

33 Judicial Systems

Every society requires authoritative rules to govern it. Without rules of behavior that are enforced, social order quickly turns chaotic. Aristotle famously stated that human beings isolated from a system of “law and justice” are the “worst of animals,” but subject to law and justice they are the “best of animals.”

Institutions that identify and apply legal rules (law) are known as *judicial systems*; democracies, like other systems of government, realize order and preserve civilization through these systems. Judicial systems consist of courts and allied institutions. The primary task of the judges and similar officials (“the judiciary”) who operate judicial systems is to apply law to cases brought before them. In doing so, all democracies strive for a “rule of law,” though they do so in differing ways.

The powers of courts differ with the type of legal system being considered. In some systems, any court, or in others a special court established for the purpose, may be empowered to decide upon the consistency of statute law with the country’s constitution and to invalidate law found inconsistent. Under the American judicial system, for example, all courts are empowered to decide upon the “constitutionality” (consistency with the U.S. Constitution) of a law, with the U.S. Supreme Court having the final say, unless an amendment changes the Constitution or Congress changes a law.

Whatever their structure and powers, the judicial systems of democracies play a key role in allowing democracy to function peacefully within a legal framework which seeks to apply equal justice for all under a rule of law.

Functions of judicial systems

Judicial systems perform some or all of the following functions:

- **Apply legal sanctions to those who violate law** Courts determine the guilt or innocence of those charged with breaking the law and apply legal sanctions, such as fines or imprisonment, to those found guilty.
- **Allow checks against judicial error** Modern democratic judicial systems include a hierarchical court structure in which decisions of lower courts can be appealed to higher courts. In some systems appellate (higher) courts deal with all types of cases, both civil and criminal; in others, specialized appellate courts deal only, for example, with civil, with criminal, or with constitutional cases. Appellate features of judicial systems are designed to allow higher courts to redress the errors of lower courts.
- **Resolve conflicts between private parties** In noncriminal cases, known as “civil cases,” courts are forums in which private parties can resolve disputes, such as types of personal injuries, breach of contract, and the like.
- **Administer the enforcement of certain legal decisions** In some instances, courts may administer legal decisions. If an institution is found guilty of some infraction, courts may oversee the process of the institution’s compliance with the remedy ordered by the court.

- **Create law** Sometimes courts create law through the binding character of their decisions (mainly in common law systems, though some civil law systems to a degree also follow precedent).
 - ▶ Common law courts reach decisions in civil (noncriminal) cases by applying rules and principles found in previous cases that are like the case being decided. In some cases, this is also true of criminal law. Sometimes such applications are novel and have the effect of new law, since future courts often follow previous decisions. Abiding by previous decisions is expressed by the principle of *stare decisis*, which means to “let the precedent stand.”
 - ▶ Traditionally, the courts in civil law systems have had no such powers and are to adhere strictly to statute law. Studies of courts in civil law systems today, however, have found they do sometimes follow precedent.

- **Interpret statutory and constitutional law** The Supreme Court of the United States was historically among the first courts to claim the power to declare null and void (invalid) law it found contradicting constitutional law. (Prior to the U.S. Constitution’s adoption in 1787, a number of courts of the newly independent states declared laws unconstitutional under state constitutions.)
 - ▶ This power is known as “*judicial review*.” In nullifying “statute law” (laws passed by a legislature) the U.S. Supreme Court treated constitutional law as superior law that takes precedence over law created by legislatures.
 - ▶ Today many countries have adopted some version of judicial review, for example, Australia, Canada, India, France, Germany, and some Latin American countries. The practice of “judicial review” is spreading to the legal systems of other countries.

Types of judicial systems found in democracies

Contemporary democracies have two principal types of judicial systems—*common law* and *civil law* systems. The former are found in England and in former British colonies, such as the United States and Australia.

- **Common law and civil law systems**

The main distinction between common law and civil law systems is that

- ▶ common law systems are conceived to be based in part on *experience*. This experience is embodied in previous decisions whose rulings are to bind future decisions.
- ▶ civil law systems are often conceived to be based on *legal codes* embodying *logical consistency*.

■ **Common and civil law systems compared**

Because of the basic difference between the two systems,

- ▶ common law systems have traditionally been far more open to change from judicial decisions than civil law systems.
- ▶ civil law systems, by contrast, insist that judicial decisions adhere closely to written law. Where problems arise from the language of the law, the remedy in civil law systems lies primarily in *changing the law*, not in the creation of the “judge made law” as found in common law systems.

What do you think?

- 1 How do the principal functions of their judicial systems help democracies to flourish?
- 2 What is “judicial review”? Is it compatible with constitutional democracy? Why or why not?
- 3 Do you prefer a judicial system with “judicial review” or one without this power of the courts? Why?
- 4 What are the principal differences between common law and civil law judicial systems?
- 5 What are the advantages and disadvantages of each of these types of judicial system?