisions for th right to confront accusers and even to remain siler for the presumption of innocence. And it can b argued that Chinese may actually have move from a strict inquisitorial to a semi-adversari mode by changing the role of judges to a les authoritative role, allowing questioning and cross examination to be handled more by the prosecu- tion and the defense, and allowing suspects mor access to lawyers earlier in the process (Liu an Situ, 2001; Trevaskes, 2007).

There are many reasons cited for the increase convergence in the area of criminal procedur including the growing influence of internationa law and supranational courts (Hodgson, 2005). I fact, those courts are currently the best and cleare examples of the convergence of criminal procedur in the world today (Ambos, 2003). Other fre- quently cited reasons for convergence include th failure of domestic systems of justice in democrat countries; the increasing openness to global per- spectives; and the many cultural, economic, an political changes throughout the world (Van Kesse 2002). The end result of convergence seems to be certain homogenization of criminal procedur among the legal traditions. This process was pre- dicted by legal scholar John Merryman ove 25 years ago when he wrote of the blending o the inquisitorial and adversarial systems:

> *In a sense, it can be said that the evolution of criminal procedure in the last two centuries in the civil law world has been away from the extremes and abuses of the inquisitorial system, and that the evolution in the common law world during the same period has been away from the abuses and excesses of the accusatorial system. The two systems, in other words, are*

> *converging from different directions toward roughly equivalent mixed systems of criminal procedure. (1985, p. 134)*

BEYOND CONSTITUTIONAL REVIEW: SUPRANATIONAL COURTS

What happens when a citizen within a particular country has exhausted all the legal means of redress but still feels that his or her rights have been violated by the criminal justice system? And how do we address the issue of international or transnational criminality that occurs within or across borders? Special criminal courts and courts of human rights have been developed to address such situations. Because these courts and their decisions cross national boundaries and supposedly have a higher legal standing than decisions of courts in individual countries, they are often referred to as international or **supranational courts**. With the explosion in worldwide communications, the globalization of the economy, and the increase in international problems related to crime and justice, supranational courts are developing at a rapid pace. There are three general forms of supranational courts. The first are international courts that have been commonly known and accepted as internationally as legitimate. These include the International Court of Justice and the International Criminal Court. The second are supranational courts that are ad hoc tribunals that been developed for a specific purpose, have a narrowly defined jurisdiction, and are meant to be temporary. Examples of these are the International Criminal Tribunals for Yugoslavia and Rwanda.. The third and final type of supranational criminal courts is **internationalized courts**. Internationalized courts, also called mixed tribunals or hybrid courts, operate with the support of the United Nations to prosecute those responsible for crimes against humanity, war crimes, and violations
of domestic law. These courts are gener
located in places where the crimes occ
they utilize law and judges from the inter
and domestic jurisdictions. There are a nu
these courts active around the world today,
ing the Special Court for Sierra Leone and t
cial Tribunal for Lebanon. We will
supranational courts in more detail in Ch
But first we conclude this chapter with a b
cussion about criminal procedure in three
courts. The International Criminal Court
the International Criminal Tribunal for Yu
(ICTY) and the Special Tribunal for L
(STL), are examples in each of the three f
supranational courts. In Table 6.5 we provi
of key criminal procedure rules that are use
three courts as well as web pages that you c
up more closely compare the three courts.

The ICC was brought into force th
multilateral international treaty in 2002
power to investigate and prosecute seriou
tions of international human rights law
and Angermaier, 2005). The Rules of
Procedure and Evidence were passed in
part of the Rome Statute to serve as the
rules for ICC judges and lawyers to follow
the prosecution of offenders. The rul
formed from a variety of sources, incluc
United Nations Covenant on Civil and
Rights, procedures followed in criminal
of the ICC during the 1990s, and ideas fro
tries with Common Law and Civil Law pro
The procedural rules do have aspects of
adversarial and inquisitorial systems of
although some argue that too much em
placed on the latter system (Volger, 2005,
Walker, 2004). Although many of the crim
cedure rules of the ICC are similar to oth
national courts such as the tribunals, the ru
in at least three ways. First, a party calling
in the ICC may not meet with this witnes
his or her appearance in the court. Thi
called witness proofing is common, but I
best to protect witnesses and avoid

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ABLE 6.5 Key Steps of Criminal Procedure for the ICC, the ICTY, and the STL

estigation

Prosecutor must determine whether "there is a reasonable basis to proceed with an investigation." (ICC

If the prosecutor intends to initiate an investigation he or she must first submit to the pretrial chamber a request for authorization of an investigation and any supporting material collected. (ICC)

The pretrial chamber shall authorize the investigation if it considers that there is a *reasonable basis* to proceed and that the case appears to fall within the jurisdiction of the Court. (ICC)

The prosecutor may summon and question suspects, victims, and witnesses and record their statements, collect evidence, and conduct on-site investigations. (ICTY, STL)

The prosecutor undertakes such other matters as may appear necessary for completing the investigation and for the preparation and conduct of the prosecution at the trial and will provide for the safety of potential witnesses and informants. (ICTY, STL)

The prosecutor may seek assistance from any State authority concerned or from any relevant international body, including the International Criminal Police Organization (Interpol). (ICTY, STL)

to Counsel

Office of Public Counsel for the defense provides legal representation and protects the rights of the suspect during the initial stages of an investigation (ICC).

All suspects or accused persons are guaranteed free choice of counsel under the Rome Statute. Counsel must be provided without payment if the person does not have sufficient means to pay for it. (ICC)

Suspect has the right to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel. (ICTY, STL)

Counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. (ICTY, STL)

Defendant has the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it. (ICTY, STL)

to Trial (No trial by jury of peers)

The trial chamber (professional judges) determines the innocence or guilt of the accused. (ICC)

Trial must be held in public hearings, unless special circumstances require that certain proceedings be in closed session. (ICC, ICTY, STL)

to Remain Silent

Suspect has right to remain silent, without such silence being a consideration in the determination of guilt or innocence. (ICC, ICTY, STL)

Suspect shall not be compelled to incriminate himself or herself or to confess guilt. (ICC, ICTY)

Suspect has the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence (ICC, ICTY, STL).

to Bail

shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except grounds and in accordance with such procedures as are established in the Rome Statute. (ICC)

Rules of Criminal Procedure for ICC at http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rules+of+Procedure+and of Criminal Procedure for ICTY at http://www.icty.org/sid/136; Rules of Criminal Procedure for Special Tribunal for Lebanon at http: cuments/rules-of-procedure-and-evidence/rules-of-procedure-and-evidence contamination. Second, victims in the ICC are viewed as full participants in the trial, not merely as witnesses. Finally, the Rome Statute that formed the ICC calls for victim reparations (Nerlich, 2011). In each of these it is clear that those that developed the procedures for the ICC were very intent on protecting the rights of victims.

The criminal procedure rules for the International Criminal Tribunal for Yugoslavia (ICTY) were formed in 1994 but since that date they have seen 46 amendments; the most recent came in August 2012 when the court decided on a new rule for the nondisclosure of witness identities for protection reasons (UN-ICTY, 2012). The Special Tribunal for Lebanon (STL) is an example of a recently formed internationalized court. inaugurated on March 1, 2009, for the pur prosecuting and holding those persons resp for the February 2005 attack that killed 23 including the former prime minister of Le The procedure rules have been amende times since their adoption in 2009; the most changes were made in February 2012 to seve of the court, including major changes in rights and participation (STL, 2012). A pe the procedure laws of the ICC, ICTY, and well as other supranational courts, suppo position we stated earlier that there has been vergence of criminal justice systems in decades.

SUMMARY

We have seen how all law systems have gradually developed a series of procedures designed to make certain that accused persons are not treated unfairly or arbitrarily by the government that has jeopardized their well-being by accusing them of breaking its laws. We have also seen how, over time, there has been a large degree of convergence among various families of law with respect to the rights of the accused. This convergence has been influenced by the evolution of the concept of human rights that occurred chiefly in the 20th century and has led to the development of international law and international courts.

By considering the different traditions in our model countries, we have been able to develop some sense of the way that criminal procedure controversies are handled in other modern systems of justice. Civil Law criminal procedure is still largely defined by statute. The inquisitorial process is concerned not with procedural intricacies but with truth-finding in a fair and expeditious manner. In the Common Law, however, the guarantees of protection for the accused historically have been integral to the whole concept of adversarial procedure. Socialist procedure is in many ways similar to Civil Law procedure. Although Socialist Law theory emphasizes the collective good rather than judicial independence or defendants' rights, the law inal procedure is designed to provide predi and fairness in the criminal justice process, a nonpolitical cases. Sacred (Islamic) Law crimi cedure has historically relied on the criterion ness and justice to secure these rights, recent changes in procedure have begun the system more formalized. It continues fewer guarantees regarding the rights of the than either the Civil Law or the Comm Popular (mixed) systems of justice are ava all legal traditions except in the Sacred Law where *quadi* justice dominates.

When actors in the system inadequately the accused, special mechanisms are availab systems to force officials to maintain co with this higher law. These mechanisms may tively simple, consisting largely of higher co have the mandate to adhere to the highe actual cases, or they may be complex, involvement by other structures of govern other judicial officials. Recently, internation called supranational courts have been forme justice beyond borders. There are three of supranational courts: international, tribu internationalized courts.