Judiciaries

1. Types of Law

DEF: *positive law That is written by humans and accepted over time, the opposite of natural law*

There are five major branches of positive law:

CRIMINAL LAW

Modern criminal law covers a specific category of wrongs that are considered social evils and threats to the community. The state is the plaintiff or prosecutor.

Offenses are usually divided into three categories:

* Petty offenses that are punished with a fine ex. traffic violations.
* Serious but not major offenses that are punished by a bigger fine or short sentence ex. prostitution.
* Felonies that are punished by imprisonment ex. rape, murder or extortion.

In the U.S some criminal offenses are federal, and other are state concerns, but crimes can also be both.

CIVIL LAW

Civil law (*noncriminal disputes among individuals*) provides redress for private plaintiffs who can show they have been injured. The decisions are in dollars, not in jail time and private individuals conduct litigations.

CONSTITUTIONAL LAW

DEF: *that which grows out of a country’s basic documents*

Written constitutions are usually general documents. Subsequent legislation and court interpretation must fill in the details.

In the United States, the ultimate responsibility of interpreting the Constitution rests with the U.S. Supreme Court.

The Constitution had not changed, but society’s conception of individual rights did. Constitutional law is not static but a living, growing institution.

ADMINISTRATIVE LAW

administrative law covers regulatory orders by government agencies, it develops when agencies interpret statues, and they begin to build up a body of regulations and case law that guides the commission in its future decisions.

INTERNATIONAL LAW

International law consists of treaties and established customs recognized by most nations.

It is different because it cannot be enforced in the same way as national law: It has some judges and courts, but compliance is largely voluntary.

Its key mechanisms are reciprocity (*mutual application of legal standards*) and consistency (*applying the same standards to all*)

Modern legal systems are written and largely codified. Putting laws in writing makes them more precise and uniform. Codification began in ancient times and has been a major feature in the development of civilization. The Ten Commandments and the Code of Hammurabi were early law codes, but the great ancient code was Roman law.

The Code of Justinian is the foundation of most of Europe’s modern legal systems. Modern European law is based on an amalgamation of Roman, feudal, and church law.

1. **The Courts, the Bench and The Bar**

Judicial systems are always hierarchical with different courts having specific jurisdictions.

* 1. **The U.S Court System**

The U.S. court system consists of fifty-one judicial structures: the national system and fifty state systems.

The federal courts hear many cases in which the issue is one of state laws, but the parties are residents of different states, the so-called “diversity jurisdiction.” Also, of course, they hear cases concerning federal laws.

THE NATIONAL COURT STRAUCTURE

The ninety-four federal district courts form the base of the U.S. national court system. They serve as trial courts in civil suits arising under federal law, criminal cases involving federal infractions, and the diversity jurisdiction. Most criminal cases, however, even those involving federal law, are tried in state courts.

Federal district court decisions can be appealed to a U.S. court of appeals.

The thirteen courts of appeals consider only whether the law has been misinterpreted or misapplied.

The pinnacle of the federal court system is the U.S. Supreme Court, consisting of one chief justice and eight associate justices. The Court will generally not hear a case unless it involves a constitutional question or some significant point of federal law. Because the U.S. system is based on precedent, the Court’s ruling is national law.

THE STATE COURT SYSTEM

Each of the fifty states has its own court systems. Most of their cases are civil, not criminal. Generally, state trial courts operate at the county level and have original jurisdiction in all civil and criminal cases.

* 1. **Judges**

FEDERAL JUDGES

Federal judges are nominated by the president and must be approved by the Senate. To free them from executive and political pressure, they may serve for life unless impeached.

The attorney general lists eligible candidates; as vacancies occur, the president selects a few names from that list. Senate approval used to be routine but is now highly political: Presidents now appoint judges of their own political party who share their judicial philosophy.

Ex. Bush 43 appointed conservatives as several vacancies occurred on the Supreme Court. In this way, his conservative legacy lived long after his presidency. President Obama appointed two liberal women justices in an attempt to counterbalance the conservative tilt. Partisan polarization has thus entered even the judicial branch.

STATE JUDGES

State judges are either popularly elected or appointed, for terms ranging up to fourteen years.

Both parties often nominate the same slate of judges so that the judicial elections have become largely nonpartisan.

Governors appoints judges from a list given by a bipartisan nomination commission; later, they are subject to a retention vote after they have been on a bench a number of years. Some argue that elected state judges turn into crowd-pleasing politicians with shaky judicial skills.

1. **Comparing Courts**
   1. **The Anglo-American Adversarial and Accusatorial Process**

English and American courts are passive institutions: they wait until a law is challenged or a defendant is brought before them. The system operates on an adversarial (*system based on two opposing parties to a dispute*) and accusatorial basis (*like adversarial but with a prosecutor accusing a defendant of crimes*).

the plaintiff must demonstrate how and in what ways the defendant has caused damage. During the trial, the judge acts as an umpire. Both parties present their evidence, call and cross-examine witnesses, and try to refute each other’s arguments. The judge rules on the validity of evidence and testimony, on legal procedures, and on disputed points. After both sides have presented their cases, the judge rules on the basis of the facts and the relevant law.

One weakness of the adversarial system is that the decision often goes to the side that can hire the best attorney. Thus, money may tilt the scales of justice.

* 1. **British Courts**

Britain’s court system is divided into civil and criminal branches.

SELECTION AND TENURE OF JUDGES

British judges are nominally appointed by the monarch, but the choice is really the prime minister’s, based on recommendations of the lord chancellor of House of Lords.

British judges have lifetime tenure and are above politics. With the adoption of the European Convention on Human Rights in 2000 judicial review was introduced in the system.

THE LAWYER’S ROLE

In Britain, the government hires lawyers to prosecute crimes. Lawyers can be divided into solicitors, who handle all legal matters except representing clients in court and solicitors, who do defend the client in court.

**3.3 European Court System**

European courts are heavily based on the Code Napoleon, and they do not have separate criminal and civil division.

THE EUROPEAN INQUISITORIAL PROCESS

Judges play a more active role: the prosecutor is an official who forwards evidence to an investigating, a representative of the justice ministry who conducts a thorough inquiry, gathering evidence and statements. These European magistrates first make a preliminary determination of guilt before sending the case to trial.

In European criminal procedure, the decision to indict is made by a judge, and the weight of evidence is controlled by the court. In code-law countries, the accused bears the burden of having to prove that the investigating judge is wrong.

THE LAWYER’S ROLE

The trial lawyer does not question witnesses; the court does that. Instead, he or she tries to show logical or factual mistakes in the opposition’s argument.

* 1. **Courts in Russia**

Russia’s legal system has continued much of the Soviet legal structure because most personnel were trained under the Communists. Now Russia is struggling to build “rule of law,” including concepts such as property law and civil rights. In 1991, a Constitutional Court with fifteen justices was established, the first independent tribunal in Russian history. It can theoretically rule on the constitutionality of the moves made by the president and the State Duma. Nonetheless, crime is still rampant in Russia.

Putin used legal-looking procedures to get rid of opponents, who were charged with embezzlement or tax evasion and sent to prison for decades. Rule of law was never established in Russia, and democracy died.

1. **The Role of the Courts**

Judicial review is more highly developed in the United States than in any other country.

* 1. **The U.S Supreme Court**

The U.S. Supreme Court’s power to review the constitutionality of federal legislative enactments is not mentioned specifically in the Constitution and has been vehemently challenged.

Judicial review was first considered and debated at the Constitutional Convention of 1787. Delegates suggested that, when in doubt, legislators might call on the judges for an opinion on a proposed law’s constitutionality.

In the twentieth century, the doctrine was used extensively. The court itself, however, has always been divided on how it should be used.

Judicial “activists,” have argued that the Supreme Court must be vigilant in protecting the Bill of Rights. Advocates of judicial “restraint,” have argued that only Congress should make public policy and that unless a legislative act violates the Constitution the law should stand.

The courts that followed have been more cautious, reflecting the fact that most of their members were appointed by conservative Republicans. In recent years, conservative justices have mostly favoured restraint, though that was not always true.

1. **The Supreme Court’s Political Role**

The U.S. Supreme Court plays an important political role. Personal beliefs and ideology loom large in their decisions, raising the question of whether the Court can be an impartial dispenser of justice.

* 1. **The Views of Justices**

The justices’ personal convictions influence their decisions. Historically, Supreme Court justices used to be WASPs upper- or upper-middle-class males. Radical critics claimed that such judges could not appreciate the situation of the poor or oppressed. That picture has greatly changed.

Many factors affect the justices’ rulings. They are older, averaging close to 70. Southern jurists have usually been more conservative on racial matters, former corporation lawyers may be more sympathetic to business problems.

The two most important influences on voting, however, seem to be party affiliation and the justice’s conception of the judicial role.

Many justices see the Court’s role as standing firm on certain constitutional principles, despite public opinion, but changing public attitudes also influence Supreme Court justices.

Another influence is colleagues’ opinions. Some were able to convert some of their colleagues to their judicial philosophies by force of personality and their judicial reasoning. Many factors, not all of them knowable influence decisions.

The fact that Supreme Court justices are appointed for life may be the most important of all. They are independent and immune to congressional, White House, and private-interest pressures.

* 1. **The Supreme Court’s Political Impact**

Justices are expected to be impartial, but the importance of the Court gives them political power.

The warren Court and implemented its “personal political and social philosophy” and was active and controversial in three key areas: civil rights, criminal procedure and legislative reapportionment, where it rewrote constitutional law.

CIVIL RIGHTS

The Supreme Court’s decision in Brown in 1954 triggered a revolution in American race relations: The Court accepted the argument that segregated public school facilities were “inherently unequal” because they stigmatized African American children and deprived them of the Fourteenth Amendment’s guarantee of equal protection. Southern whites vowed massive resistance.

African Americans, encouraged by this legal support, sought equal treatment in other areas engaged in confrontation with the white establishment; the Court also supported sit-ins which became a major weapon in the civil rights struggle.

CRIMINAL PROCEDURE

The Warren Court ruled that evidence police seized without a warrant was inadmissible in a state court, that indigent defendants must be provided with legal counsel, that a suspect could not be denied the right to have a lawyer during police questioning and that any confessions so obtained could not be used in court and that arrested persons must immediately be told of their right to remain silent and to have a lawyer present during police questioning.

LEGISLATIVE REAPPORTIONMENT

The Court mandated equal population voting districts. Until 1962, many states had congressional districts that overrepresented rural areas and underrepresented cities. In a series of decisions, the Court found that unequal representation denied citizens their Fourteenth Amendment (equal protection) rights. The Court ordered that state legislatures apply the principle of “one person, one vote” in redrawing electoral lines, which many now must do after every census.

THE POST-WARREN COURTS

1. The Burger Court:

Overall, there was a conservative drift but an unpredictable one. The most controversial ruling of the century declared abortion was protected by the right to privacy.

The next year, however, it found that quotas to help African American workers attain skilled positions were constitutional. In 1984, it added a “good faith exception” to the Mapp rule, which excluded wrongfully seized evidence. If the police with a warrant to look for a particular piece of evidence stumble on another, it may be used as evidence. In 1976, the Burger Court found that capital punishment was not necessarily “cruel and unusual” if the rules for applying it were fair.

1. The Rehnquist Court:

The Rehnquist Court both pleased and alarmed conservatives. The Court upheld the constitutionality of independent federal prosecutors, something the White House said interfered with the powers of the executive branch. The Court also ruled that burning the American flag could not be outlawed because it is a form of free speech. This ruling brought a mass outcry and a new federal statute outlawing flag burning. In 2003, the court upheld campaign-finance reform, university affirmative-action programs to promote diversity, and other liberal causes.

1. The Roberts Court:

The Roberts Court was markedly conservative but not uniformly. In 2013, the Court the burdens the Voting Rights Act placed on Southern states, a setback to African American voting registration. It also decided five to four that a gun in the home is an individual right. The Court, however, required the Pentagon to accord terrorist suspects certain rights and support Obamacare.

The Court ruled that individuals, corporations, and unions could contribute unlimited funds to so-called “super-PACs” on the theory that money is a form of speech and PACs provided information and education.