# COURT SYSTEMS

Contents



## Jewish (Halacha) Law

**J Levinson**, John Jay College of Criminal Justice, New York, NY, USA



### Introduction

#### Source

A summary of the rulings on victim identification in Halacha (Jewish law) can be found in the *Shulchan* '*Aruch* (codex of Jewish law) *Even HaEzer*, chapter 17. The basic sources of this summary are from the Talmud. They are supplemented by extensive rabbinic responsa literature that applies Talmudic principles to specific situations.

#### Purpose

These laws were developed to guide rabbinic courts in resolving matters of personal status. For example, according to Jewish law a woman cannot remarry unless her husband gives her a bill of divorce or dies. Laws regarding victim identification are meant to prove the death of a husband when no remains or unidentified remains are found. Another less common application is to prove the death of a wife; the widower can divorce her and marry another woman, but it is only once his ex-wife has died that he can marry her sister. Thus, conclusive proof of death is needed in such a circumstance. Proof of death is also important in inheritance cases.

#### Testimony

The norm in Jewish law is that two proper witnesses present testimony before a rabbinic court of at least three judges; only then can a ruling be made. In most cases of victim identification the testimony of one person (with no conflicting interest) is sufficient. Hearsay testimony is also allowed for victim identification. This easing of restrictions is done to facilitate the remarriage of women.

### No Remains Found

Jewish law does not recognize mere disappearance for a specified period of time as a basis to assume or declare death. When no remains of a person are found, death can still be proven by showing that the missing person was in a situation from which there was no escape. A modern application would be proving that a person was definitely on board a flight that crashed under circumstances that did not allow any survivors.

### Remains Found – Personal Recognition

Identification can be made by personal recognition. That is to say, a person looks at a body and testifies that he or she recognizes the face. There are, however, certain requirements before such an identification can be valid.

### Time

The victim must be dead for no longer than 3 days; after that time changes in the face can prevent accurate identification. There is an unresolved question of whether 3 days means an exact 72 h, or whether part of a day is considered the entire first day. There is also Talmudic discussion about whether 3 days is dependent upon climate, with more time allowed in colder temperatures. A modern application is whether refrigeration of a body extends the time limit. The general tendency is to be strict in answering these questions so that there is no doubt about the identification.

If the victim is pulled out from water, personal recognition must be made within the first hour since changes are more rapid.

### Condition

The face must have three parts present: forehead, nose, and cheeks. This is similar to the modern practice of covering eyes to prevent identification, for example on television. These three parts of the face cannot be reconstructed, since the result is not necessarily accurate and is heavily dependent upon the work of the mortician. Nor can there be extensive damage (including charring and burning) of any of these parts of the face.

### Pictures

It is generally accepted that there cannot be personal recognition based upon pictures – neither stills nor video. One reason is that they are only two-dimensional and lack depth. Pictures, however, are an accepted means of recording marks or characteristics on the body; this includes X-rays.

### Witness

The person making the identification must be unbiased and of sound mind. The latter is particularly difficult to judge, since it can be difficult to recognize the traumatic reactions that a person undergoes when he or she views the body of a close friend or relative.

Although there is validity to personal identification, there have been errors. In the modern era rabbinic courts have shown a tendency to prefer identification by technical means whenever possible.

## Remains Found – Characteristics or Marks

### Introduction

Characteristics or marks can be classified into three groups: simple, medium, and absolute. A simple mark is one that is so common that it has no value for identification. For example, the presence of a beard would be a simple mark. An absolute mark is something so uncommon that it is found in fewer than 1 in 1000 persons; it can be the sole basis of an identification. (There is an unresolved debate whether one is talking about any population sample of 1000 persons, or whether this is 1000 apparently similar persons; for this reason there is a tendency to require much larger numbers.) A medium mark is exactly what the name infers – something in the middle. There is extensive literature concerning the question of whether two medium marks can constitute the equivalent of an absolute mark.

This discussion of marks relates to an incident with an open population; that is to say, the victim to be identified could theoretically be anyone in the world. There are different considerations when dealing with a closed population. In the 1990s, a helicopter crashed with five passengers aboard. This was an incident with a closed population. Thus, although the sex of a victim would normally be a simple mark, it was sufficient to identify the only female aboard.

### Fingerprints

These have been recognized as an absolute mark. There is no discussion in Jewish law concerning the number of identification points required. The decisions of competent local police are accepted.

### DNA

This is a relatively new and controversial subject. Assuming that experts in properly equipped laboratories do the comparisons, responsa in Jewish law accept DNA as a reliable negative (nonidentification). That is to say, "A" is not related to "B" is accepted without reservation.

Acceptance of positive identifications is much more qualified, since DNA for identification was first discovered in 1985 and widely introduced only in the 1990s. The most widely accepted opinion on positive identification is that DNA is a very important medium mark that still requires at least some more supporting evidence. This is further qualified by requiring that the sample that is to be compared with the postmortem DNA should be an antemortem sample from the victim or a DNA sample from a biological relative of the first order (parent, sibling from both parents, or child).

### Scars

The scars left from a common operation are considered a medium mark at best. Scars from an accident are random and can often be considered an absolute mark.

#### Odontology

Dental comparisons are considered an absolute sign when, in the opinion of a qualified forensic odontologist, there is sufficient uniqueness of formations or dental work to constitute an identification. Jewish law is very specific that teeth missing in the mouth upon postmortem examination do not constitute a characteristic or mark, since they may have fallen out at any time, including upon death.

#### Tattoos

Unique tattoos, for example the numbers tattooed by Nazis on the arms of concentration-camp inmates, are absolute marks. The tattoos often given to hundreds, if not thousands, of sailors on a ship are of lesser importance.

#### Fractures

The mere presence of a fracture is of questionable importance, except to exclude an identification. Since fractures are random, and bones break differently, an X-ray of a fracture is of strong importance.

#### Malformations

Anomalies or significant birth defects are generally considered absolute marks.

### Identification by Property

In theory it is possible to identify a body based on property; however there are significant restrictions.

First, one must be absolutely certain that the property belonged to the deceased. This is relatively simple with clothing that is worn. Property found next to a body is not automatically associated with the deceased.

There is no reason to worry that property on a body is stolen, unless there are significant reasons to suspect such.

Only property not loaned to other persons is considered as a basis of identification. There is significant responsa literature concerning clothing as a basis for identification. In the past centuries, clothing was often made for a person, and that person never gave it away. However, that is far from present reality. Today clothing is routinely given to charity or to friends when it no longer fits or is out of style. The responsa regarding clothing are, therefore, not considered relevant to modern western society.

Another modern question of property involves the identification of bodies found in vehicles after traffic accidents. The mere presence of a body in a vehicle is insufficient to determine that the deceased person was the owner. It is common to lend cars to others.

An example of property not lent to others is dentures. Other examples are dependent upon the customs of society.

### Autopsy

Any acts not routinely done to a living person (e.g., autopsies) and performed upon a cadaver are a violation of the honor of the deceased and are prohibited. Notwithstanding, there are instances when autopsies are permitted: to obtain information that can save the life of another person; to enable the arrest and prosecution of a murderer; and to identify a body. Hence general autopsies are prohibited.

If, for example, an autopsy is permitted to remove a bullet, that removal must be done as directly as possible, leaving the rest of the body intact.

Autopsies to identify a body are a last resort and not a general procedure to be implemented on a routine basis.

### Burial and Mourning

#### Burial

According to Jewish law, deceased Jews are buried on a timely basis in a Jewish cemetery. It is certainly permissible to delay burial so that the body can be accurately identified.

Burial includes all remains recovered, including blood spilt as part of death (for example, a victim's blood after a shooting or bombing). For this reason blood-stained clothing is not laundered and is buried with the deceased.

Each body is buried in its own grave. Mass graves are not allowed in Jewish law except in cases with no practical choice, such as under war conditions. This applies to the head and the majority of limbs and torso; some opinions are that it applies to all significant parts of the body. After a mass casualty incident, there are often unidentified remains such as blood, skin, and tissue fragments; these miscellaneous remains can be buried in a mass grave.

Jewish law does not recognize symbolic graves containing dirt from the scene of a disaster or pieces of an airplane. When there are no remains to be found, there is no grave.

Jews are buried in simple shrouds made of plain and undecorated white cloth. An exception is soldiers who fall in battle and are buried in their uniforms. The Israeli Rabbinate has ruled that civilians who are killed in terrorist attacks are to be buried in their clothes and not in shrouds.

There is no requirement for a coffin. When a coffin is used, it is of simple wood with no metal. An advantage of a coffin is that it gives no visual indication of

how much of the body was recovered for internment. This is particularly important when only partial remains are recovered after incidents such as fire or bomb explosion.

If a body is buried in a temporary grave, the custom is not to remove it for reburial for at least 11 months.

#### Mourning

The customs of mourning fall upon the parents, siblings, children, and spouse of the deceased. After the death of a relative, the mourners occupy themselves with preparations for the funeral. In mass casualty situations, this includes providing information for victim identification. The week of mourning begins either at the time of the funeral or at the moment of despair that the body will be recovered.

### Note

This entry is a summary of the most common decisions in Jewish law. It should absolutely not be used as a basis to make decisions in Jewish law. Some of the decisions are written in couched language, since they are dependent upon specific application.

### Further Reading

Karo J ben Ephraim (1488–1575) *Shulchan Aruch (codex of Jewish law): Even Ha-'Ezer.* (Many editions are available. There is no translation into western languages.)

Levinsohn A, Levinson J (1999) *Aspects of Disaster Victim Identification in Jewish Law: Part I.* Jerusalem: Israel Police Rabbinate.

Levinson J (2001) *An Halachic Reconsideration of Victim Identification*, pp. 55–57. Jersualem, Israel: ASSIA (Shaarei Tzedek Medical Centre).

## Sharii'ah Law

**H A N El-Fawal**, Mercy College, Dobbs Ferry, NY, USA



### Introduction

The purpose of this article is to provide a Muslim perspective on the Sharii'ah (pronounced sha-ree-aah), often referred to as Islamic law. In part, it is intended to clarify some of the misconceptions popularized since the eleventh century in the West, propagated with insufficient research by the popular media, and dramatized on the big screen. The article will review the sources of Sharii'ah and the authority provided by these sources. It will also review the organization of the Sharii'ah legal system, the crimes that are the scope of this system, and the provisions of the penal code. How Sharii'ah law impacts on the forensic sciences, or relies on it, will also be addressed. In addition, the impact of Sharii'ah on the role of government and the guarantee of human rights will be touched upon to shed light on contemporary Islamic societies. This is not a religious treatise, although it may seem so at times, since Islam does not separate church and state. It does illustrate why, for the Muslim, Sharii'ah cannot be divorced from its scriptural and spiritual sources. The reader is cautioned from concluding that Islam operates as a theocracy, since for 90% of Muslims, Ahl As-Sunnah w-al-Jama'ah, known in the west as Sunni Muslims, this is not the case. Rather, it is incumbent on all Muslims to seek knowledge and understanding in general and of their religion in particular.

### Definitions

Sharii'ah literally means "the way" and according to some "the way to water . . . the source of all life." In point of fact, this latter definition is quite illuminating since Sharii'ah is about the preservation of life. The Muslim philosopher Ibn Khaldoon points out that the purpose of a legislative system is to preserve the well-being of the individual and of the society of which the individual is part. We, therefore, find that Sharii'ah encompasses 'Aqeedah (beliefs), 'Ebadah (ritual worship), Adaab (morals and manners), Mu'amalat (transactions and contracts), and 'Uqubat (punishments). In this regard, the purpose of Sharii'ah is to protect the individual's and society's life, family, property, religion, and intellect. For the Muslim, these are indisputable rights and practices guaranteed by revelation, the *Quran*, and by the practice carried out by the Messenger Mohammed.

### Sources of Sharii'ah

There are four sources of Sharii'ah law. The first two take precedence over all others, and none is ever to be considered above or in conflict with the first. These are the *Quran*, the Islamic revelation; the *Sunnah*, referring to the sayings and practices of the Messenger Mohammed; *Ijmaa*', the consensus of the Islamic scholars/religious authority; and *Qiyas*, referring to the drawing of analogy from sanctioned precedence as formulated through *Ijtihad*, the exertion of one's reasoning in light of the *Quran* and *Sunnah*.

### The *Quran*

For the Muslim, the *Quran* is the verbatim revelation received by the Messenger Mohammed over a

23-year period beginning in 609 through 632 CE. The *Quran* was written down as it was revealed during the messenger Mohammed's lifetime. It has not been revised or edited since its revelations, as witnessed by the historical record and extant manuscripts in Arabia, Egypt, Turkey, and Uzbekistan. It is also preserved by oral recitation, since it is the essential means of performing the five daily ritualistic prayers of its 1.4 billion adherents worldwide. The *Quran* is recited *in toto* during the Muslim fasting month of Ramadan, is recited daily in mosques, and is broadcast on radio and television. It has a place in every Muslim gathering, wedding, or even business transaction. In this regard, it has been continually recited, without interruption, for over 1400 years. The language of revelation is Arabic, the language of recitation is Arabic, and the language of prayer is Arabic. Whether in China, the UK, or South America, the *Quran* remains Arabic. Commentary and interpretations exist in an individual's own language, but because, for the Muslim, this is the verbatim word of God, no translation will do it justice. The *Quran* is organized into 114 chapters (surah) of decreasing length. Each chapter has a title and numerical designation. For brevity we will be using the numerical designation of chapter and verse (ayah).

It is estimated that about 11% of the *Quran* deals with strictly legal matters such as penal law for transgressions, debts, international relationships, rights of individuals, and inheritance. Nevertheless, most Muslims would recognize the *Quran*, as a whole, as Sharii'ah since even in its historical narratives of earlier civilizations and prophets, it aims at providing a spiritual and moral guide as to consequences or rewards for a particular action and not history for history's sake. Because Sharii'ah is rooted in revelation, the Muslim perceives an unnatural dichotomy in the much-touted separation of church and state.

In order to establish, maintain, and protect society, the *Quran* emphasizes five major aspects:

1. knowledge of God, as the creator, provider, and ultimate arbitrator
2. knowledge of one's origin, purpose, and role in society
3. knowledge of the blessings bestowed upon one (in Islam this does not simply refer to material possessions, but extends to talents, responsibility, and family). All of these are considered trusts for which one is accountable
4. knowledge of one's ultimate fate. This refers to the rewards or consequences of our actions, in this life and the hereafter, for which we, as creatures of free will, are responsible
5. correcting and improving the human lot. This refers to the five purposes of Sharii'ah: preserving freedom of faith, family, property, life, and intellect.

The nature of *Quranic* legislation has been characterized as being inclusive, shammel, e.g.,

> "We have neglected nothing in the Book (6:38)" and "We have sent down to you the Book as an exposition of everything, a guidance, a mercy, and glad tidings (16: 89)."

It includes an exposition of international relationships, war, contracts, debts, inheritance, divorce, and judicial punishment. A second characteristic is the establishment of generalities, '*Ummum*, that allow for adaptability to time and place, e.g., "and they conduct their affairs by mutual consultation (shurah) (42: 38)." This is usually interpreted as pertaining to the governance of the Islamic society, whether as community, city, or nation. It does not lay down the system of government, but rather establishes the major principle that must be found in government. To the vast majority of Muslims, and in contradiction of popular opinion, this is a principle that lays down a foundation for an Islamic democracy, but not necessarily a western-style democracy. Another characteristic aiming to establish a just and equitable society is the *Quranic* appeal to one's humanity and emotions. For example:

> O you who believe! Avoid suspicion of one another, indeed some suspicions are sins. And spy not, nor backbite one another. Would one of you like to eat the flesh of his dead brother? You would hate to do so, so do not backbite. So fear and obey God. Indeed God is the one who forgives and accepts repentance. He is the most merciful (49:12).

This is an admonishment against suspicion of others, and bearing false witness. The verse makes it repugnant to do so by the analogy of cannibalism, for false witness may lead to the injust loss of livelihood, property, or life of another.

The fourth major characteristic of the *Quranic* narration is the appeal to one's intellect and sense of justice

> O you who believe! Stand firmly for God as just witnesses, and let not the enmity and hatred of others make you avoid justice. Be just! That is nearer to piety, and fear God. Indeed God is acquainted with all that you do (5:8). ... And come not near the orphan's property, except to improve it, until he/she comes of age, and give full measure and full weight with justice. We do not burden any person with more than he/she can bear. And when you give your word (in witness), say the truth even if a near relative is concerned, and fulfill the Covenant with God. This He commands you, that you may remember. This is my straight path so follow it and do not follow other paths, for they will lead you away from

> His path. Thus He directs you that you may become righteous (6: 152–153).

## The *Sunnah*

The term *Sunnah* refers to the sayings, *Hadith*, of the Messenger Mohammed, as well as his actions, or actions which he approved. *Seerah*, which is considered part of *Sunnah,* describes his biography. The authority of the *Sunnah* as a basis of Sharii'ah is based on several *Quranic* injunctions, e.g.:

> O you who believe! Obey God and obey the Messenger and those of you in authority. If you differ in anything among yourselves, refer it to God and His Messenger if you indeed believe in God and in the Last Day. That is better and more suitable for a final determination (4: 59) ... Indeed in the Messenger of God you have a good example, for whoever desires to meet God and the Last Day, and remember God much (33: 21) ... what the Messenger has commanded take it, and what he forbids, abstain from it (59: 7) ... But no, by your Lord, they cannot truly believe unless they make you judge in all disputes between them, and find no resistance against your decisions and accept them in full submission (4: 65).

This role for the Messenger Mohammed is eloquently voiced by his wife, 'Aishah, one of the major narrators of *Hadith*, when she said, "He was the *Quran* walking" – in other words, the embodiment of its precepts.

Many western writers have analogized the collection of *Ahadith* (plural of *Hadith*) with that of the New Testament gospels in that they are based on the narration of the messenger's companions. However, the canon of traditions in Islam began to be collected at the end of the seventh century, when many of these companions were still alive. Furthermore, they were transmitted and written in their original language, and they did not require an assembly similar to the Council of Nicea in 325 CE to be accepted into the canon of Islamic practice.

A *Hadith* is composed of two sections, the *Assnad* (transmitters) and *Matn* (text). Five criteria must be met for a *Hadith* to be accepted in Sharii'ah and become a source of legal statute. These are given as follows:

1. continuity in the chain of transmitters (*Ittisal Assnad)* refers to a verifiable chain of narrators who heard the *Hadith* in question from the transmitter before him
2. integrity ('*Adalah*) of the transmitters refers to their being practicing Muslims and not of ill repute or dubious morality
3. soundness of the transmitter's memory, and accuracy of his writings
4. conformity of the *Hadith* in content and transmitters with other *Ahadith* dealing with the same topic
5. the absence of defects ('*Illah*) that may come to light on further examination.

The care in establishing the veracity of *Ahadith* gave rise to what is known as the science of *Hadith* biography ('illum Ar-Rijal), a virtual investigation of narrators, their conduct, and their reputation. In many respects it was more intense than the "background check" run before the appointment of government officials to office in the USA.

Even after having met these criteria, not all *Ahadith* are considered equal. There are two distinct categories of *Ahadith*:

1. The recurrent *Hadith* (*Al-Hadith Al-Mutawatir*) is definitive in its certainty with no doubt that it originated with the messenger. To establish this, four criteria must be met:
   a. The *Hadith* is narrated by at least four independent narrators.
   b. It is impossible for them to have concurred in a lie.
   c. The chain of transmitters is identical.
   d. Narration is dependent on more than memory alone.
2. The nonrecurrent *Hadith* (*Al-Hadith Al-Ahad*) applies to those that do not meet the four criteria of the recurrent *Ahadith*. The categories include:
   a. The well-known *Hadith* (*Mash-hur*) is one narrated by at least three narrators.
   b. The strong *Hadith* (*Aziz*) is one narrated by at least two narrators.
   c. The rare *Hadith* (*Gharib*) is one narrated by one narrator.

The nonrecurrent *Ahadith* may also be classified as to whether it is traceable to the messenger (Marfu'), to a companion of the messenger (Mawquf), or to a companion of a companion of the messenger (Maqtu').

For the purpose of Sharii'ah only those *Ahadith* called sahih (authentic), having met all five criteria, or hasan (good), having met the five criteria, except that only the condition of the soundness of the transmitter's memory or accuracy of his writings is satisfied. The most authentic of the *Hadith* collection is sahih (authentic) *Al-Bukhari,* completed before 870 CE when Al-Bukhari died.

## *Ijmaa'* (Consensus), Qiyas (Analogy), and *Ijtihad* (Informed Reasoning)

Ijmaa' is the consensus of those scholars versed in Islamic studies. The concepts and ideas dealt with may not be found explicitly in the *Quran* or *Sunnah*;

however, this consensus cannot have precedence or deviate from the general directive of Sharii'ah to preserve life, family, property, religion, and intellect. Jurists can examine *Ijmaa*' to formulate and create new innovative means of dealing with crimes and social problems associated with social development. It may also deal with the place and practices of immigrant Muslims in a non-Muslim society.

Qiyas refers to analogy with similar, but not identical, situations confronting the Islamic society. Qiyas, *per se*, is nor explicitly found in the *Quran*, *Sunnah*, or *Ijmaa*'. It relies on *Ijtihad*, the informed reasoning of the judge, and allows for the development of new case law. For example, in the USA, much debate goes on about copyright and the internet and whether material on the internet belongs in the public domain. *Ijtihad* may reason that downloading material for personal use may not be theft, but blatant plagiarism, profiting, or freely distributing such material at the cost of the author would be. Alternatively, using the internet to access the bank account of someone would not necessitate *Ijtihad*, because this sophisticated form of theft is not explicitly mentioned in the *Quran*, or *Sunnah* does not change the nature of the crime as theft.

The informed opinion of a respected jurist may be used as a basis for new case law. This is not unlike the deliberations of the Supreme Court in the USA in attempting to reach a consensus and use legal precedence from earlier rulings. There are, however, differences. The Supreme Court does not usually reach a consensus, partially due to partisanship, but publishes a majority and a dissenting opinion. Furthermore, while it may rely on precedent, it is not bound by revealed text as Sharii'ah is.

Despite the fact, that Ijmaa' and Qiyas may rely on consensus and informed reasoning of a group of jurists or an individual jurist, respectively, there is precedence in the *Quran* and *Sunnah* for the practice of seeking the opinion of experts in a given field. In the *Quran* we find: "So ask those who know, if you know not (16: 43)." The Messenger Mohammed, appointing a governor to Yemen, asked him: "What will you do if a matter is referred to you for judgement?" The governor-to-be answered: "I will refer it to the Book of God," and then was asked: "And if it is not there?" The governor-to-be answered: "I will refer it to the Sunnah," and then was asked: "And if it is not there?" The governor-to-be answered: "Then I will make Ijtihad to arrive at a judgement." The Messenger smiled and patted him on the chest, stating: "Praise to God who has guided the messenger of His Messenger to that which pleases Him."

Since *Ijtihad* does rely on informed reasoning, it is in this that forensic sciences contribute. Forensic accounting and computing provide a new dimension to uncovering theft, fraud, and other crimes. One is reminded of the admissibility of e-mail in stock fraud on Wall Street and in divorce procedures. Forensic toxicology, anthropology, dentistry, and pathology are of evidentiary value to jurists. DNA technology has come into acceptance, although it may not necessarily supplant eyewitness accounts. Some jurists are hesitant in encouraging routine autopsy, if there are more acceptable lines of evidence. However, Matwali Sha'rawy, a renowned Muslim scholar, is of the opinion (following *Ijtihad*) that such dissections are sanctioned to prove a crime.

What has been discussed above is collectively known as Usul Al-Fiqh (Sources of Knowledge). Fiqh is the aggregate of legal proofs, and evidence that will lead to certain knowledge of Sharrii'ah ruling or at least to a reasonable assumption concerning same, as well as the manner by which such proofs are adduced and the status of the adducer. It deals with the manifest aspects of human conduct, as opposed to the inner spiritual aspects. Between 719 and 850 CE there arose several Schools of Jurisprudence (Madhaahib). Four of these, named after their scholars, predominate in the Muslim world. They are Al-Haneefiyah, Al-Maalikiah, Al-Shaafi'eyah, and Al-Hanbaliyah. Many of the other schools were absorbed by these. It is important to point out that these are not sects, but schools of legal thought. In point of fact, the overlap of opinion is greater than 75%, while divergence in opinion is not in regard to criminal law, but in the details of civil and ritualistic practice.

## The Sphere of Sharii'ah Law and Islamic Society

The principle of conduct for the Muslim is permissibility of all things, unless they are explicitly prohibited or discouraged in clear-cut sources. What is forbidden is referred to as Haram, what is discouraged is Makruh (literally, detested), and what is permitted is said to be Halal. It is interesting to note that what is Haram is often referred to as Munkar, literally meaning that which is denied by civilized society, and what is Halal is referred to as Ma'rouf, literally meaning that which is acknowledged by civilized society. A *Hadith* states: "God has prescribed certain obligations for you, so do not neglect them. He has set limits, so do not transgress them. He has prohibited certain things, so do not do them; and He has kept silent concerning other thing out of mercy for you, not out of forgetfulness, so do not question them." In another *Hadith*, the Muslim is instructed: "Whoever

of you sees a Munkar, let him change it with his hand (if in a position of authority), and if he cannot, with his tongue (advising, critiquing, protesting), and if he cannot, then with his heart (prayer), and that is the weakest of faith."

We should also bear in mind that unanimously, with good reasoning, Islamic jurists agree that whatever is conducive to an act that is Haram is itself Haram. For example, Islam prohibits sex outside the sanctity of marriage; it therefore prohibits men and women from wearing suggestive or revealing clothing, nudity, and pornography, which may encourage such practices. Justifying obscenity as constitutionally protected freedom of speech is contrary to Islamic practice. Similarly, Islam prohibits racial discrimination, therefore the freedom of hate speech *à la* Ku Klux Klan is not acceptable.

## Categories of Crimes in Sharii'ah

It has been argued that a requirement of a viable legal system is to be inclusive of both fixed and variable elements in its penal postulates. Indeed, this is the case of Sharii'ah. Crimes are classified into three categories based on the punishment associated with them. These categories are:

1. Hadd (plural Haddud, which literally means limits) are the most serious. These include capital offenses where there is no plea-bargaining and no commuting of sentence by the judge. The crime and associated punishment are decreed by God alone in the *Quran*. However, there is a provision of qesas (equitable justice of retribution, reparation, or restitution).
2. Al-Ta'zeer: crimes that deal with the rights of the community (e.g., pollution, cheating).
3. Al-Mukhalafat (fines): crimes that deal with the right of the state and its ability to run the state (e.g., traffic violations, industrial compliance).

## Ta'zeer Crimes

These are less serious Hadd crimes, and are often analogized with misdemeanors of common law. Because these are not explicitly mentioned in the *Quran* or *Sunnah,* there is significant judicial flexibility in sentencing. Countries like Egypt have codified many of the associated punishments, while Arabia leaves it to judicial discretion. It is recognized that societies change in time and place. Islamic judges have much more flexibility than their common-law counterparts. Since Sharii'ah places an emphasis on societal interest, punishment may be judged to be appropriate in preventing a future "greater evil" to society. The specific punishment is determined by the judge on an individual basis, with the emphasis that he/she does not exceed God's commands. Punishments may include counseling, fines, public or private censure, confiscation of property, detention, or corporal punishment. Who has not seen a judge (and occasionally police officers) reduce a charge, or a fine, or revoke a license at his/her own discretion and insight into the specific defendant, despite the legal statutes?

The definition of some Ta'zeer crimes is found in the *Quran* and/or *Sunnah*, and in addition, many countries define others through their legislative process. Some of these crimes include bribery, selling defective goods (including cheating and fraud), usury, and selling drugs or intoxicants. Sharii'ah judges are free to punish based upon local norms, customs, and informal rules. The judge determines the appropriate punishment that will likely deter others from similar crimes and rehabilitate the offender. From contemporary headlines we are not strangers to so-called "white-collar" crimes. Do they do harm to society? Do they deny people their savings and earnings beyond the normal risks of business? The fate of such perpetrators, in Sharii'ah, is not likely to be a slap on the wrist. Since this is a Ta'zeer crime, the guilty party may be freed under judicial supervision in order to make restitution to the victim(s) of the fraud and/or community services that address the wrong done to society.

Although punishment for Ta'zeer crimes is typically less stringent than for Hadd crimes, if the offender in Ta'zeer crimes is determined to be a repeat offender who poses a threat to the well-being of society and is perceived to be beyond rehabilitation, a stronger punishment, including capital punishment, may be applied. For example, a drug dealer who kills through his "product" and profits not only corrupts society, but may use violence as a means to an end, thereby accelerating the harm done to society. Such an individual, or organization, would be perceived in Sharii'ah as being in open rebellion against God and society. The *Quranic* injunction is then:

> We ordained for the Children of Israel that if anyone killed a person, not in retaliation for murder, or to spread mischief in the land, it would be as if he killed all of mankind. And if anyone saved a life, it would be as if he saved all of mankind. Indeed there came to them Our Messengers with the clear evidence, but many continued to exceed the limits. The recompense of those who wage war against God and His Messenger and do mischief in the land is that they should be killed, or crucified, or have their hands and feet cut from opposite sides, or exiled from the land. That is their disgrace

> in this world, a great torment is theirs in the Hereafter. Except for those who repent before you establish power over them. Indeed God is Oft-Forgiving, Merciful (5: 32–34).

In the USA, the baseball analogy of "three strikes and you're out" is used indiscriminately for repeat offenders, many of which are minorities. Similarly, the Rockefeller mandatory drug sentencing law is used. One has to wonder at the lack of flexibility given to the American judiciary: such flexibility is an inherent characteristic of Sharii'ah, except in capital crimes.

## Judges in Sharii'ah

A *Hadith* says: "Whoever God tests by letting him become a judge, should not let one party of a dispute sit near him without bringing the other party to sit near him. He should fear God in how he sits, his looking at both of them, and his judging between them. He should take care not to look down at one as if the other is in a higher station. He should be careful not to address one and not the other, and he should be careful of both of them." In another Hadith: "Judges are three, two in Hell and one in Heaven. One who knows the truth and judges by it is in Heaven. One who knows the truth and does not judge by it is in Hell. The one who does not know the truth and judges between the people in ignorance is also in Hell."

This introduction illustrates the weight of responsibility placed on being a judge in Sharii'ah, the least of which are knowledge of the law and impartiality. This is significant, since there is no jury system in Sharii'ah. It is crucial to recognize that, although judges are appointed by the government, specifically the Head of State, the judiciary is independent of the government. Qualifications of the person to be appointed a judge are that they be knowledgeable of legal injunctions in the *Quran* and *Hadith*, the opinions of the early companions of the Messenger Mohammed and later scholars of jurisprudence, what they agreed upon and differed in, be knowledgeable of the nuances in language and of qiyas. As to restricting the position of judge to a particular gender, according to the majority school of Islamic jurisprudence, Al-Haneefiyah, women are not restricted from becoming judges of civil or commercial matters. Indeed, Omar Ibn-El-Khattab, the second successor (Khalifah) to the Messenger Mohammed, appointed a woman to oversee trade in the markets of Medina. In addition, the ninth-century scholar, Al-Tabarii, was of the opinion that there are no restrictions in women becoming judges of any category. There are three types of judge (singular Qadi; plural Qudaa) in Sharii'ah:

1. Qadi 'Aam (General Judge) who settles disputes between people, dealing with both civil and criminal cases. Only one judge can hear a given case and his decision is binding. Other judges can be referred to in consultation, but they do not deliberate or interfere. All disputing parties, or their proxies, and witnesses must be present and in attendance with the judge in court. The types of cases heard and decided by the Qadi 'Aam include:
   a. Munaza'at: disputes between people (e.g., property disputes)
   b. Huquq: rights
   c. Wilayah: guardianship of orphans and their possessions
   d. Tanfeedh Al-Wasiyah: probate and execution of wills
   e. Waliiy Amr: guardianship of those who do not have family or other qualified guardian
   f. Iqamat Al-Hadud: capital crimes
   g. Misalih An-Nass: public interest, like building projects that impact on the community and its prosperity (e.g., determining right-of-way for a railroad)
   h. Tassaffahi Shuhud: investigation and verification of witnesses eligible for deposition
   i. Taswaia fi Al-Hukm bain Al-Qawi wa Al-Da'eef: adjudication between the strong and weak.

   A Qadi 'Aam may specialize in one or more of these areas. A judge's ruling is final and can only be reversed by that judge. The exception is a ruling that is contrary to Sharii'ah according to the *Hadith*: "Anything not derived from our teaching is a reject." Reversal here is instituted by Qadi Madhaalim (see point 3 below).
2. Qadi Muhtasib (Judge of Standard Compliance) is a judge who regulates the performance of trade and commerce in the interest of the consumers. For example, he/she ensures the compliance with manufacturing, weights, and measures, so the public is not subject to fraud. This applies to the common rights and expectations of society. The Qadi Muhtasib has the right to adjudicate an offense on the spot to see that it is corrected, and does not require a court. There is no specific plaintiff, since here the judge represents the public, and is in effect the plaintiff and judge. It may take place in the marketplace, in a trading house, wherever he/she finds an infraction against the public interest. The Qadi Muhtasib may also appoint deputies to help perform the judge's task providing they have proper knowledge and

training, similar to the Qadi Muhtasib. The analogy to the Qadi Muhtasib is the inspectors of Board of Standards.

3. Qadi Madhaalim (Judge of Grievance and Injustice) is responsible for removing any injustice or grievance perpetrated by the state, including the Head of State, against any individual citizen or noncitizen. The precedence for this is exemplified by a *Hadith* where the Messenger Mohammed, speaking as Head of State, says: "If I took money from someone, here is my money, and if I whipped someone (unjustly), here is my back." It should be made clear that, contrary to popular belief and contemporary practice, the Head of State according to Sharii'ah is an employee of the society. Therefore, among the mandatory duties of the Qadi Madhaalim is removal of the Head of State or any civil servant of that state that has perpetrated an injustice against an individual or society. Qadi Madhaalim may remove cabinet members, governors, and county executives, even if the Head of State may object. This court would also look into unlawful taxes, government price-fixing, and bribery. In point of fact, Qadi Madhaalim does not need a plaintiff or for a complaint to be filed. This is a court whose sole mandate is to look into abuse of power. Is it any wonder that in contemporary society many governments shy away from Sharii'ah?

There is one last type of judge in Sharii'ah – Qadi Al-Qudaa (Judge of Judges), who is responsible for the compliance of other judges in terms of qualification and their application of Sharrii'ah. Qadi Al-Qudaa may appoint or remove judges based on their conduct and compliance with the law.

## Sharii'ah and Human Rights

In the West, what we are not told is that before the Magna Carta (1215 CE), the American Constitution (1787 CE), and in the late twentieth century the Universal Declaration of Human Rights, there were the *Quran* and *Sunnah* (609–632 CE) guaranteeing human rights. Below are some examples, and by no means an exhaustive catalog.

### Sharii'ah and the Sanctity of Life and Property

According to *Quranic* injunction:

> O you who believe. Eat not your property among yourselves unjustly, but trade by mutual consent between you. Do not kill yourselves or each other. Surely God is Most-Merciful to you (4: 29) . . . and do not kill anyone which God has forbidden, except in truth (justice). This He has commanded, perhaps you may understand (6: 151; also see 5: 32 above).

And in Hadith: "Your lives are and properties are forbidden to one another till you meet your Lord on the Day of Resurrection."

Specifically referring to nonMuslims or those under treaty with the Muslim state: "Anyone who kills a person from among the people with whom there is covenant will not smell the fragrance of Paradise. Regarding property: It is Haram for a Muslim to take so much a stick without permission of its owner."

### Sharii'ah and the Sanctity of Honor, Privacy, and Human Dignity

According to *Quranic* injunction:

> O you who believe! Let not one group scoff at another group, it may be that the latter is better than the former, nor let one group of women scoff at another group of women, it may be that the latter are better than the former. Do not defame one another, nor insult one another by labels [nicknames]. How repugnant is this after belief. Whoever does not repent [desist] is an oppressor. O You who believe! Avoid suspicion of one another, indeed some suspicions are sins. And spy not, nor backbite one another. Would one of you like to eat the flesh of his dead brother. You would hate to do so, so do not backbite. So fear and obey God. Indeed God is the One Who forgives and accepts repentance. He is the Most Merciful. O Mankind! We have created you from male and female, and made you into nations and tribes that you may know one another. Indeed the most honored among you in the sight of God is the most pious. Indeed God is All-Knowing, All-Aware (49: 11–13) . . . O you who believe! Do not enter houses other than your own without seeking permission and greeting those within them. That is better for you, perhaps you will remember. And if no one is there, still do not enter without permission. And if you are asked to withdraw, then do so. That is purer for you. God knows all that you do (24: 27–28).

As for *Hadith,* we have some examples. Regarding slander the Messenger Mohammed said: "Backbiting is saying something about your brother, in his absence, which he dislikes. When asked what if what is said is true? If it is true, it is backbiting. If it is untrue, you have slandered him." When reprimanding someone who uttered something critical of another in that person's absence, he said: "You have spoken something such that if it were mixed with the water of the ocean would have polluted it." Regarding spying and suspicion, he said: "He who pulls the curtain and looks into a house without permission granted to him has committed an offense," and "The ruler who sows suspicion among the people corrupts them." Regarding gossip and false witness, he said: "The most evil among God's servants are those who go about spreading

gossip, dividing those who love one another, and desiring to defame those who are innocent."

### Sharii'ah and the Opposition to Tyranny

According to *Quranic* injunction:

> God does not like to hear the public utterance of evil, except by someone who is oppressed. Indeed God is All-Hearing, All knowing (4: 148).

Abu-Bakr, the successor and Head of State after the Messenger Mohammed, said: "Cooperate with me when I am right, but correct me when I commit an error. Obey me when I obey God and His Messenger, but turn away from me when I deviate."

It is a given, according to Sharii'ah, that the individual will receive equal and fair justice, and that the individual will also receive the services of the state, without resorting to bribery or gifts. In the *Quran*, for example, we read: "And do not consume one another's property unjustly (stealing, robbing, deceiving), nor give bribery to those who govern (rulers and judges), that you may knowingly consume a portion of people's property sinfully (2: 188)."

The Messenger said: "God's curse is on the one who offers a bribe, and the official who accepts it." He also said: "God has cursed the one who offers the bribe, the one who receives it, and the one who arranges it." It is not likely that the "contributions" of Political Action Committees (PAC) and lobbyists would be endorsed in an Islamic state. We read reports on how bribery is business as usual in "Islamic countries." Sharii'ah denounces that as being anti Islamic.

### Sharii'ah and the Freedom of Religion

One of the most frequently recited verses in the *Quran* states unequivocally:

> There is no compulsion (coercion) in religion. Indeed the right path becomes distinct from the wrong path (2: 256).

This flies in the face of the illusion of the Arab galloping with the *Quran* in one hand and sword in the other. As Bernard Lewis points out in the *Jews of Islam*, this could only be true if all Arab swordsmen were left-handed, because a Muslim would never handle the *Quran* with his left hand. In point of fact, respect for other religions, particularly People of the Book (the *Quranic* term for Jews and Christians), was long practiced in Islam. Karen Armstrong, in *Holy War*, indicates that the concepts of antisemitism (many Arabs would argue that they could not be antisemitic since they are Semites themselves) did not exist until the introduction of Anglo-French literature in the late nineteenth and early twentieth centuries. NonMuslim populations were not obligated to serve in the Islamic army or to pay zakat, the obligatory alms required by every Muslim. They were, however, required to pay a jizyah (tax) to support the efforts of the state for protection. Furthermore, they were not obligated to Sharii'ah in their own civil laws. These populations are known as Ahl Al-Dhimmah (People of Covenant or Trust). The Messenger said: "On the Day of Resurrection I shall dispute with anyone who oppresses a person from among the People of a Covenant, or infringes on his right, or burdens him with a responsibility beyond his strength, or takes something from him against his will."

## Conclusions

Sharii'ah law provides a framework that, if implemented as intended, should ensure justice in contemporary Muslim societies. It is a grave mistake to think that what is often espoused in the name of Sharii'ah is a reflection of its sources. And if the reader asks whether Sharii'ah exists today as it was designed and established over 1400 years ago? The answer is a resounding "No!" Are there parts of Sharii'ah in practice? Typically in civil law, such as marriage and inheritance. This does not preclude the fact that some countries pay lip service to practicing Sharii'ah. Much of the criticism leveled at contemporary Muslim societies as violation of human rights, repression, and oppression, as well as the characterization of Sharii'ah as being "archaic fanaticism" is a critique of governments or groups that would not exist if Sharii'ah existed. Repressing the voices of criticism against inequality, bribery, nepotism, and despotism is to have effectively abrogated Sharii'ah, even if those in authority clothe their actions as Islamic.

Sharii'ah, as outlined in its sources, is a viable legal system offering solutions for those who view justice as a divinely ordained right and that humanity is not a dichotomy of spiritual and secular, body and soul. The condition that is established, and deviated from in the past centuries, is succinctly stated:

> Indeed God commands that you should render trusts to those to whom they are due, and that when you judge between people, that you judge with justice. How excellent the teaching He has given you. Indeed God is All-Hearing, All-Seeing. O you who believe! Obey God and obey the Messenger, and those who are in authority (when they satisfy the conditions of justice). If you differ in anything among yourselves, then refer it to God (*Quran*) and the Messenger (*Sunnah*). This is if you believe in God and the Last Day. That is better and more suitable for a final determination (4: 58–59).

## See Also

**Court Systems:** Law, China; **Judicial Punishment**

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# Law, China

**Z Gaoling and H Youyi**, Peking University, Beijing, China



## An Overview of Court Systems in China

The court system of the People's Republic of China derives from the trial mechanism in the revolutionary bases and has been remodeled several times. In 1949, the following courts were set up: (1) the Supreme People's Court in the capital; (2) subcourts of the Supreme People's Court in administrative districts; (3) courts in provinces and counties; and (4) subcourts of province's courts in districts. In 1954, the administrative districts were eliminated, and the people's courts were reorganized into four levels: (1) in the capital, the Supreme People's Court; (2) in districts, intermediate people's courts; (3) in counties, grassroots-level courts; and (4) special people's courts. The current court system has been established in line with the Constitution of the People's Republic of China (1982) and the Organic Law of the People's Courts (1983).

## Organization and Functions of the Courts

The current Chinese court system consists of local courts, special courts, and the Supreme Court: the Supreme Court supervises the local and special courts. Local courts are established in the administrative divisions, while special courts are set up where necessary. The Supreme Court is responsible for and reports to the national People's Congress and its Standing Committee. Local courts are responsible for the local People's Congress and its Standing Committee. Lower people's courts are supervised by the higher people's court (**Figure 1**).

### Local Courts

Local courts are divided into three levels: primary, intermediate, and higher.

The primary courts sit in counties, autonomous counties, cities without administrative districts, or administrative districts of cities. They are responsible for trying minor criminal, civil, and administrative cases as courts of first instance.

Intermediate courts are set up in prefectures, cities directly under provinces, autonomous regions, and municipalities directly under the central government (henceforth referred to as municipalities). The intermediate courts try the first-instance cases under their jurisdiction, first-instance cases transferred by primary courts, cases appealing the verdict and decisions of primary courts, and first-instance cases transferred from courts at higher level according to law.

The higher courts are set up in provinces, autonomous regions, and municipalities. They try first-instance cases under their jurisdiction, first-instance cases submitted for trial by lower courts, cases of appeal against judgments made by lower courts, and protested cases submitted by prosecutors in accordance with the procedures of trial supervision.

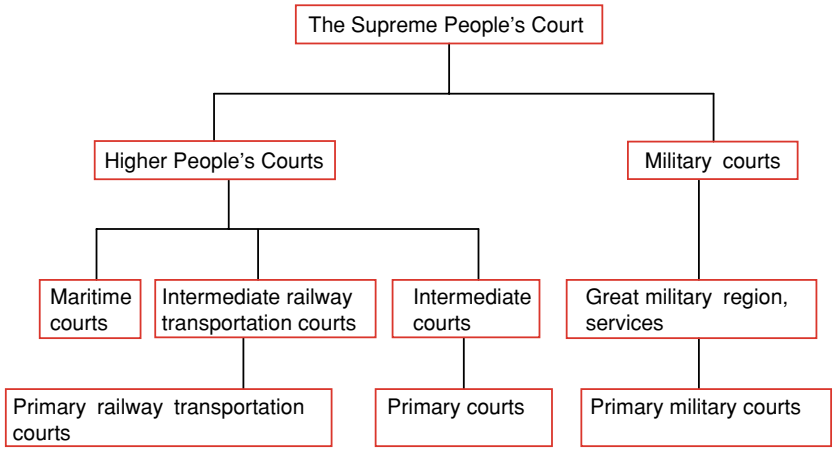


**Figure 1** Organization of people's courts.

### Special Courts

Special courts are set up in special departments for particular cases wherever necessary. Currently, China has special courts handling military, maritime, and railway cases. The military courts deal with violation of military duties and criminal cases involving servicemen in the Chinese army. The maritime courts handle cases related to maritime affairs. Railway transportation courts deal with criminal cases that occur along rail lines and aboard trains, and cases of economic dispute related to railway transportation.

### The Supreme People's Court

The Supreme People's Court is the highest judicial body in China. Its main responsibilities include: (1) dealing with cases that have a significant impact on the judicial system of the whole nation; (2) cases of appeal against the judgments of higher courts and special courts; (3) cases of protests filed by the Supreme People's Procuratorate in accordance with legal procedures; (4) supervising the administration of justice by local people's courts and special courts at all levels; and (5) giving a judicial interpretation of questions concerning special applications of law in judicial proceedings.

## The Major Principles and Systems of the Courts

### The Major Court Principles

According to the Constitution and related laws, the organization and functions of the courts in China are governed by the following major principles:

- The courts exclusively exercise the judicial power of the state.
- The courts exercise judicial power independently in accordance with the law, taking facts as the basis and the law as the criterion.
- All citizens are considered equal before the law.

### The Major Court Systems

The main systems relating to organization and functions of the courts in China are as follows.

**System of open trials** The courts try all cases publicly, except those involving state secrets, individual privacy, or minors.

**Defense system** The accused is entitled to the right to defend him/herself. A defendant may also be represented by a lawyer or by a close relative or guardian.

**System of second instance as final** In trying cases, the courts apply the system whereby the second instance is final, except those first-instance cases handled by the Supreme Court and cases heard by primary courts in accordance with civil procedures.

**Withdrawal system** Criminal procedure law states that, in any of the following situations, a member of the judicial, prosecutorial, or investigative personnel shall voluntarily withdraw, and the parties to the case and their legal representatives shall have the right to demand his/her withdrawal:

- if he/she is a party or a near relative of a party to the case
- if he/she or a near relative has an interest in the case
- if he/she has served as a witness, expert witness, defender, or agent *ad litem* in the current case
- if he/she has any other relations with a party to the case that could affect the impartial handling of the case.

The other two procedure laws on civil and administrative cases have similar provisions.

**System of trial supervision** This is a special system for the court to reexamine judgments and rulings that have already taken effect and have been found to contain errors in establishing the facts or application of laws. It is a remedy to the system of second instance as final.

## Criminal Trial

### The Procedure of Trials of First Instance

Trials of first-instance criminal cases are a public prosecution initiated by the people's procuratorates or a private prosecution initiated by the complainant. A criminal case is under the jurisdiction of the people's court in the place where the crime is committed. If it is more appropriate for the case to be tried by the People's Court in the place where the defendant resides, then that court may have jurisdiction over the case.

Procedures of first instance can be classified into ordinary and summary procedures.

**Ordinary procedure of first instance** Criminal cases of first instance are generally tried in a people's court by a collegiate panel. Trials of cases of first instance in the Primary and Intermediate People's Courts are conducted by a collegiate panel composed of three judges or of three judges and people's assessors. Trials of first-instance cases in the Higher People's Courts or the Supreme People's Court are conducted by a collegiate panel composed of three to seven judges or judges and people's assessors.

There are five stages in the ordinary procedure of first instance: (1) open court session; (2) courtroom investigation; (3) court debate; (4) the defendant's final statement; (5) deliberation, and pronouncement.

When evaluating articles, bodies, and corpses in reference to crimes, professional experts should be appointed by the courts. Independent judicial evaluation bodies should be established in the Supreme Court, Higher People's Courts, and possibly some Intermediate People's Courts. Courts may appoint these judicial evaluation bodies. In a particular situation and following the principle of respecting litigants' choice, combined with the appointment of people's courts, the litigants from both parties may request other individuals to evaluate. If parties cannot reach an agreement after negotiation, an expert person will be selected from the list of judicial evaluation bodies and who meet evaluation requirements. For people's courts without judicial evaluation bodies, full-time judicial evaluation personnel may be provided by judicial executive management bodies. For contested medical evaluations of personal injuries that need reevaluation, or medical evaluation on mental disease, hospitals appointed by the people's government in the provinces should carry out the evaluation. Judicial evaluation of mental diseases committees is set up in provinces, autonomous regions, municipalities, districts in the four municipalities, and cities with administrative districts. The committee comprises related officials in charge and experts in people's courts, people's procuratorates, public security, judicial, and health organizations. They are responsible for checking evaluators, organizing evaluation groups, and supporting the evaluation. In criminal cases, the task of judicial evaluation of mental diseases is to verify:

- whether the defendant suffers from a mental disease
- which kind of mental diseases the defendant is suffering from
- the relationship between mental disease and harmful behavior
- whether the defendant is criminally responsible
- the defendant's mental state during the lawsuit
- whether the defendant is fit to stand trial
- the defendant's mental state while serving a sentence
- suggestions on legal measures that should be taken.

After evaluating, the evaluator should write a conclusion, sign his/her name, and affix a special evaluation seal.

**Summary procedures of first instance** Summary procedure is only applied in primary courts. Summary procedures are not limited by rules in ordinary procedure. The people's court (Figure 2) may apply summary procedure to cases that are only to be handled upon complaint, and minor criminal cases, that are tried by a single judge.

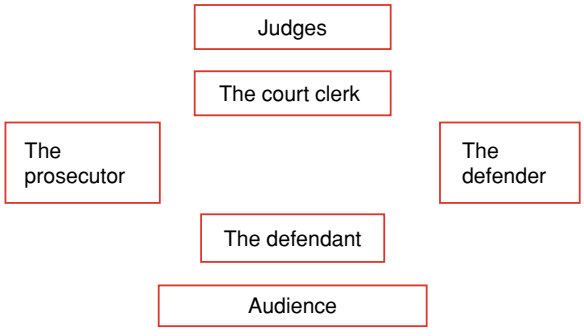


**Figure 2** A plan of a courtroom.

### Procedure of Second Instance

Criminal procedure of second instance is followed after an appeal by the defendant, the private prosecutor, or legal representatives, or a protest of the people's procuratorate at all levels. In the trial of a case appealed by a defendants legal representative, or defendants near relative, the people's court of second instance may not increase the defendant's sentence. A people's court of second instance will conduct a complete review of the facts determined and the application of law in the judgment of first instance and will not be limited by the scope of appeal. A people's court of second instance forms a collegiate panel and opens a court session to hear an appeal case. However, if, after consulting the case file, interrogating the defendant, and heeding the opinions of the other parties, defendants, and agents *ad litem*, the collegiate panel thinks the criminal facts are clear, it may rule that no court session is to be opened. A people's court of second instance opens a court session to hear a case appealed by a people's procuratorate.

### Procedure for Review of Death Sentences

Death sentences are subject to approval by the Supreme People's Court. When necessary, the Supreme Court may delegate to the Higher Courts the power of approving death sentences in crimes that seriously undermine public security and social order. A case where an Intermediate People's Court has imposed a death sentence with a two-year suspension of execution is subject to approval by a Higher People's Court. Reviews by the Supreme People's Court of cases involving death sentences, and reviews by a Higher People's Court of cases involving death sentences with a suspension of execution are conducted by collegiate panels, each composed of three judges.

### Procedure for Trial Supervision

A party or the defendant's legal representative or near relative may present a petition to a people's court or a people's procuratorate in regard to a legally effective judgment; however, execution of the judgment is not suspended. If the president of a people's court at any level finds a definite error in a legal judgment with regard to the facts or application of law, he/she refers the matter to the judicial committee to handle and determine a retrial. If the Supreme People's Court or a higher-level people's court finds a definite error in a legal judgment of a lower-level people's court, it has the power to bring the case up for trial itself or may direct a lower-level people's court to conduct a retrial. If the Supreme People's Procuratorate finds a definite error in a legal judgment of a people's court at any level, or if a higher-level people's procuratorate finds a definite error in a legal judgment of a lower-level people's court, it has the power to present a protest to the people's court at the same level against the judgment in accordance with the procedure for trial supervision.

## Civil Trial

In general, trials of civil cases of first instance are under the jurisdiction of the people's court in the place where the defendant has his/her domicile or in the place of his/her habitual residence.

### Ordinary Procedure of First Instance

Civil cases of first instance are tried in a people's court by a collegiate panel consisting of both judges and assessors or of judges alone. The collegiate panel must have an odd number of members.

Trial procedures in courts are as follows: open court session; courtroom investigation; court debate; judgment; or conciliation.

The organization and entrusting of judicial evaluation are the same as in criminal cases. In civil cases, the task of judicial evaluation of mental disease is to verify:

- whether the person suffers from a mental disease
- which kind of mental disease the person is suffering from
- the influence of mental disease on the person's ability to express him/herself
- whether the defendant has civil capacity
- the defendant's mental state during mediation and trial
- whether the defendant is fit to stand trial.

As with the evaluation of cases involving medical malpractice, medical societies of cities with administrative districts, prefectures or cities directly under provinces, autonomous regions, and municipalities are responsible for organizing the first judicial evaluation of cases involving medical malpractice. If necessary, China's Medical Society may organize an evaluation of difficult, complicated, and nationally influential and controversial medical malpractice cases. Medical societies responsible for organizing the evaluation of medical malpractice should set up a database of experts. Experts from related professions who participate in the evaluation of medical malpractice are chosen at random from the database by hospitals and patients under the direction of medical societies. An expert evaluation group operates under the collegiate system. The number in the evaluation group should be odd. Where cause of death and degree of disability are concerned, legal medical experts should be chosen at random from the database to participate in the evaluation.

Summary procedure, second instance, and procedure for trial supervision are generally the same as in criminal cases.

### Special Procedure

When a people's court handles cases concerning the credentials of voters, the proclamation of a person as missing or dead, the determination of a citizen as incompetent or with limited capacity for civil conduct, and the determination of a property as ownerless, the provisions of special procedure apply. With respect to a case tried in accordance with the procedure, the judgment of first instance is final. A collegiate panel of judges is formed for the trial of any case involving the credentials of voters or any important, difficult, or complicated case; other cases are tried by a single judge.

### Procedure for Hastening Debt Recovery

When a creditor requests payment of money or negotiable securities from a debtor, if certain requirements are met, he/she may apply to the basic people's court that has jurisdiction for a payment warrant.

### Procedure for Public Invitation to Assert Claims

Any holder of a bill which may be endorsed to someone else according to regulations may, if the bill is stolen, lost, or missing, apply for public invitation to assert claims to the basic people's court in the place where the bill is to be paid.

### Company Bankruptcy Repayment Procedure

If an enterprise as a legal entity has serious losses and is unable to repay its debts, the creditors may apply to a people's court to declare bankruptcy, and the debtor may also file at a people's court to declare bankruptcy.

### Procedure of Execution

Legally effective judgments in civil cases, as well as judgments relating to property in criminal cases, are carried out by the people's court that tried the case in the first instance. Other legal documents, that are to be executed by a people's court as prescribed by law, are carried out by the people's court in the place where the person subject to execution has his/her domicile or where the property subject to execution is located (Figure 3).

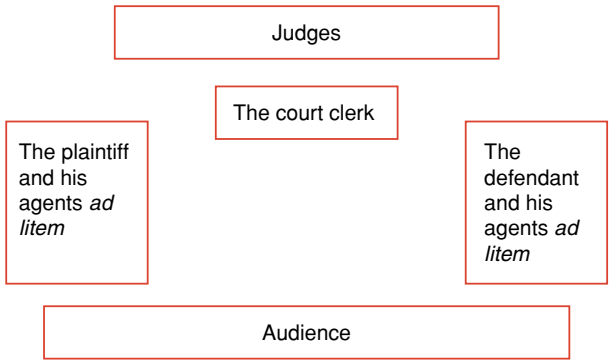


**Figure 3** A plan of a civil courtroom.

## Administrative Trial

If citizens, lawyers, or an organization consider that their lawful rights and interests have been infringed upon by a specific act of an administrative organ or its staff, they have the right to bring a suit before a people's court. Administrative divisions of the people's courts handle administrative cases. Special people's courts do not have administrative divisions to handle such cases.

When people's courts handle administrative cases, they may apply the Administrative Procedure Law (1989) and the interpretations of the Supreme People's Court; if there are no specific regulations, they may apply the regulations of the Civil Procedure Law (1991).

### Range of Cases Accepted

People's courts only check whether the actual administrative act is legal and do not check the legality and reasonableness of the abstract administrative act. The people's courts do not accept suits in any of the following matters:

- acts of the state in areas such as national defense and foreign affairs
- administrative rules and regulations or decisions and orders with general binding force formulated and announced by administrative bodies
- decisions of an administrative organ on awards or punishments for its personnel or on the appointment or relief of duties of its personnel
- specific administrative acts that, as provided by law, are finally decided by an administrative body.

### Evidence Providing Responsibility

In administrative procedure, the defendant has the burden of proof for the specific administrative act he/she has undertaken and provides the evidence and regulatory documents in accordance with which the act has been undertaken. In the course of legal proceedings, the defendant does not by him/herself collect evidence from the plaintiff and witnesses.

### Mediation

In handling administrative cases, a people's court does not apply conciliation, as the people's court only

affirms whether an actual administrative act is legal. But if citizens, lawyers, or organizations suffer damage because of an infringement upon their lawful rights and interests by a specific administrative act of an administrative body or the personnel of an administrative body, they have the right to claim compensation.

#### Making Judgments

After hearing a case, a people's court makes a judgment according to the varying conditions.

## Qualifications of Judges, Public Procurators, and Lawyers

#### Judges

Judges must have the following qualifications:

- be a citizen of the People's Republic of China
- be at least 23 years of age
- support the Constitution of the People's Republic of China
- be of good political, professional, and moral standing
- be in good health
- be a graduate of law from an institution of higher learning
- alternatively, be a nonlaw graduate from an institution of higher learning with indepth knowledge of law, and two years of work experience
- have a Master's or PhD degree in law and one year's work experience
- have a Master's or PhD degree in another major, but with indepth knowledge of law, and one year's work experience.

With a degree, candidates who aim to be judges in higher people's courts and the Supreme People's Court need three years' work experience; those with a postgraduate qualification must have two years' work experience.

Judges must sit national judicial examinations held in a unified way across the nation to gain their judicial credentials. Those who have a criminal record or who have been dismissed from public office are not eligible to become a judge.

#### Procurators

The qualifications of procurators are generally the same as those of judges.

#### Lawyers

An individual must pass the national judicial examination if he/she wants to be a lawyer. A graduate of law from an institution of higher learning or a graduate of other subjects from an institution of higher learning with indepth knowledge of law must also pass the judicial qualification examination.

Lawyers wishing to set up in practice must also have a lawyer's business license. According to the Law on Lawyers and Legal Representation, a lawyer's business license can be gained with the following qualifications: having a lawyer's credentials; having worked as a trainee in a law office for a full year; and demonstrating good behavior.

A lawyer's business license will not be granted in the following circumstances:

- if the candidate is incapable of civil action or restricted from performing civil conduct
- if the candidate has a criminal record – however, those who have committed a negligence crime are an exception
- if the candidate has been discharged from public employment or has had a lawyer's business license revoked.

## Court Reform

The developing court system in China has had many problems and has been unable to keep abreast of legal changes in other countries. In view of these problems, the Supreme Court is exploring judicial reform. Court reform will be carried out in the following four ways: (1) extending judicial democracy; (2) strengthening the judge's independence; (3) improving judicial prestige; and (4) improving the quality of judges.

#### Extending Judicial Democracy

The Supreme Court hopes that a perfect people's assessors system may make China's judicial system more democratic. In order to perfect the people's assessors system, the Supreme Court has drafted *Decisions Concerning Perfecting the People's Assessors System (Draft)* and submitted it to the Standing Committee of the National People's Congress for review. It has made specific demands as to the conditions for being an assessor, the choosing procedure, the range of trials attended, and an assessor's rights and obligations. The Supreme Court hopes that the people's assessors system will be well implemented to prevent judges from acting arbitrarily.

#### Strengthening the Judge's Independence

China's management system for judges is a typical administrative system. Court presidents and divisional chief judges decide on judges' promotions. The judicial committee has a right to override a judge's opinion on a certain case. The Supreme Court expects

to strengthen the trial function of a collegiate panel and a judge's independence, by reforming the trial procedure and emphasizing an adversarial system. It also hopes that introducing court presidents and chief judges of divisions to be presiding judges may make the collegiate panel more independent. At the same time, the Supreme Court hopes to standardize the judicial committee's function. As it is the highest judging organization in a court, the judicial committee is expected to discuss serious, difficult, and complex cases submitted by the collegiate panel to the court president and not to interfere with the collegiate panel when it handles specific cases.

#### Improving Judicial Prestige

The prestige of China's courts has been threatened in two ways: first, that cases cannot be handled for a long time, and second, that judgments are difficult to implement. For the first problem, the Supreme Court separates simple cases from complicated cases and applies the summary procedure to simple cases. The Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Justice have issued *Suggestions Concerning Applying the Summary Procedure to Public Prosecuting Cases* (2003) and *Regulations Concerning Applying the Summary Procedure to Civil Cases* (2003) in order to improve the efficiency of judging civil cases and lighten the burden for litigants. As for the second problem, China requires that governments at all levels support and assist courts at different levels. The Supreme Court has submitted Article 313 in Criminal Law (1997) on the crime of refusing to execute judgments to the National People's Congress for practicable interpretation. It hopes that the penalty for a criminal offense will guarantee that the execution is carried out. The Supreme Court coordinates with different ministries and commissions in order to guarantee that departments at different levels cooperate fully when executing judgments. At the same time, the Supreme Court has provided courts at different levels with many personnel and equipment in order to guarantee the efficiency of execution.

#### Improving the Quality of Judges

It was only in 2001 that the Judges' Law (2001) stipulated that if a person wants to be a judge, he/she must have a qualifying certificate. At present, some judges are still not formally educated in law. Overall, the standard of judges is not very high. In addition, for a long time, the function of a clerk and a judge has been confusing and not clear-cut. National judges' colleges have now strengthened judges' training. The Supreme Court has taken many measures towards improving the quality of judges by making a public appraisal and choosing "model judges" and dismissing some judges who have broken the law. For the confusing function of a clerk and a judge, the Supreme Court, the Ministry of Organization, and the Ministry of Personnel have issued *Managing Ways of Clerks in People's Courts* (2003) and established separate management for clerks.

## See Also

**Court Systems:** Sharii'ah Law; Law, United Kingdom; Law, United States of America

## Further Reading

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# Law, Japan

**T Sawaguchi**, Tokyo Women's Medical University, Tokyo, Japan



## The Legal Systems and Courts of Law in Japan

Japan is a unitary state that has a unitary legal system.

In Japan, a system of law in the early modern age evolved from continental origins, particularly from the German law: Anglo-American concepts were introduced in 1948 after World War II. At the end of this article, detailed information on the historical background of the law and judicial system in Japan is summarized.

The judiciary system is divided into criminal and civil sections in Japan. The interrelationship among the criminal, civil and family courts in Japan is shown in Figures 1–3.

The Japanese court adopts an inquisitorial system with no jury. The opinions of experts are neutral.

## Types of Court in Japan

### The Summary Court

There are 437 summary courts spread throughout Japan. Civil cases and civil claims for amounts not exceeding 900 000 yen come under the jurisdiction of these courts. Minor offenses, such as those involving theft or embezzlement, also fall under the jurisdiction of the summary courts.

The penalties handed out by these courts are usually fines or light punishment. Imprisonment not exceeding 3 years is rarely handed out by the summary courts. Cases that are considered to be outside the jurisdiction of the summary courts must be transferred to the district courts.

Several proceedings for summary disposition of civil and criminal cases are possible in the summary courts. The summary courts also offer conciliation proceedings for citizens concerned with the civil law. For these proceedings the judge and more than two conciliation commissioners help to reach an agreement and hear the arguments of both sides. The results of conciliation are recognized to have the same effect as a final binding judgment.

All cases in a summary court are handled by a single summary court judge.

### The Family Court

The family courts and their branch offices are located at the same sites as the district courts and their branches. Local offices of the family courts share facilities with the summary courts. The family court system is composed of about 200 judges, 150 assistant judges, and 1500 family court probation officers.

Family disputes as well as all related domestic affairs (e.g., divorce and cases of juvenile delinquency involving youths under 20 years of age) are handled at the family court. All criminal cases of juveniles must first be sent to a family court. Juvenile cases are handled by a single judge who utilizes reports prepared by the family court probation officers and medical officers whose specialty is psychiatry.

### The District Court

There are 50 district courts and about 200 branches in Japan. About 900 judges and 500 assistant judges serve at the district courts, which generally have original jurisdiction. However, in civil cases, they also have appellate jurisdiction against judgments of the summary courts.

In a district court, cases are handled either by a single judge or by a collegiate body of three judges. The collegiate court is required in appellate cases.

### The High Court

The high courts are located in eight major cities in Japan and their six branch offices are distributed throughout Japan. Almost 300 high court judges, including eight presidents, serve on the high courts. The presidents of high courts are appointed by the cabinet.

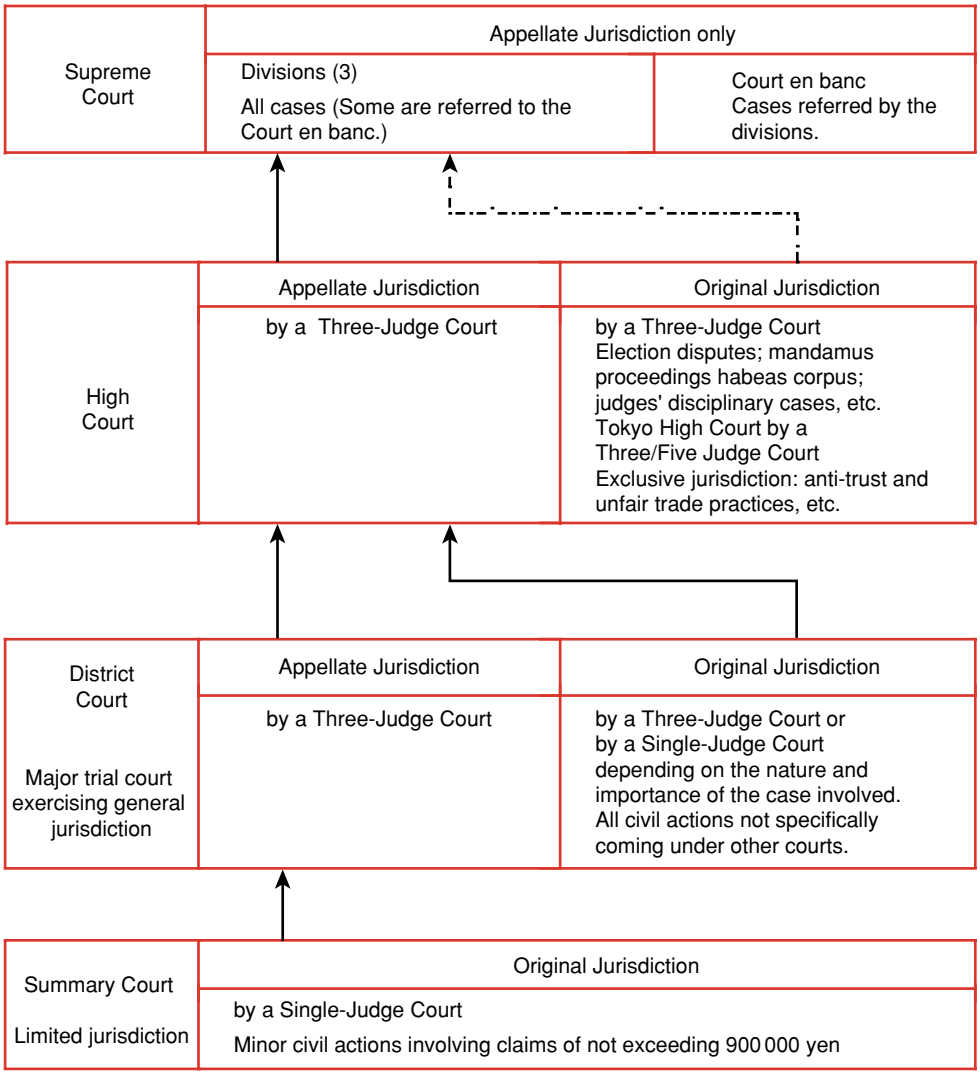
A high court has jurisdiction over appeals against judgments by the district and family courts. In criminal cases originating in the summary courts, appeals come directly to the high court. A civil case that originates in a summary court must be appealed first to a district court, then to a high court.

Cases in a high court are usually heard by three judges.

### The Supreme Court

The Supreme Court is the highest court in Japan. It is vested with rule-making power and is the highest authority of judicial administration. The chief justice and 14 justices serve on the Supreme Court. The chief justice is appointed by the Emperor as designated by the cabinet. To assist the justices of the Supreme Court, judicial research officials are selected from the judges who serve on the inferior courts.

The Supreme Court exercises appellate jurisdiction from a high court and may overrule a decision by a district or family court. Criminal cases handled by a summary court are also judged in the Supreme Court.




Note: 1) Where both parties agree, a 'jumping appeal' may be made from a judgment of the summary court to the high court or from a judgment of the district court to the Supreme Court.

2) Where a summary court case involves constitutional questions, a special appeal may be made from a judgment of the high court to the Supreme Court.

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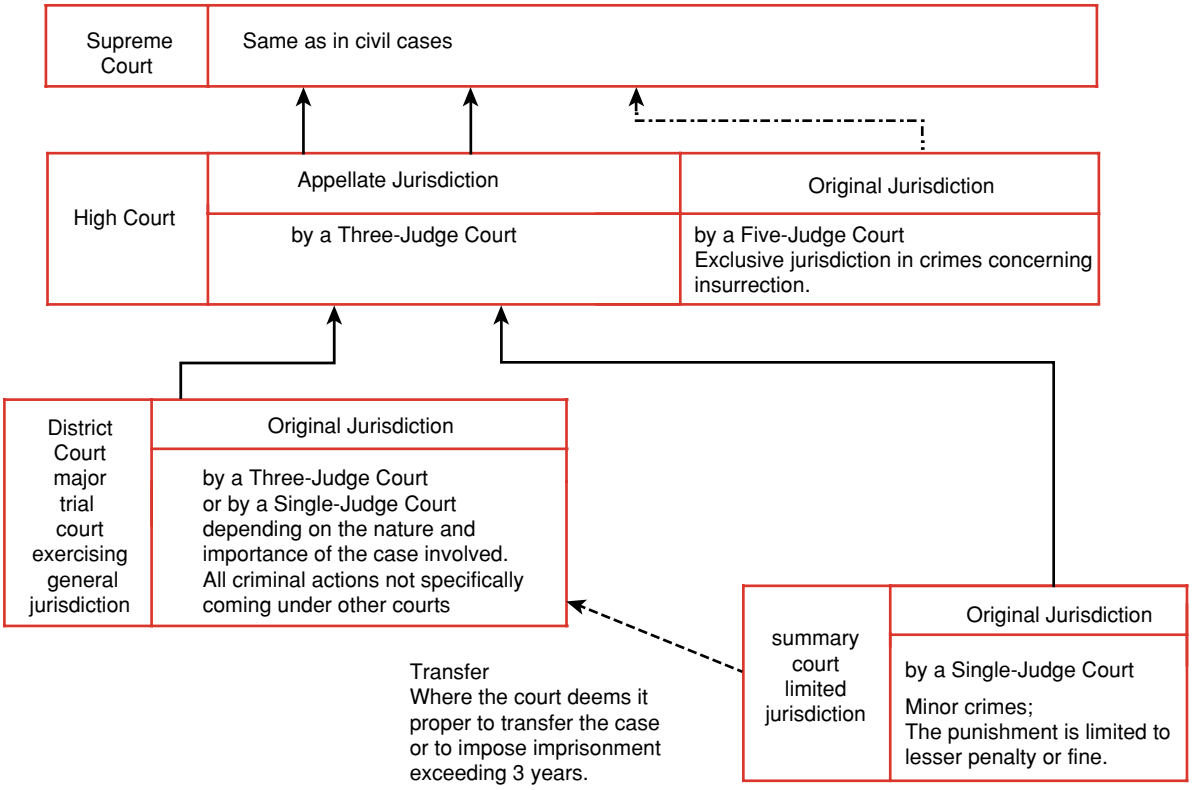
**Figure 1** Jurisdiction and procedure of Japanese courts: civil cases.

## Historical Background of Japanese Legal System

### From the Ancient to the Heian Era

According to *Nihonshoki*, which was the first historical document compiled in 720 AD, justice was first administered in the fourth century by Emperor Ingyo, the ancestor of the present emperor of Japan. *Jushichijo Kempo* (Seventeen Maxims), the oldest written code in Japan, was promulgated by Prince Shotoku. As the fundamental law of the nation, it was applied to officials and people.

The centralization of power and bureaucratic governing structure under the Emperor was established by the Great Reform of Taika in 645. Ritsuryo, the form of which came from China, was enacted to centralize power. The term Ritsuryo comprises ritsu, signifying a criminal code, and ryo, all other regulations, including the law of national organization, administrative law, and civil codes.




Note: A direct appeal may be made to the Supreme Court from a judgment of the district court or the summary court in which the court decided unconstitutionality of law, ordinance, etc.

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**Figure 2** Jurisdiction and procedure of Japanese courts: criminal cases.

There were two kinds of judicial proceeding under Ritsuryo. One was by oral presentation, in which a lawsuit was instituted when a plaintiff complained to the local authority having regional jurisdiction in the defendant's domiciliary area. In the other, a judgment was recorded and an action was instituted when an accusation was made by an injured person or the general public to the authority having jurisdiction in the place where an alleged crime had been committed. The judgment was based on a confession.

### From the Kamakura Era to the Edo Era

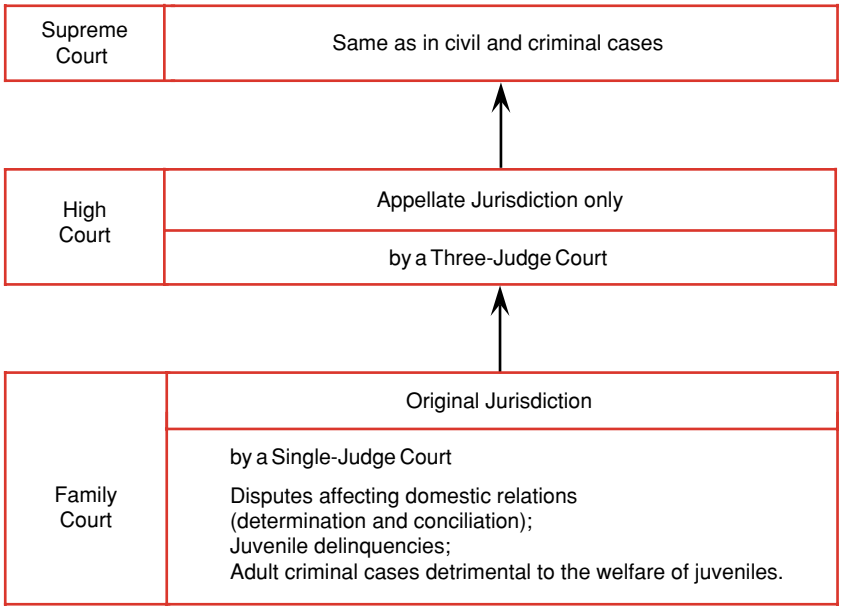
In the history of Japan, the Samurai-family Feudal Era, the so-called Sengoku, Kamakura, Muromachi, and Edo, are important. The Emperor delegated an authority to the Shogunate at Kamakura under the government by Bakufu. Shogun is a general of Samurai-family Feudal Era in Japan. Shogunabe is a duty of Shogun. The Samurai-family Feudal Era lasted from this time until the Tokugawa Era.

In the Kamakura Era, Goseibai Shikimoku (Shogunate ordinance) was enacted and promulgated by the Shogunate in 1232 AD. Civil cases were tried at a documented hearing and appeals were possible when the defendants disagreed with the judgment. In criminal trials, the procedure was almost identical to that used during the Ritsuryo period except that torture in felony cases was banned and few appeals were allowed.

After the Kamakura Shogunate, the Muromachi Shogunate was established. However, the authority of the Shogunate declined gradually and the Shugo-daimyo, the local authority in each province, exercised power by administering his domain as he saw fit, so the former legal order was eroded. This era is called Sengokujidai (the civil-war era of 1467–1573). During this period, many codified local laws were developed by each Shugodaimyo.

Sengokujidai came to an end with national unification under Hideyoshi Toyotomi in 1590. The Edo Shogunate was founded by Ieyasu Tokugawa, who succeeded Hideyoshi Toyotomi. The decentralization of power was accomplished by establishing a unique relationship between the Shogunate and Han, which is the subordinate local unit.

Under the Edo Shogunate, Bukeshohatto was enacted as customary laws. In the initial stage of this




Note: A direct appeal may be made to the Supreme Court from a judgment of the Family Court in which the court decided unconstitutionality of law, ordinance, etc.

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**Figure 3** Jurisdiction and procedure of Japanese courts: family cases.

era, justice was carried out according to Bukesho-hatto. As the unitary code of criminal law, Kujikata Osadamegaki, promulgated in 1742, formed a basis of justice under the Edo Shogunate. The official judicial court, the so-called Hyojyosho, and its performance were defined by this code, which included the organization of a police system. A magistrate's office was called Bugyosyo. A trial was conducted on the basis of a documentary hearing or oral presentation. In a criminal case, a decision was rendered only on the confession of the accused. Confessions obtained through torture could also constitute evidence.

### Before the Promulgation of the Meiji Constitution

The feudal age of military ascendancy continued for about 700 years. In 1867 the last Shogun, Yoshinobu Tokugawa, restored the supreme power of the Emperor as the ruler of the nation.

In 1868, Seitaisho was promulgated. Seitaisho is the basic statute in Meiji Era after Tokugawa Era which was the last Samurai-family Feudal Era. The basic principles of the form of government were shown in Seitaisho. The cabinet, the so-called Dajokan, was divided into three branches: legislative, the judiciary, and administration. However, the separation of these three branches was not complete at this time.

In 1871, all civil and criminal affairs were under the jurisdiction of the Ministry of Justice. At that time, the nationwide judicial system included five types of courts: (1) the temporary courts of the Ministry of Justice; (2) Courts of the Ministry of Justice; (3) branch courts; (4) prefectural courts; and (5) local courts. The Supreme Court was created in 1875 as the highest appellate court and the independence of the judiciary was established.

The Code of Criminal Law, patterned after the Napoleonic Criminal Code, was promulgated in 1880 and in use until 1907.

### Under the Meiji Constitution

The constitution of Japan was promulgated in 1889. Since then, Japan has adopted a constitutional parliamentary monarchy. Under this constitution, three independent bodies exist: (1) the National Diet, which has the power of legislation; (2) the cabinet, which has administrative power; and (3) the courts, which have judicial power. The independence of each separated power was not complete and was subordinate to the emperor. The jurisdiction of the courts was limited to ordinary, civil, and criminal suits. For special cases, the administrative court was used and courts martial were held.

The Code of Civil Procedure and the Code of Criminal Procedure, modeled after the German system, were enacted in 1890. The courts were organized in the following manner: Supreme

Court, Court of Appeals, District Court, and Local Court.

Civil procedure was handled by an adversary system. Appeal to an immediate appellate court was a continued trial and only legal problems could be finally appealed under the Code of Civil Procedure.

Under the Code of Criminal Procedure, official prosecutions were organized. Appeals to an immediate appellate court were handled as a new trial. Legal and factual problems and a penalty that was considered unjust could be brought to a higher court.

The Minister of Justice, a member of the cabinet, had the administrative authority in judiciary and judges were under his influence. However, the independence of the judicial branch was defined under the constitution.

## Japanese Medicolegal System

### Historical Background

In Japan, the practice of forensic activities, such as a postmortem examination, was active even during the Edo period. Instead of physicians, low-level officials of the then feudal government (Bakufu), such as the secret police (Okappiki) and constables (Doshin), engaged in these activities. During this period, medicolegal textbooks from China were used mainly as guidebooks. Meanwhile, western medicine was beginning to be introduced by Dutch physicians. In 1862, a Dutch army surgeon, Pompe Van Meerderfort, gave lectures on forensic medicine in Nagasaki.

The practical aspect of forensic medicine is closely related to the legal system of the country. The legal system used on the European continent was transplanted to Japan after the Meiji Restoration, while criminal laws were strongly influenced by German law. Following the end of the Second World War, the Anglo-Saxon and American legal systems were introduced into Japan. Their effects were particularly eminent in the Criminal Procedure Act. The introduction of the philosophy of a trial based on evidence resulted in an extensive change in court procedures. Corresponding to these changes in the legal system, regulations and the system of forensic medicine in Japan underwent changes. During the Meiji period, German legal medicine prevailed, while, after World War II, the system of medical examiners was introduced from the USA. Thus, the Japanese forensic medical system has assumed a legislative form that is unique in the world, with features of two contrasting systems blended into one.

The following are the notable events in the history of forensic medicine in Japan during the Meiji period: in 1875, Wilhelm Doenitz gave a lecture on legal medicine at Tokyo Medical School (the present Tokyo University Medical School); in 1888, Kuniyoshi Katayama, who had completed his medical studies in Germany, established the Department of Forensic Medicine at Tokyo University Medical School and started giving lectures on legal medicine. Since then, departments of forensic medicine have been created in many other universities. In 1914, the Japanese Society of Legal Medicine was founded. Currently, legal medicine is taught at almost all university medical schools and the courses specially designated for forensic medicine number 80 in all. During the Meiji and Taisho periods, activities related to criminal identification were performed by special technologists and parttime physicians affiliated to Metropolitan Police Headquarters and the Ministry of Home Affairs. After the end of the Second World War, with the modification of the Criminal Procedure Act in 1949, the Institute for Scientific Investigation (the current Scientific Police Institute) was founded at Metropolitan Police Headquarters for criminal identification. Currently, the identification section at each prefectural police headquarters has a laboratory for scientific investigation for actual identification and research. During the Meiji and Taisho periods also, criminal autopsies were conducted in the department of forensic medicine at a university medical school; and inquests on deaths were conducted by a parttime police surgeon. In 1948, under a directive from the US occupational forces, a medical examiner system was established in several cities that were designated by ordinance and all administrative autopsies and inspections were conducted by medical examiners. However, as indicated in the next section, the medical examiner system in Japan is somewhat different from that of the USA. In spite of the presence of a medical examiner system, criminal autopsies are still conducted in departments of forensic medicine at various university medical schools.

### Medical Examiner System in Japan

The medical examiner system in Japan differs from its counterpart in the USA.

First, medical examiners in the USA have a legal authority (mainly the power to conduct investigations) equal to or greater than the police, whereas in Japan, similar authority (especially that involving corpses) is only given to the Public Prosecutor's Office. Medical examiners and students of forensic medicine at university medical schools have no such authority.

Second, there are multiple coroners' offices in each US state and a coroner is assigned to each district under his or her jurisdiction. In Japan, there

are no facilities equivalent to a coroner's office. The Japanese medical examiners are employees of municipal governments and are not legally empowered in the same way as their counterparts in the USA.

Third, an autopsy is conducted at the medical examiner's office in Japan (especially in the city of Tokyo) on the body of a person who died in unnatural and suspicious circumstances and that involved in a criminal act. In the 23 wards at the center of the city of Tokyo, these autopsies are performed by forensic pathologists in the departments of forensic medicine of university medical schools. In Osaka, Kobe, and Yokohama, where medical examiner's offices are located at university medical schools, physicians specializing in forensic medicine at each medical school act as medical examiners and perform both criminal autopsies of corpses found under unnatural and suspicious circumstances and those who died from an unnatural cause.

Fourth, the medical examiner's system is not prevalent throughout Japan. Currently, medical examiners reside in the medical examiner's office or medical examiners' headquarters which are only located in the central part of Tokyo, Yokohama, Osaka, and Kobe. Handling of bodies found in unusual and suspicious circumstances is independently determined in the following three administrative areas: (1) the area with the existing medical examiner's system; (2) one where there is no medical examiner's system and a criminal autopsy (that should otherwise be performed by a medical examiner) is conducted as the so-called "autopsy under the agreement of family"; (3) and the other, the area where there is no medical examiner's system or the practice of autopsy under the agreement of family. The administrative differences among these three areas are faithfully reflected in the percentage of autopsies performed. In those prefectures where there is no medical examiner's system, parttime physicians employed by a local police station (local practitioners in many instances) preside at a postmortem inspection of bodies that were found in abnormal circumstances.

A corpse found in abnormal or suspicious circumstances and the handling of such bodies are defined in article 21 of the Japanese medical practitioner's law, under Report of Unusual Cases: "A medical practitioner shall, in a case where he has found anything unusual on examining a dead body or a stillborn baby of four months or more in gestational age, report it to the police authorities within 24 hours."

However, the law does not clearly stipulate the details of "unusual." One may presume that it is up to an individual physician to determine whether the circumstances are unusual or not; and there is a problem of individual differences among physicians in determining what is unusual. In 1994, to avoid ambiguity, the Japanese Society of Legal Medicine published a guideline for identifying death under unusual circumstances. According to this guideline, death under unusual circumstances is outlined as follows:

1. Death due to external causes (regardless of whether the patient had been treated; and if treated, how long he or she had been under a physician's care)
   a. Unexpected accidents
      i. Traffic accidents: death due to accidents involving various means of transportation (automobiles, as well as all others, such as bicycles, trains, and ships). The victim may be the operator of the vehicle, a passenger, or a pedestrian. Accidents include all types (e.g., driver error and a collision involving a single vehicle)
      ii. Falls of all types: death due to a fall on to a flat surface, from steps, stairs, or from a building
      iii. Drowning: drowning of all types, including in the ocean, river, lake, marsh, pond, swimming pool, bathtub, and a puddle
      iv. Fatal injuries caused by fire and flame: death due to a fire (all types of death due to fire, including fatal burns, carbon monoxide poisoning, airway burns, and their combinations); and death due to burns through contact with a flame or highly heated substance
      v. Asphyxiation: fatal asphyxiation due to causes such as compression of the neck or the thoracic region, airway obstruction, the presence of a foreign body in the airway, or anoxia
      vi. Poisoning: death due to ingestion, injection, or coming into contact with a drug or poison
      vii. Exposure to an abnormal environment: exposure to abnormal thermal environments (e.g., heatstroke and freezing), sunstroke, and caisson disease (dysbarism and barotrauma)
      viii. Electrocution or being struck by lightning: death due to electrocution at a work site, a short circuit, or being struck by lightning
      ix. Other accidents: death due to external causes involving all other types of accidents not listed above
   b. Suicides: death due to the wish and action of the deceased, regardless of the means of committing suicide. Examples include strangulation,

jumping from a height, throwing oneself into a path of an oncoming train, self-infliction of wounds by using a sharp or blunt instrument, self-drowning, and ingestion of a poison

c. Homicide: all deaths due to injuries inflicted by another, regardless of a homicidal intention on the part of the assailant. The homicidal means are not limited: examples include strangulation, obstruction of the nose and mouth, injuries inflicted by a sharp or blunt instrument, burning by fire-setting, and poisoning

d. Death due to external causes under unknown circumstances (death may be caused by an accident, suicide, or homicide). No restrictions are placed on the means responsible for the death

2. Death due to complications or sequelae from injuries of external causes. Examples include bronchopneumonia developing from head injuries or poisoning caused by sedatives; interstitial pneumonia and pulmonary fibrosis subsequent to Paraquat poisoning; septicemia, acute renal failure, multiple organ failure, and tetanus subsequent to external injuries, poisoning, and burns; fat embolism associated with fractures
3. Incidents that are suspected to be involved in (1) or (2) above, including instances in which there is a slight suspicion of a cause-and-effect relationship between the external cause and death or such a cause-and-effect relationship is not evident
4. Unexpected death related to a medical action or a suspicion that the death may have been due to a medical action. This includes an unexpected death that occurred during or relatively soon after a medical action, such as an injection, anesthesia, surgery, diagnostic procedure, or delivery; a death possibly related to a medical action; and a sudden death of unknown etiology that occurred during or relatively soon after a medical action. The presence of errors in medical actions or questions of negligence are unrelated to this category
5. Deaths without any evident cause:
   a. Discovery of a body after death has occurred
   b. Unexpected sudden death of a person who has been seemingly healthy up to then
   c. Death of a patient who sought medical care for the first time but expired shortly after the examination before a diagnosis was established
   d. Death of a patient who had been treated at a medical facility but it is not clear that he/she expired from the disease for which he/she had been treated (when the patient expired within 24 h of the final treatment and it is difficult to conclude that he/she died from the disease from which it had been known he/she suffered)
   e. Others in which the cause of death is unknown: instances where it is uncertain whether a death was caused by an illness or an external cause.

When a death under an unusual circumstance is reported, the police conduct an investigation and postmortem examination to determine whether it was a natural death (death due to an illness), noncriminal death (e.g., suicide or accidental death), or an unnatural death (i.e., one in which there is a suspicion of criminal involvement). Article 1 of the Guidelines for Handling Corpses Found in Unusual Circumstances (the 1975 Regulation) classifies corpses handled by the police into the following three types:

1. Bodies of those who were killed in a criminal act: those that exhibit clear evidence that the subject died as a consequence of a criminal act.
2. Bodies found in unnatural circumstances: The Criminal Procedure Act, article 229, item 1, defines those who succumbed and were found in unnatural circumstances as follows: "If there is a person who expired in an unnatural circumstance, or a dead body that is suspected to be in an unnatural circumstance, a public procurator of the district or local public procurator's office having jurisdiction over the place where it is found shall make the postmortem inspection."
3. Bodies of those who expired without involvement of criminal acts: bodies in which it is objectively evident that the deaths were due to noncriminal causes. It is understood that bodies found in unnatural circumstances are only those in which the involvement of a criminal act cannot be established. The postmortem examination defined by article 229 of the Criminal Procedure Act is conducted to obtain clues to investigate a possible criminal act and it is designed to gather all evidence so that a criminal act causing a death may not escape detection by the police.

   Therefore, there is no need to conduct such an examination on those bodies with or without obvious criminal involvement: only the bodies found in unnatural circumstances are subjected to criminal investigation. The bodies of persons who evidently suffered from a criminal act are immediately inspected and examined at the site by police officers, according to the specifications of the Criminal Procedure Act and Criminal Investigation Code. At the same time, investigative activities, such as the issuance of a permit to identify the victim and assign a professional to conduct an autopsy (criminal autopsy), are initiated. When no

criminal involvement is indicated, administrative processing based on the Family Registration Act and regulations on the handling of corpses are considered to be sufficient. In Japan, article 192 of the Criminal Law and article 229 of the Criminal Procedure Act stipulate that bodies found in unusual circumstances cannot be buried without a postmortem examination.

Secret burial of a person who died an unnatural death: a person, who without a postmortem examination buries another who has died an unnatural death, shall be punished with a fine of not more than 50 yen or a minor fine (Criminal Law, article 192).
Postmortem inspection: if a person dies in an unnatural circumstance, or a dead body is found with a suspicion of an unnatural death, a public procurator of the district or local public procurator's office having jurisdiction over the place where the body was found shall make a postmortem inspection (Criminal Procedure Act, article 229).

4. A public procurator may cause a secretary in the public procurator's office or a police official to take such measures as noted in the preceding paragraph. These regulations require a public prosecutor's inspection and examination of the body (a comprehensive procedure, normally called a criminal autopsy, including a death scene investigation, to determine if the person in question was killed in the performance of a criminal act) accompanied by a postmortem inspection by a medical doctor (external examination of the body to establish the cause of death, the time that had elapsed after death, and whether the death was due to a natural or unnatural cause). The definition of "a person who died under an unnatural circumstance," as cited in article 192 of the Criminal Law, is more comprehensive than that described in article 229 of the Criminal Procedure Act: the former includes all those found in unnatural circumstances (even when it is obvious that the persons were not involved in criminal acts but the cause of death was not established) and may also include some that are the subject of an administrative autopsy (examination required by administrative regulation, conducted on bodies found in unnatural circumstances and those also found in unnatural circumstances but where no criminal act is suspected. The examination is conducted for purposes such as a contribution to public welfare and general hygiene). The person who dies in an unnatural circumstance cited in article 229 of the Criminal Procedure Act refers to an individual who is found dead in unnatural circumstances, where there is a suspicion of criminal involvement. Therefore, the requirement of this article does not apply to a death in unnatural circumstances where the involvement of a criminal act is evident, a death due to natural disasters, such as floods and lightning, drowning while swimming, unquestionable cases of suicide, and accidental deaths due to carelessness. In other words, this law requires a postmortem inspection of those bodies that were found in unnatural circumstances and where there is a suspicion of criminal involvement. Major criminal acts, especially vicious homicidal acts, arson, and rape culminating in a homicide, violence, and fatal injuries caused by a violent crime constitute criminal deaths.

At a postmortem inspection, a physician conducts the inspection and renders a medical judgment. The physician who inspected a body that had been found in an unnatural circumstance confirms or determines the cause of death, and submits a record of the inspection to the attending police officer and a report on the inspection to the survivor of the victim. In this instance, the inspection is conducted by a medical examiner in those areas where the medical examiners' system exists (23 wards in the center of Tokyo, Yokohama, Osaka, and Kobe) and by a physician assigned by the police in other areas (a police surgeon who is primarily employed to care for the health of the detainees or a general practitioner).

When a natural death or death not involved with a criminal act is proven and a cause of death is established through inspection, the surviving family members submit the inspection report and a notice of death to the municipal office and make arrangements for burial or cremation.

When the cause of death cannot be determined through inspection, an autopsy is conducted. In those areas where the medical examiner's system exists, a medical examiner conducts the autopsy (this is called an administrative autopsy). In areas where there are no medical examiners' systems but there is a system for conducting autopsies with the agreement of the family, the department of forensic medicine of a university medical school does the autopsy. However, the budget allocated to autopsies by the local municipal government is not always sufficient so it may not be performed in all cases of a death under unnatural circumstances or with unknown etiology. An autopsy under the aforementioned conditions is rarely performed in areas where neither a medical examiner's system nor the system of autopsy under the agreement with a family exists. If an autopsy is absolutely necessary, steps are taken to resort to a judicial autopsy. An administrative

autopsy is performed by a medical examiner in accordance with article 8 of the Autopsy and Body Preservation Act:

> Inspection and autopsy by a medical examiner: the metropolitan or prefectural governor having jurisdiction over a place stipulated by cabinet order shall, with regard to a corpse suspected to be affected by a contagious disease, intoxication, or disaster or a corpse from an unknown cause of death in that place, appoint a medical examiner to clarify the cause of death that has not been clarified even after the examination, by performing its dissection, provided that, with regard to a corpse found in an unnatural circumstance or suspected to be from an unnatural death, the examination or dissection shall not be performed until a postmortem inspection under article 229 of the Code of Criminal Procedure Law is carried out. The examination or dissection under the preceding paragraph shall not affect an autopsy for inspection or gaining expert evidence under the Code of Criminal Procedure.

If the death has occurred in an unnatural circumstance or has been caused by a criminal act, the judicial authority shall investigate to discover how the death occurred or on whom the responsibility rests. As part of this investigative activity, an autopsy is necessary. In accordance with articles 165 and 168 of the Criminal Procedure Act, an autopsy is conducted:

> An investigation is made to find the cause of death and other pertinent facts; and an expert opinion based on these findings is submitted. (Expert testimony: The court may order persons of learning and experience to give expert testimony. Expert testimony, a necessary measure: A permit; an expert may, when it is necessary with respect to expert testimony, enter a dwelling, or residence, building, or vessel under guard, examine the body, dissect a corpse, exhume a grave, or destroy things by obtaining permission from the court. The court shall, in granting permission ... issue a permit setting forth therein the name of the accused, the offense, the place to be entered, the body to be examined, the corpse to be dissected, the grave to be exhumed, or the things to be destroyed, the name of the expert, or such other matters as are specified by the rules of the court. The expert shall show the permit to the person subjected to the measures ...)

The procedure is called a judicial autopsy. There are no regional differences in this procedure.

## See Also

**Court Systems:** Sharii'ah Law; Law, China; Law, United Kingdom; Law, United States of America; **Crime-scene Management, Systems:** Continental Europe; United Kingdom; United States of America; **Death Investigation Systems:** Japan

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# Law, United Kingdom

**I Wall**, Ruislip, UK



## Introduction

Laws are rules that seek to guide and regulate orderly behavior in a collective society. The agencies responsible for the creation and enforcement of these rules form the collective enterprise known colloquially as "the law."

The legal systems of England and Wales are fully fused. In Scotland, by way of contrast, historical forces have shaped a distinct legal tradition, which draws upon English common law and Roman law influences.

## Sources of Law

In England and Wales the two principal sources of law are Parliament, and the decisions of judges in the courts of law. Increasingly, however, rule-making powers are now the subject of delegation to other bodies.

## Judicial Law

Often referred to as "common law" or "case law," this form of evolved, case-precedent law is based on the corpus of decisions made by judges in courts. Until the seventeenth century, it was the preeminent source of law in the UK, and while "statute law" has since superseded it in terms of volume, case law still enjoys an important role. Judicial law seeks to apply rules of law to particular factual situations and occasionally, in novel situations, to extend and develop the law. Judges therefore perform both an adjudicative and a "legislative" role.

Consistency and fairness are maintained to a certain extent by the "doctrine of precedent," which ensures that the principles enunciated in one court will normally be binding on judges of inferior courts in subsequent cases. Under the principle of *stare decesis,* the decision of the House of Lords is binding on the lesser courts but not themselves. Decisions of the Court of Appeal are binding on inferior courts and to a limited extent on themselves in civil cases and to a lesser extent in criminal cases. A decision of the Divisional Court binds inferior courts. Clearly for such a system to operate there must be an appropriate and adequate system of reporting cases. Though bound to follow the provisions of statutory law, the courts have always exercised a role in interpreting statutory language, sometimes with the effect of thwarting Parliament's intention.

## Branches of Law

The common law in the UK is divided into a number of specialist areas, each with its own language, procedures, and substantive rules of law and evidence. The two principal categories are civil law and criminal law. Civil law is concerned with the resolution of disputes between private individuals. It is the aggrieved party who undertakes the legal action or suit, and remedies are usually financial. Criminal law, on the other hand, is concerned with the relationship between individuals and the state. The focus of the state's coercive powers is the elimination of behavior of which it disapproves by the proscription of punitive sentences.

There is an overlap between these two main jurisdictions such that a criminal offense will often have an equivalent in the civil jurisdiction (for example, the offense of assault and the civil wrong of trespass, respectively).

## An Adversarial System

The conduct of criminal and civil litigation is adversarial in nature. The court's final adjudication is based upon the strength of the opposing arguments presented before it, and "truth," therefore, is not a matter of principal concern.

Some jurisdictions utilize an inquisitorial approach whereby the tribunal itself embarks upon, and sets the agenda and parameters of, its own fact-finding exercise.

## The Prosecution of Offenses

The Crown Prosecution Service (CPS) is responsible for the conduct of all criminal prosecutions commenced by the police in England and Wales.

The head of the service is the Director of Public Prosecutions, who is superintended by the Attorney General, a member of the government. The Attorney General and the Solicitor General are both political appointees and have final responsibility for enforcing criminal law, in addition to their advisory role to the government. Responsibility for the independent public prosecution service in Scotland lies with the Procurator Fiscal and the Crown Office. The Crown Office is led by the Lord Advocate, in whose name all prosecutions are brought, and the Solicitor General for Scotland.

## The Court System

The court system is similarly split into civil and criminal jurisdictions, and the courts are arranged in hierarchical tiers reflecting precedent and expertise. Most business is transacted in the lower or "inferior" courts, operating as trial courts of first instance, with the superior courts functioning in an appellate capacity.

## The Criminal Courts of England and Wales

### The Magistrates' Courts

Magistrates' courts are local courts, and are the lowest of the courts in the criminal hierarchy. They hear 95% of all criminal offenses, including all minor "summary" offenses, as well as the less serious examples of offenses "triable either way" (offenses such as assault, criminal damage, and theft). In respect of "either-way" offenses, the magistrates will decide whether to remit the case to the crown court for trial on indictment or to hear the case summarily themselves. The accused must consent to the summary trial of an either-way offense but cannot insist on one, and where the accused elects trial by judge and jury at crown court, the magistrates will undertake committal proceedings to ensure that the crown has a *prima facie* case.

The 30 000 or so lay magistrates or justices of the peace are not legally qualified; they are unpaid and are drawn from the local community. Magistrates sit as a "bench" of three, assisted on matters of law by a legally qualified Clerk to the Justices, who does not participate in the outcome of a case. In metropolitan areas, 100 legally qualified, salaried District Judges (Magistrates' Courts) sit alone.

### The Crown Court

The Crown Court is a single court that sits in a number of different "tiered" centers throughout England and Wales, and has exclusive jurisdiction over trials on indictment.

Indictable offenses are classified according to their gravity to ensure their allocation to an appropriately experienced judge. High Court judges will hear the most serious cases such as murder, while circuit judges, who are the typical Crown Court judges, will hear most less serious cases. Recorders are parttime judges who hear the least serious cases and combine their role with private legal practice.

Unlike the Magistrates' Courts, where the justices act as tribunal of "fact and law," the roles are split in the Crown Court between the judge as arbiter of law, and jury as tribunal of fact.

The Crown Court has a criminal appellate function in respect of appeals from magistrates' courts against conviction on a legal issue, or sentence.

The Queen's Bench Division of the High Court exercises an appellate role, "by way of case stated" in respect of criminal appeals from magistrates' courts and Crown Courts where there is dissatisfaction over points of law or issues of jurisdiction.

#### Court of Appeal

The Criminal Division of the Court of Appeal hears appeals against conviction and sentence from the Crown Court.

The court comprises the Lord Justices of Appeal and is presided over by the Lord Chief Justice and the Vice-President of the criminal division.

An appeal to the court requires permission or "leave," a matter that will usually be ruled on by a single Lord Justice after considering a transcript of the crown court proceedings.

Appeals will only be allowed where the initial conviction was unsafe (Criminal Appeals Act 1995) as a consequence of a procedural or a legal error.

The court has the power to allow the appeal and to acquit the appellant or to order a retrial. The Attorney General can refer a case to the Court of Appeal where there is concern over the interpretation of a point of law that has resulted in an acquittal, or where a sentence has been passed that is considered too lenient.

#### The House of Lords

The House of Lords, sitting in its judicial capacity, is the supreme criminal court in England and Wales, and hears appeals from the Court of Appeal involving a point of law of general public importance, though this is not a requirement for a civil appeal. (Interestingly, the Scotland Act 1998 treats rights granted under the European Convention on Human Rights as "devolution issues" and so criminal cases raising human rights issues are, with leave, appeallable to the Privy Council.)

An appeal to the House requires leave and the cases heard are not by way of retrials, as evidence is considered by the three or five of the Lord Justices of Appeal (Law Lords) in written form only.

## The Civil Courts in England and Wales

The magistrates' court exercises a significant, though more limited, role in the civil sphere, where its jurisdiction relates to matrimonial issues and licensing for the gaming and liquor industry.

#### County Courts

Above the magistrates' court are the 230 or so County Courts situated throughout England and Wales. Here, in the presence of a Circuit Judge or District Judge, 90% of all civil disputes are heard annually.

The manner in which each case is dealt with depends on the monetary value of the case, so that time spent (and therefore costs) are proportionate.

#### The High Court

The High Court has unlimited civil jurisdiction, and hears cases that involve more complex legal issues or where high monetary values are involved. It sits principally in the Royal Courts of Justice in London, but increasingly, much business is conducted in provincial High Court District Registries.

The High Court itself comprises three divisions, and each division exercises both first-instance and appellate jurisdictions. The Chancery Division specializes in matters of bankruptcy, trusts, and tax, and has an appellate jurisdiction in respect of bankruptcy petitions from the county courts. The Family Division specializes in matrimonial issues, matters relating to minors, and probate; while the Queen's Bench Division, whose judges sit under the auspices of the Lord Chief Justice, deals with general civil matters.

The High Court's "puisne" judges usually sit in the absence of a jury when hearing a case at first instance, but as a bench of two or three as an appellate "Divisional Court." The Divisional Court of the Queen's Bench is a distinct entity that exercises a supervisory appellate jurisdiction by way of judicial review over inferior courts and tribunals, and in respect of certain jurisdictional appeals from Magistrates' Courts and County Courts.

#### Civil Division of the Court of Appeal

The Civil Division of the Court of Appeal also sits at the Royal Courts of Justice and hears appeals on matters of law (and therefore are not retrials) from the three divisions of the High Court, the Divisional Court, the County Courts, and certain tribunals.

It is presided over by the Master of the Rolls, and courts of two, three, or five judges are normally

constituted from the Lords Justices of Appeal, depending on the importance of the case.

The time constraints on appeals to the House of Lords mean that, in practical terms, the Court of appeal is the final Appellate court for urgent cases.

To ensure that only cases of a complexity appropriate to the standing of the court reach there, all classes of cases require permission to appeal.

Where a case has already been heard on appeal at a lower court there is no longer a right to appeal to the Court of Appeal unless the case raises important legal issues (Access to Justice Act 1999).

#### House of Lords

This is the supreme appellate civil court for Great Britain and Northern Ireland. The vast majority of appeals originate in the Court of Appeal, though certain cases may "leapfrog" directly from the high court. Appeals are heard by either five or seven The Lords of Appeal in the Ordinary.

## Special Courts

#### Youth Courts

Youth Courts are special magistrates' courts, established to deal with persons under the age of 18. There is an assumption that all criminal offenses involving juveniles will be tried here (with notable exceptions, such as homicide).

The bench comprises justices who have particular experience in dealing with juveniles. The Youth Courts are held in the same building as the adult magistrates' court, but differ from the magistrates' court in that the language and setting of the courtroom are less formal and their proceedings are private affairs with restrictions on public access and media reporting.

#### Coroners' Courts

These ancient courts are unique to English law as their proceedings are inquisitorial in nature. The coroner's jurisdiction is over certain categories of unexplained or unnatural deaths, and inquests are held to determine the "how, when, and where" of death and not to apportion blame or to give an opinion on criminal or civil liability.

Coroners are either lawyers or medical doctors with legal qualifications. It is usual for inquests to be held in the absence of a jury, though the coroner may empanel one in high-profile cases.

Scotland does not have a coroners' court; instead the Procurator Fiscal deals with unexpected deaths, and where circumstances require, a public fatal accident inquiry may be held.

#### The Judicial Committee of the Privy Council

This court, sitting in London, is composed principally of Law Lords. It exercises an important appellate role in respect of civil and criminal cases arising in the 24 Commonwealth territories and six independent republics within the Commonwealth who have retained the option to appeal to "Her Majesty in Council."

Acting in this capacity, the decisions of the Judicial Committee are not binding in domestic law, though they are highly persuasive.

The court also exercises a jurisdictional role in matters relating to the legality of the operation of powers devolved to the legislative and executive authorities established in Scotland, Wales, and Northern Ireland, and in this capacity its decisions are binding on the House of Lords.

Finally the court also has a domestic appellate jurisdiction in respect of decisions of disciplinary committees of certain professional bodies governing medical, dental, and veterinary professions.

#### The European Court of Justice

The European Union's judicial power resides in the European Court of Justice, which sits in Luxembourg. It has responsibility for ruling on the interpretation or application of the treaties and legislation of the European Union in disputes between member nations, or member nations and European institutions.

Referrals to this court can arise from any domestic UK court or tribunal, except the House of Lords (Article 177 of the European Economic Community Treaty).

#### The European Court of Human Rights

Sitting in Strasbourg, France, this court is one of the institutions of the Council of Europe, an agency distinct from the European Union. The Council of Europe was established in 1949 with the aim of defending human rights; under its auspices the European Convention on Human Rights was drawn up, and the European Court of Human Rights was established. The European Court of Human Rights is entrusted with the responsibility of enforcing the obligations of member states under the convention, and its jurisdiction lies where there is an allegation that guaranteed rights and freedoms have been infringed.

## A Supreme Court

The incumbent government has advanced proposals to establish a supreme court for the UK. This, it is anticipated, would address issues of judicial independence pursuant to Article 6(1) of the European

Convention on Human Rights, as well as assuageing the discomfort exhibited by European courts in relation to the interpretation of legislation by judges who have had a role in its enactment.

One further aspect of this desire to achieve a tangible separation of powers is the proposed abolition of the ancient office of the Lord Chancellor and the establishment of a new Department of Constitutional Affairs and an "independent" Judicial Appointments Committee that would assume responsibility for the appointment of judges.

The putative court would assume ultimate appellate jurisdiction for the UK (except criminal cases arising in Scotland), and it would act as a constitutional court, assuming responsibility for devolutional issues currently undertaken by the Judicial Committee of the Privy Council.

## The Scottish Courts

### Scottish Criminal Courts

Scotland has a three-tier criminal court system. The High Court of Justiciary is Scotland's supreme criminal court. Under the auspices of the Lord Justice General, the Lord Justice Clerk and the 25 judges known as Lords Commissioners of Justiciary, the court exercises first-instance jurisdiction in respect of grave crimes by way of solemn procedure, in which a judge and jury sit. The High Court also acts in an appellate capacity, hearing appeals from courts of "inferior" jurisdiction.

Below this is the sheriff court, which exercises a wide criminal jurisdiction in all but the graver criminal offenses. There are six sheriffdoms in Scotland, each headed by a Sheriff Principal. The Sheriff Court has an extensive workload dealing with over 60% of criminal cases.

At the bottom of the court hierarchy are the 30 District Courts. They are broadly similar to the magistrates' courts of England and Wales, and sit locally under the auspices of lay magistrates assisted by a legally qualified assessor or convenor. The District Court deals with lesser criminal offenses by way of summary procedure in which only a judge (or bench) sits.

### Scottish Civil Courts

The Court of Session is Scotland's supreme civil court. Sitting in Edinburgh, it consists of 32 judges, known as Lords of Council and Session, and is divided into an Inner House and an Outer House.

The Inner House is itself divided into the First and Second Divisions, of equal authority, and exercises an appellate role in respect of cases originating in the Outer House, Sheriff Courts, and certain tribunals.

The Outer House functions as the court of first instance in respect of a wide range of civil matters, usually in the absence of a jury.

The Sheriff Courts deal with the majority of civil cases and they have a jurisdiction broadly similar to the Outer House.

### The Courts

The institutionalization of the process of arbitration and dispute resolution is a common feature of developed legal traditions.

The hierarchical court system in England and Wales has evolved from Anglo-Norman times and has been shaped by both constitutional forces and peculiar legal rules such as the doctrine of precedent.

The English common-law tradition has spread beyond its shores so that its court structures are now reflected in other jurisdictions.

## See Also

**Court Systems:** Jewish (Halacha) Law; Sharii'ah Law; Law, China; Law, Japan; Law, United States of America

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# Law, United States of America

**R T Kennedy and T L Sanchez**, New Mexico Court of Appeals, Albuquerque, NM, USA



## Introduction

The USA comprises a national government, including 50 state governments, sovereign Native American tribes, and US territories. Thus, it is a paradox to apply the term "court system" to the USA when discussing the structure of the courts, as that term implies a single, unified system. This article will provide a general overview of the US's court system, its interrelation, general development, and the commonality of procedure and evidence law between the disparate jurisdictions.

Although the general structure of US courts is similar among various jurisdictions, there are also practical

differences within any given forum. This article will generally discuss: (1) the background and formation of the US and its courts; (2) the branches of government; (3) sources and types of laws; (4) the federal and state judiciary and their jurisdiction; and (5) the interplay between federal and state court jurisprudence.

## Background

The USA emerged from 13 autonomous colonies that had enjoyed broad powers of self-determination for over a century prior to securing their independence from the UK. Though diverse, they possessed similar institutional structures, legal doctrines, and political constructs predicated upon English law. Upon declaring independence, they became individual independent states possessing republican governments with their own written constitutions that were adopted by the consent of their citizens.

Upon independence, the 13 original states derived their existence from the consent of their citizens to be governed. When the colonies united under the Constitution, they did so as representatives of their citizens. The underlying sovereign authority in the USA therefore belongs to and emanates from the people. When a national government formed, the people, represented by the states, ceded the power and authority to do so by allowing the formation of a national government by adopting and ratifying a national constitution. Through the US Constitution, states yielded some sovereignty to the national government, and established the framework within which the national government was created.

## Branches of Government

The Constitution defined and enabled the new US government. It created and delegated powers to three branches: legislative, executive, and judicial. Each branch possesses power over the functions of the other; this system is referred to as "checks and balances" between the branches of government. This structure is duplicated in the individual states' governmental structure.

Article I of the Constitution established a legislature (Congress), composed of two houses, the House of Representatives and the Senate. Article II established the Office of the President, as the executive branch that carries out the laws enacted by Congress. These articles enumerate the powers given to each branch and provide a framework for their exercise of these powers.

Article III established the judiciary. The US Supreme Court is the only court created by the Constitution. Congress is given the power to create lower-level courts. One of Congress' initial pieces of legislation was the Judiciary Act of 1789. It established lower federal courts – the district courts and circuit courts. All states have their own constitutions. Their governmental structure is uniquely similar to that set forth in the US Constitution. The US Constitution organizes and distributes national governmental power. It confers the power to form a government. The Constitution also establishes the structure to which government must adhere. The Constitution confers upon the Congress the power to make law. Article VI, Section 2 of the Constitution provides that the US Constitution and laws created pursuant to it are the supreme law of the land, "and the Judges in every state shall be bound thereby." This provision establishes the supremacy and uniting force of federal law among the states, and perhaps more importantly, makes the Federal Constitution enforceable in all courts. Federalism is also a system of dual sovereignty, with the national government being limited by the existence of the states. Today, each state is also governed by its own constitution which serves as the ultimate law of the state. A state constitution may grant greater protection than the federal constitution but no less protection.

The US government combines the features of both a unitary state and a federation. The Constitution limits the federal government's power to those stated in the document, and reserves for the states those powers not ceded by them in the US Constitution. The judiciary is no exception to these limitations. Judicial powers and obligations are inherently vested in both national and local governments.

## Legal Framework

There are four main types of law in the US: (1) constitutional law; (2) common law; (3) statutory law; and (4) regulatory law. Each originates from a different source and serves a different purpose.

### Constitutional Law

Constitutional law is the body of principles which apply in the interpretation and construction of constitutions. The law of constitutions is considered fundamental law, which is applied to statutes and other legislative acts. In the USA, constitutional law is derived from English jurisprudence. Its rules and principles have grown out of the development of the USA and the individual states. Constitutional law is the supreme law, expressed in written form, by which all private rights must be determined and public authority administered.

### Common Law

The original colonies' legal system was founded in English common law. Common law is derived from the courts resolving disputes and creating legal decisions, of which the holdings are then binding on all lower courts. Trial courts' decisions are reviewed by appellate courts for error. Appellate decisions exist to resolve issues and establish legal precedent from which to govern the conduct of the courts in future cases. The principle that precedent decisions are to be followed by the courts is called *stare decisis*.

Supreme courts, both state and federal, review decisions of lower courts and are the final arbiters of their constitutions and the laws created by their respective governments. The US Supreme Court is the court of last resort for cases arising under the US Constitution and federal laws. Its decisions are binding in all federal jurisdictions. States must conform their rulings to those of the US Supreme Court. The US Supreme Court's decisions are "authoritative" and must be followed. State Supreme Court decisions are only binding within that state's jurisdiction, but are frequently cited as persuasive authority by other states in the absence of their own law on a particular issue.

### Statutory Law

Statutes are the product of their representative legislative branches of government. For the USA, this power rests with Congress. Each state also has its own legislative body to pass laws for governing affairs within its borders. Statutory law defines criminal offenses and establishes a body of law through which public, governmental, and private affairs are governed. Disputes concerning statutory law are decided by the courts, which have the power to decide relationships between individuals, individuals and the government, or parts of the government itself. Statutory law is limited by combined or separate state and federal constitutional power. Legislatures cannot exceed their constitutional authority to act, nor can they pass laws inimical to rights or duties that are constitutionally secured. Laws passed by the US Congress generally regulate national or interstate matters, and are binding upon the states on matters within their purview. The states may not legislate matters to control the federal government.

### Administrative/Regulatory Law

When legislation is passed, the executive branch of government implements it into law. The US Constitution establishes the Office of the President as the executive office of the USA. States generally have governors. The executive branch institutes suboffices, agencies, or departments to carry out its functions. For example, agencies and departments may have police and prosecutorial powers to enforce criminal laws or regulatory and enforcement power over commerce and the environment. Legislatures delegate some power to the executive agencies to make rules governing these functions within legislated boundaries. This "quasilegislative" function is limited by enabling legislation, as state legislatures themselves are limited by the Constitution. Additionally, many agencies create "quasijudicial" agencies to resolve disputes arising in the administration of the laws, which are subject to judicial review.

## Foundations of the US Court System

### Judicial Review

In the 1803 case of *Marbury* v. *Madison*, 5 US (1 Cranch) 137 (1803), the US Supreme Court held that laws passed by the Congress could be interpreted against the Constitution by the courts, and if the Constitution and the laws were in disagreement, the laws are pronounced as invalid. The Supreme Court held part of the Judiciary Act itself could not be enforced, because it gave the Supreme Court powers beyond those conferred by the Constitution. Chief Justice Marshall stated, "It is emphatically the province and duty of the judicial department to say what the law is." Even though Congress may have believed it was acting properly in passing the law, that was not the issue.

### The Adversarial System

Courts in the USA employ an adversarial system. This requires individuals to present their dispute to a neutral fact-finder. The litigants, without assistance, guidance, or direction from the court, accomplish the work of collecting evidence and preparing it for presentation to the court. Failure to present one's case properly, or preserve issues of dispute for appeal, generally results in losing the case. The adversarial system is believed best suited for dispute resolution. This method permits the court to examine opposing facts, determine the truth, and resolve disputes. The USA inherited this tradition from English common law.

## Federal and State Courts

### United States Courts: Structure

The constitutional provision for a Supreme Court and granting of power to Congress to establish the inferior courts creates the judicial branch. The Constitution provides that "The Judicial Power of the US, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" (Article III, Section 1). There

are three levels of federal courts. Specialty courts also exist. Jurisdiction is determined by federal statute, except with regard to the Supreme Court, whose jurisdiction derives from the Constitution.

The US Supreme Court is composed of a Chief Justice and eight associate justices. It is the court of last resort for the USA. It is the highest supervisory court in the USA, and has final authority over all US courts, both state and federal, concerning matters of federal law and the US Constitution. Its jurisdiction extends to those subjects enumerated in Article III of the Constitution. While the Supreme Court has the power to review and dictate states' application of federal law, it may not review state decisions based on "adequate and independent" state grounds.

Federal judges, including US Supreme Court Justices, are nominated by the President and "hold their [o]ffices during good [b]ehavior," after confirmation by the US Senate, unless they resign or are impeached and convicted by the US Congress. The Supreme Court sits *en banc* with all nine justices participating. Each justice of the Supreme Court oversees one or more circuit courts, with jurisdiction to act in emergency matters within those circuits. The Supreme Court, with Congressional approval, also makes procedural rules for the lower federal courts.

As the nation's highest court, the Supreme Court chooses the cases it hears, usually by granting a writ of certiorari. Once the Supreme Court decides a constitutional case, its decision is virtually final. Only through a subsequent Supreme Court opinion invalidating its previous ruling or a rarely enacted amendment to the Constitution itself, which requires ratification by three-fourths of the states' legislatures, can a constitutional decision of the Supreme Court be abrogated. When the Supreme Court interprets a statute, and Congress does not agree with the interpretation, the opinion governs, but Congress can enact another statute addressing the court's decision.

Below the US Supreme Court are 13 circuit courts of appeal. These intermediate appeals courts review decisions of the district courts, specialty courts, and administrative agencies in their circuits (Figure 1). These courts are created by Congress' power to establish inferior federal courts. Circuit courts have panels of three judges, though they can sit *en banc*, which means that all of the judges in the circuit participate in the decision.

The circuit court is the forum provided by law to review for error district court judgments and administrative agency decisions. A party who disputes the lower court or agency's ruling has a right to appeal. The Court of Appeals for the federal circuit sits in Washington, DC. It has national jurisdiction to hear appeals in specialized cases, including intellectual property and decisions from the Court of International Trade and Court of Claims.

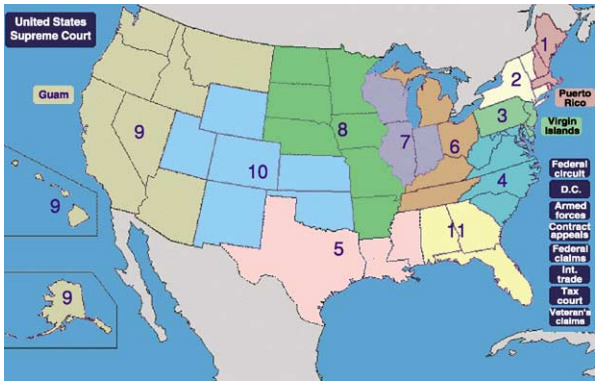


**Figure 1** Map of federal judicial circuits.

As an intermediate appellate court, circuit courts interpret the law. Their decisions are binding in matters of federal law within the geographical areas of the circuit. If a circuit's interpretation or application of federal law conflicts with the decision of another circuit, the US Supreme Court may resolve these disputes. US district courts exercise original trial jurisdiction of the federal courts. There are 94 US district courts. Each district is contiguous with one state's boundaries, with more populous states having subdistricts. There are also district courts in US territories that are not states. District courts also include additional courts such as adjunct magistrate and bankruptcy courts within their jurisdictions, to handle limited matters.

### State Courts: Structure

As in the federal system, each state has a judicial branch of government. The head of the judicial branch is typically the court of last resort or the chief judge or justice of that court. Because there are a number and variety of state courts, it is necessary to discuss general court organization. State court structure parallels the federal court system. State courts are organized into trial courts, which are typically courts of general jurisdiction that decide disputes by examining the facts in each case. Appellate courts review the trial court's application of the law to those facts as established in the trial court. Trial courts may also have limited jurisdiction over a statutorily or constitutionally defined area of the law. They often exercise some form of appellate review over outcomes in limited-jurisdiction courts or decisions by administrative agencies.

Limited-jurisdiction trial courts exist in most states and typically have criminal jurisdiction over misdemeanor offenses and ordinance violations. Limited-jurisdiction courts typically have jurisdiction over

civil cases where the claims are under a fixed maximum amount. Appellate courts are also divided into either intermediate appellate courts, which hear initial appeals, or courts of last resort (typically called supreme courts) which have final jurisdiction over appeals.

State court judges are typically elected by voters in their states to serve for a fixed term. Depending on the state, judges may be selected in partisan and nonpartisan elections or by appointment by the state's governor. Once selected, a judge may face partisan or nonpartisan reelection or retention elections if he/she decides to remain in office past the fixed term. Qualifications for service as a judge are set by state statutes and constitutions. To qualify for office, judges must typically meet age and residency requirements and possess specific legal credentials. Most states have an official evaluation process which is responsible for evaluating judicial performance, conduct, and judicial recommendations.

The judicial branch is governed by rules of court procedure, which may be formulated by the state's highest-level court and its state legislature, including a combination of statutory and constitutional authority. States have central offices to handle administrative responsibilities for their courts. Some states have also established state–federal judicial councils to address issues of jurisdictional overlap and other matters of common concern between these two parallel judicial branches.

Appellate courts review issues that were raised and preserved during the lower court proceedings concerning issues of law, procedure, evidence, results, and error. Appellate courts may also create broad public policies through their interpretation of the law and public policy. All losing parties have the right to a review of their case in an appellate court. Each case is entitled to be reviewed only once by the appellate court. After the losing party appeals to an intermediate appellate court, their right to appeal is considered protected. A further appeal may be made to the state's highest court. The court of last resort, in its discretion, chooses the cases it wants to consider and decide. However, under certain limited circumstances (e.g., death-penalty cases), cases are appealed directly to the state's highest court. Cases that are accepted by this high court are typically complex and implicate public policy considerations.

### Jurisdiction

The state and federal court systems are similar in design and function. One of the important distinguishing characteristics between them is jurisdictional requirements to file a cause of action. Jurisdiction is "[a] government's general power to exercise authority over all persons and things within its territory." With a few exceptions, state courts have general jurisdiction over all cases arising within the state. Federal court jurisdiction is limited only to cases enumerated in the Constitution and those provided for by Congress. These include cases in which the USA itself is a party, cases involving federal statutory or constitutional law, and cases between citizens of different states that meet diversity of citizenship requirements with a specified amount in damages. Courts must have either personal jurisdiction over the defendant or have in *rem* jurisdiction over the *res* or thing situated in the state in order for the case to be properly before it.

## Conclusion

Despite the existence of many legal jurisdictions and sources of law in the USA, common legal traditions, structure, and continuing interdispersment of ideas have created a diverse, unified, and consistent court system in the USA. This diversity illustrates how the interrelationships between federal and state law and courts can be complicated, even for experienced practitioners.

## See Also

**Court Systems:** Sharii'ah Law; Law, China; Law, United Kingdom

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# COURTS, REPORT WRITING

**M Solon**, Bond Solon, London, UK



## Definitions

More healthcare practitioners today are preparing evidence and supplying it in court, if by court is meant any legal forum where evidence is heard (e.g., a coroner's court, civil and criminal courts, public inquiries, and disciplinary hearings).

This article gives practical advice on how to prepare written evidence. Although the document format may vary between courts, the basic principles are the same. The report should be written for an intelligent reader who does not have specialist knowledge, and the document should have everything the reader may need to understand the issues discussed. In fact, well-written evidence can save the writer from the unpleasant experience of cross-examination. The intention should be to help the reader with precision and clarity rather than including complex descriptions.

Healthcare practitioners will either be witnesses of fact or expert witnesses. Witnesses of fact give evidence of what they saw, heard, and did in the course of an incident. Such a witness would have been part of the actual events and probably would have made contemporaneous notes. The witness will not be asked to express an opinion on what happened but may have to justify why a procedure was utilized. The witness of fact should try to recreate for the court the events as they happened.

An expert witness is independent of the case and assists a judge or tribunal to understand technical issues and expresses a professional opinion on these issues. The technical expert is case- and issue-specific and is entitled to express an opinion by way of his/her qualifications and experience relevant to that issue. The expert's duty is to the court and not to the party who pays the fee. Like the witness of fact, the expert witness should aim to give accurate, complete, and honest evidence.

Criminal cases involve the state trying to prove that a crime has been committed. Because this can involve an individual's liberty, the level of proof required is high. The case must be proved beyond reasonable doubt. The defense will try to raise doubts and obtain an acquittal. The defendant will be found either not guilty or guilty and if guilty, will usually be punished.

Civil cases generally involve disputes over money. An individual or organization wants money from another for something that happened or did not happen. Because the case is between private parties, the level of proof required is less than in criminal cases, that is, on a balance of probabilities, was something more likely than not? There is no element of punishment but the court will try to put the parties back into the same position had the dispute not arisen.

Both civil and criminal proceedings are adversarial. This means that the parties test each other's evidence to find the truth, with the judge (or jury in a criminal trial in a crown court) as decision-maker. All the evidence of witnesses, including expert witnesses, will be tested in cross-examination, if the written evidence is not agreed before.

## Written Evidence for Criminal Proceedings

This section considers the procedure for preparing written witness statements of fact for criminal proceedings; describes the rights of the police in reference to a patient undergoing medical treatment and the implications for a healthcare professional treating the patient; explains the reasons for the appointment of healthcare professionals as expert witnesses for the criminal courts; and reviews the preparation of expert reports for criminal proceedings.

## Who is Responsible for Prosecutions in England and Wales?

The prosecution of criminal offenses is controlled by the Crown Prosecution Service (CPS), a body set up by act of parliament in 1985 that became fully operational in October 1986. The CPS receives the evidence concerning a crime and makes the decision as to whether or not to proceed with charging an individual.

## Who Provides the Evidence to the CPS?

The police gather the evidence and present to the CPS to decide on charges. In the case of injuries sustained by a victim, the police normally approach the healthcare professionals who examined and treated the victim to obtain statements in relation to a possible offense. In these circumstances, the healthcare professional is providing clinical evidence regarding the injuries received or information on specific aspects of the care the victim was given. While the victim may generally describe the injuries suffered, he/she is not in a position fully to know the extent of injuries or, more specifically, the treatment required. The reason why healthcare professionals are required to describe the injuries and their treatments is because they have both the skills and the knowledge that a layperson neither has nor has access to.

A description of the injuries received and the necessary treatment given to the patient indicates the seriousness of the injuries. When this information is presented to the CPS, it may influence the charge that a person faces and therefore influence the sentence pronounced, if found guilty.

In these circumstances, the healthcare professional is a "witness to fact." He/she recalls what was observed or heard during or following an incident. A witness of fact will be required to discuss facts only as remembered or recorded in his/her notes.

## The Nature of the Request to Provide a Statement

For doctors, most requests for statements regarding patients who have been treated in a hospital are coordinated through an administrative channel. The police will request a statement from the doctor(s) involved in the case. In serious cases, particularly where evidence such as clothes, personal effects, or samples are taken by the police, other healthcare professionals may be asked to give a statement outlining their involvement in the case. In these circumstances, the most important part of collecting the evidence linking a suspect to the crime may be the circumstances of the crime. It is important for the prosecuting authorities to show an uninterrupted and complete record of the movement of a piece of evidence, including all the individuals who touched it. This is needed to show whether the evidence was tampered with or remained unchanged until a forensic scientist was able to examine it.

Most statements are compiled from the clinical notes made about a patient. These notes should be made at the time of contact or shortly after contact. It is important that all clinical records are dated and signed by the person writing them. When compiling notes, in the midst of trying to treat a patient, it may be difficult to remember that the most important thing asked in the future may be clinically insignificant during that first examination.

With some serious offenses, particularly murder, a statement may be requested shortly after the event, when the memory of the event is still clear. However, it is not unusual for a statement request to be delayed by weeks or sometimes months.

In such cases, memory is likely to have faded and the only records of involvement and findings are the written notes made at the time. This again emphasizes the importance of good note-taking. If the contemporaneous notes are unclear or brief, or if one is unable to remember a particular patient, the temptation to add anything that cannot be clearly remembered should be avoided.

In most criminal cases, medical evidence takes the form of written evidence, and the legal profession tries not to involve healthcare professionals in the court hearing. However, if the statements give cause for concern, either by the prosecution or the defense, the writer may be required to appear in court. Thus, there is always the possibility that by the time of the court appearance the memory may have faded further.

## Requirements before Writing a Statement

Before preparing a statement it should be ensured that all the relevant clinical records are available. A witness to fact, who has been personally involved, should be able to clarify the position. While some clinical records may be available, there may be specific problems in obtaining all the notes. It is important that the statement is made from notes taken and, if the practitioner is unable to provide a complete history of the treatment (e.g., if the patient was transferred to another team), details should not be added to the statement that cannot be confirmed in court.

Patient consent for disclosing clinical data from medical records must be checked. In most cases, the police obtain consent for the release of medical records when taking a witness statement from the victim, and the consent may be appended to the request. It is necessary to have written consent, and this

should be retained with a copy of the statement. If no consent is available, the police officer concerned should be requested to obtain consent.

If the patient has subsequently died and consent cannot be obtained, there are some circumstances where clinical details may be divulged as a matter of public interest. However, it would be better for the healthcare professional to discuss with either his/her professional organization (e.g., in the UK, the Medical Defence Union or Royal College of Nursing) or the statutory body regulating practice (e.g., General Dental Council) before releasing this information to the prosecuting authorities.

## Procedure for Preparing a Statement

While hand-written statements are acceptable, typewritten statements are preferable, as this saves transcription errors later. Sometimes the police ask for statements and will write the statement on behalf of the healthcare professional. Alternatively, the statement may be written by a healthcare professional and in such cases the police may be requested to return the statement.

To comply with court proceedings, most statements are written on standard paper. This includes a standard declaration known as a "Section 9 declaration" (Figure 1). This is part of the Criminal Justice Act 1967, and statements in this form are acceptable to the court. Such statements can be read out in court and have the same weight as personal appearance for giving evidence, provided both sides agree to the contents of the report.

## What Should the Statement of a Doctor Ideally Contain?

The first part of the statement should show the doctor's name and qualifications (without abbreviations). It should include the position held and the relevance to the reason for the report. Although not essential, some indication of experience, time since qualification, further examinations, and any specialist knowledge can aid the legal team to assess the contents of the statement. The statement should then identify the victim by name and date of birth (not by address). The doctor should note the date, place, and time he/she examined the victim, and the availability of records. Many notes, particularly relating to emergency treatment, do not include all these details, and sometimes the exact timing of events may be important in the case. Therefore, if not included in the medical statements, this may lead to the practitioner being called to court.

The victim's medical complaint and the reason for treatment can be recorded. This is not known *a priori* because in general the doctor was not present at the incident. The narration by the victim amounts to hearsay; therefore, as such it cannot be taken as factually correct and, in most instances, the doctor would be unable to recite the victim's narrative in a criminal court.

Witness Statement

(C.J. Act 1967, s9; M.C. Rules 1981, r.70)

(Magistrates Courts Act 1980 s102)

Statement of ..... Age .....

This statement (consisting of pages each signed by me) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.

Dated .....

Signed .....

**Figure 1** Format of standard declaration.

## Civil Cases

A healthcare professional may also be involved in a civil case. The process of preparing reports and a template for the production of such reports are discussed with a view to assist the healthcare professional in analyzing the evidence prepared for the other party in the litigation.

Many people who sustain injuries seek compensation. The injuries may be the result of an accident or clinical negligence. To show both the injuries received and the subsequent effect on his/her life, the patient or client will normally approach a solicitor to act on his/her behalf, and this solicitor will probably instruct an independent healthcare professional to assist in the preparation of the case and to provide clinical evidence for the court.

In this instance, the healthcare professional is being asked to act as an independent expert witness. The most important part of assessing the letter of instruction is the healthcare professional's decision that he/she is an appropriate person to prepare this report. This means that he/she must have the expertise to prepare the report and to give an authoritative opinion on the questions asked by the lawyer. Unless the solicitor has a practice exclusively in personal injury, he/she may be unaware of the difference in the medical specialties, such as between a neurologist and neurosurgeon, or between the role of a physiotherapist and that of an occupational therapist, when assessing continuing care needs.

For a claimant to prove that a healthcare professional was negligent in giving or refusing the claimant treatment, he/she must show:

1. that there was a duty of care
2. that there was a breach of that duty
3. that the breach of duty resulted in damage
4. that the damage was a direct result of the breach of duty (causation).

To establish each of these, there is a need for expert evidence, and the defendant health authority or individual practitioner (normally through his/her professional indemnity insurer) will also have obtained expert opinion.

Often the experts used to establish each of these parts of negligence are from differing specialist areas, and it is important that healthcare professionals involved in this work realize this.

The injury the claimant has suffered may be similar to injuries sustained in accidents where the negligence is from another source (e.g., road traffic accident (RTA)), and the type of report produced in this instance is similar to that produced for personal injury claims (known as a condition and prognosis report).

However, the report that considers the alleged breach of duty – the liability report – is completely different. A healthcare professional must have some knowledge of the legal background involved. The same report may cover causation. In such cases the expert chosen to give an opinion on liability must work in the same discipline and area of expertise as the healthcare professional against whom the allegation is made.

It is also important that the expert has knowledge of the work environment of the alleged allegation. For instance, if, as a result of an accident, a patient has suffered brain damage and it is alleged that the hospital where the patient was first admitted did not treat the patient properly, the expert chosen to prepare a report should be from the same discipline as that of the admitting hospital's head of the injury team and should work in a similar type of establishment.

Similarly, if the allegation is against a physiotherapist in private practice, the report should be submitted by a practitioner in a similar field. The following points must be considered before agreeing to prepare a report.

### What Happens if This Initial Contact is Outside the Expertise of the Healthcare Professional?

If it is felt that the area requiring an expert opinion is outside the field of expertise of the healthcare professional, the case should not be accepted. If it is accepted, and the practitioner is subsequently asked to attend court, the required expertise will be found to be lacking and a great deal of time and money will be wasted. It is far better to inform the solicitor, after reading the letter, that the request falls outside the practitioner's expertise, and explain to the solicitor exactly where the area of expertise lies. The healthcare professional could suggest to the solicitor the name of someone personally known who is in the appropriate field. However, if such a recommendation is made, the expert may create problems for him/herself if the suggested expert does not meet the requirement or produces an inadequate report.

It is appropriate to estimate the best time to prepare a condition and prognosis report. If the injuries were sustained recently, the claimant may not have recovered fully and a definitive opinion on long-term prognosis may not be possible. The instructing solicitor has to be informed by the expert if it is felt that this is the wrong time to prepare the report. There may be a legal, rather than clinical, reason for the report at this time.

Once the expert has decided that he/she is appropriately qualified to prepare the report, and is willing to do so, an acknowledgment should be sent

to the instructing solicitors indicating the terms of business. This should include an estimate of the fee and the terms on which payment is to be made following invoice submission. Also, the letter should inform the solicitor of the timeframe necessary to prepare the report. All documents required for the report or, where necessary, the authority to obtain these from the person who holds them, should be requested. A flexible approach with regard to the timing will allow the solicitor and the expert a chance to discuss this if there are any questions. Finally, the number of copies of the report needed should be confirmed.

Sometimes in civil cases one expert (known as a single joint expert) is instructed to prepare a report by both parties to save time and costs and to assist in an early settlement or decision. This is more common in smaller claims and is rare in clinical negligence disputes, particularly for liability and causation reports. Here the judge will need to know the spectrum of medical opinions within which lie the actions of the allegedly negligent practitioner.

## Obtaining Clinical Records

Most hospitals and general practitioners charge for photocopying notes and copying X-rays. In a complex case, these may be required by a number of experts. The costs of multiple copies for each expert can become high. Therefore, many solicitors now obtain the relevant records themselves, copy, paginate, and file, and send copies to the expert for the preparation of the report. If, however, the solicitor asks the expert to obtain the records, it is important that these records are sought as early as possible. For these records to be disclosed to the expert, the request must be accompanied by the patient consent (or consent of the parent or legal guardian, if the patient is a minor). The UK Law Society and British Medical Association produced a revised model consent form in 2003 which is available on their websites at http://www.lawsoc.org.uk and http://www.bma.org.uk/.

## The Type of Records to be Obtained

Records from hospitals include medical, nursing, and other clinical records, and there may be relevant general practitioner records covering the medical history before the incident. If there are complex considerations, other records from rehabilitation services may need to be obtained and reviewed. Accident reconstruction and police reports may be helpful in preparing a report in an RTA case, depending on the questions being asked. The claimant's statement may also be helpful but the expert should be aware that the statement may not be in a final form, ready for disclosure to the other parties, and therefore it may not be appropriate to quote from the statement in the report.

## Examination of the Patient or Investigation of Needs

While the format of the examination is similar to assessments made by healthcare professionals, during their normal clinical role (and similar standards of care must be exercised in the examination), the result of the investigation must be precise, with documentary evidence, to produce an independent assessment of the patient's clinical state and his/her needs. The expert's examination of the claimant should be recorded in contemporaneous notes. This is crucial, as these notes may be taken into court and used to refresh the memory. Notes made at a time distant from the event cannot be used and the healthcare professionals must rely on memory alone.

If standard further investigations are necessary, most solicitors will not worry about a small additional charge. If, however, complex assessments are deemed necessary following an initial examination, it is prudent to obtain consent from the solicitor before proceeding.

There is a difference between an expert acting on behalf of the claimant and one acting on behalf of the defendant insurers. Many claimant solicitors now request that even simple X-rays of their client are not taken by an expert acting for the defendant, without the express consent of the solicitor. In this context, the courts have interpreted Article 8 of the European Convention of Human Rights, the right to a private and family life, as requiring good reasons for repeated medical examinations of a claimant and for the disclosure of clinical records. The exceptions are those obviously relevant to the treatment of the particular injury or to a closely related previous medical condition.

## Preparing the Report

Many legal and expert witness organizations have produced a standard format for medical reports. In this age of technology there is no excuse for unprofessional reports.

In summary:

1. The report should contain information about the expert and his/her qualifications to produce the report.
2. The purpose of the report should be stated, instructions should be summarized accurately, and the issues to be addressed should be outlined at the beginning. These may be used in the opinion section of the report as paragraph headings.

3. The historical aspects of the case should be laid out using references to documentary evidence and the patient's memory.
4. The expert's examination and/or any investigations should be described, together with any further tests, and their results.
5. Finally, the expert should provide his/her opinion and conclusions and the CPR (Civil Procedure Rules) statement of truth should be attached to the report.

As appendices, the expert's letter of instruction, a list of the documents received and considered, and any supporting material to back up the opinion, such as articles from medical journals, should be included.

A brief résumé should be attached to the report.

## Formalities to be Completed before Sending the Report

Prior to submission to the solicitor, the report should be read at least twice – the first time to look for obvious errors, and again to check for clarity, plain English (with minimal medical jargon or addition of a glossary), veracity of conclusions, and consistency in style.

The number of copies needed should be prepared, each copy signed with the date, and sent with a fee note to the instructing solicitor(s).

## Who Will See the Report?

The report will initially be seen by the instructing solicitor, who will show it to the client and discuss it with him/her. When the contents of the report are accepted, a barrister may be asked for an opinion on the case, particularly in complex clinical negligence disputes. The barrister will review all the evidence, including the medical reports, and advise on the next steps. After proceedings have been issued, the evidence used to support the case will be given to the other party in the case (i.e., disclosed). This disclosure will include the expert reports. At this stage, the reports will be seen by the solicitor for the other party, possibly the party him/herself, and the barrister and expert advising the other party. If the case cannot be resolved without a trial, the judge will see the reports as part of the evidence presented to the court, by the parties to the action. In legal terms, this evidence forms "the trial bundle."

## What Can Happen to the Report After it Has Been Initially Submitted?

The next stage depends on the contents of the report and for whom it is written. If the report is prepared on behalf of a claimant, the solicitor is likely to show the claimant the report. The claimant may wish to comment on the contents and the solicitor would then send a copy of these remarks to the expert, particularly if the patient feels that there are omissions or errors in the factual part of the report.

## Procedure to Modify the Report (if Asked)

Some comments on the submitted report may be of a factual nature, and, unless there is evidence from other sources, for example, written clinical records, that do not support the comments, amendments can be made. If the facts alter the basis upon which an opinion is made, then the opinion can be legitimately changed.

If, however, the comments dispute the conclusions, unless there is a factual error leading to that conclusion, the expert must not forget that he/she is an independent witness. If the alterations requested cannot be supported, based on the factual evidence, including the expert's clinical findings, the report should not be modified, but the expert should explain why he/she believes the conclusions are correct. Finally, it is the author and signatory of the report who may have to defend its contents in a court witness box.

Much has been said about solicitors attempting to rewrite expert reports and influence the conclusions of reports. It is becoming clear that, although the judiciary are trying to stop the partisan expert, they do not wish to stop genuinely held opposing views between practitioners.

In the new world of "openness," many previously privileged documents are being disclosed, including the letter of instruction to the expert from the solicitor.

## What Happens When the Solicitor Seeks Comments on the Report from the Other Side?

Sometimes the other side will have expert evidence from another practitioner. When this is disclosed, the instructing solicitor will send a copy to the expert asking for comments. The time taken to read the report from the other side, to reread one's own notes and report, and to prepare a detailed response is chargeable and the expert should raise an invoice with the comments, detailing the time involved.

It is important to evaluate the information logically and methodically as both experts look for common ground and areas of disagreement; it is then easier for solicitors to crystallize any area of conflict within the evidence.

## Preparation of Reply with Comments

It is important to reread the earlier report, particularly if some time has elapsed between the preparation of the report and the request for comments. Any investigation or examination that has occurred and the date of that examination in relation to the expert's own examination of the claimant should be noted.

There are two distinct routes for comments. First, are the conclusions justified, based on the examination that the other expert carried out (i.e., if the expert was given the same facts, would he/she reach the same conclusions?). Are the facts at variance, even allowing for the passage of time, with the evidence collected by the expert? If the answer to this last question is yes, then this simple fact cannot be disputed, and it may be appropriate to ask the instructing solicitor for a reexamination of the claimant to ascertain whether his/her clinical status has changed since the initial examination. If, following reexamination, a change has been observed, and the conclusions drawn are now similar to those of the expert from the other side, then the medical evidence is likely to be agreed and the expert should indicate this agreement with the contents of the report.

Second, are the conclusions drawn different from what the expert would have aimed at given a similar factual basis? If the second condition applies, then there will be a disagreement between the medical experts. In this instance, it is important to provide support for any conclusions drawn in the report.

The expert should not feel intimidated by the expert from the other side, for example, his/her status in the profession. If the expert believes in his/her opinion and can support it with documentary evidence, he/she should feel secure in this position.

## What Form Should the Comments on the Report from the Other Side Take?

For the sake of clarity, any comments made by the expert should be written in a report form, using the paragraph numbers given in the expert's own report as well as those used in the report from the other side. The expert should provide a point-by-point explanation of the background and opinion whether in support or rebuttal of the other expert's conclusions. If the report appears to be lacking in factual information, this should be questioned in the response, backed up by information justifying the expert's own conclusions, rather than those of the opposing expert. Initially, this will be sent to the expert's instructing solicitor and barrister, and may possibly be disclosed if the arguments made are persuasive.

If the matter still cannot be resolved, then the parties may proceed to put formal written questions to each other's experts to clarify aspects of their reports. Such points must be answered within a short time (usually a few weeks), and the experts may be required to discuss the differences between their reports with a view to removing these differences if possible.

The questions raised on the other expert's report, the formal exchange of written questions and answers, and a note of the experts' discussion may all be useful to the barrister when preparing the case for the court.

## Medical Negligence Liability, Written Evidence

The written evidence in medical negligence liability cases has the following goals:

1. to give an outline of the procedures in clinical negligence
2. to show how an appropriate report is commissioned on liability
3. to give an outline of the preparation of such a report
4. to give advice regarding the final report for disclosure
5. to help respond to written evidence from the other party.

### The Initial Letter

Most requests to undertake a liability report commence with a letter (Figure 2) from a solicitor asking if the expert is prepared to act and including brief details about the case.

#### Example Letter of Approach

**Procedure to be followed if a request for preparation of clinical negligence report is received** First, the letter should be read thoroughly and the expert should ask him/herself the following questions:

- Do I know anyone who may be involved in this litigation?
- About what am I being asked to give an opinion?
- Do I know enough about the area in question and the procedures at the time of the alleged incident?
- Does the solicitor asking for an opinion appear to know what he/she is doing?

Having looked at this list of questions, an initial response to the request can be made. The possible responses include the following:

Dear Sir

I have been instructed by Miss Smith to pursue a claim against the War Memorial NHS trust for alleged medical negligence and you have been recommended to give an expert opinion.

In brief, my client instructs me that she attended the War Memorial hospital on several occasions over a period of weeks having, on occasions, attended herself and, on other occasions, being referred by her GP to various specialists. On each occasion, she was discharged home until on the last when she was admitted complaining of abdominal pain and severe vomiting.

She complained that she was not admitted or appropriate investigations carried out and as a result she had to be admitted as an emergency case for surgery to be carried out.

I confirm that I have in my possession the complete hospital and GP records of my client and these have been ordered and paginated.

Before we can instruct you formally, we need to know your fee so that we can seek specific authority from the Legal Aid Board.

In addition to an estimate of your fees and your timescale for preparing the report, we would be grateful that there is no conflict of interest in dealing with this matter and that you have not previously been instructed to prepare expert evidence in this case on behalf of any other party.

Once we have received specific authority from the Legal Aid Board, we can formally instruct you and forward the medical records to you.

Yours faithfully

**Figure 2** Example letter of approach.

- This request falls within the area of expertise. If so, and there is no conflict of interest, then a letter can be sent stating that the expert is prepared to give an opinion and the terms and conditions.
- If this falls within the expertise but there is a conflict (e.g., if the expert personally knows the person against whom the allegation is being made), the solicitor should be informed about the conflict of interest. The solicitor will appreciate an honest refusal due to conflict.
- After reading the letter, if it is felt that the allegations concern areas outside the expert's professional area, or if the expert belongs to a different professional discipline within the same clinical area (e.g., nursing rather than medical), then this should be explained to the solicitor, explaining what the areas of expertise are.
- Finally, if the practitioner thinks that the questions asked may be within his/her area of expertise but has doubts, further details may be requested from the solicitor.

Having received a letter of instruction, some immediate actions should be undertaken to smoothe the subsequent management of the case. All the notes should be briefly checked to ensure that the solicitor has provided all the relevant papers for preparation of the report. After reading the extent of the clinical and other material, the time estimated for preparation of the report should be checked. It should be kept in mind that a detailed evaluation of the contents of these records will only be possible when the actual report is prepared. This will take place according to the timetable agreed with the solicitor. If any records or other material appear to be missing, the solicitor must be informed immediately. If the quantity of material is much greater than expected according to the initial letter and if it is felt that the estimate given to the solicitor was an underestimate, a letter should be sent to the solicitor explaining why the estimate was incorrect and a revised estimate, including the reasons for the change, should be communicated. Before commencing any work on the report, the expert must wait for the solicitor to agree to this revision. At this stage, it is important that all the records are present and that the estimate is approximately correct: a diary note should be prepared indicating the schedule to prepare the report, and this should be kept to.

### Preparing the Report

There are three parts to a liability report:

1. What happened (the historical narrative)?
2. What should have happened (the expected standard of care)?
3. What went wrong (the breach of those standards)?

While every expert has his/her own system of setting out reports, the above outline shows one method of dividing opinion from facts. It displays to the solicitor and others the clarity of thinking in the report.

### Reading the Factual Documents

The factual documents may include not only copious clinical records, but also statements from witnesses of fact from the party who has instructed the expert. There may also be some correspondence from the defendant trust if the claimant has followed the complaints procedure before initiating legal proceedings. Finally, if there has been a death and an inquest has been convened, witness statements used in that forum may be available.

### Clinical Records

The clinical records should not be read with the benefit of hindsight. Once the diagnosis or treatment is clear, many things may appear to be below acceptable care if viewed with that knowledge. However, the healthcare professional works within an area where there is often no exact right or wrong, and incomplete information may be available at the commencement of contact between the patient and the healthcare worker. It is important for the expert witness reading the records to put him/herself in the place of the healthcare professional receiving the information as documented in the records. The expert witness should view the subsequent actions of the healthcare professional in the light of the information that was obtained at the time.

It should be appreciated that the information in the notes may be in conflict with the evidence of the witness statements in the case, particularly the proof of evidence from a claimant. When reading the clinical records, it is advisable to maintain a healthy skepticism about the total truth of these records. Records and statements from witnesses should be read, noting any similarities or differences between them and the written records.

### Writing the Narrative

The narrative section of the report can be written once all documents have been read. If there are two different accounts of the circumstances, both should be recorded in the report as alternative explanations, without, at this stage, commenting on the differences.

If there are reports from other experts that inform the narrative, particularly about an area outside the expert's field, a brief summary of this part of the circumstances should be given, as no opinion regarding that part of the case will be sought from the expert.

### Defining the Standard of Care

Having read and recorded the narrative section of the report, the next logical step is to define the acceptable standard of care for any patient presenting to a healthcare professional of equal grade at that particular time with the same problem.

Within this, there may be a variety of similar standards that could be adopted, according to the interpretation of various factors found in the history and initial assessment of the patient. At this time, any relevant texts, current at the time of the incident, should also be consulted for an authoritative view of acceptable standards of care. Sometimes, the relevant guidelines produced by statutory bodies may also be helpful.

### Writing the Opinion

The opinion is often the most difficult part of a report to write. First, the facts may be in dispute – the patient and the healthcare professional may have different perceptions of the consultation between them. It should be remembered that it is not for the expert witness to define the facts of the case but only to define whether the standard of care was acceptable.

If there are two differing accounts, then an opinion must be given for each set of facts. The expert witness must remain objective in his/her report. If there was an acceptable standard of care in some parts of the treatment but not others, it is necessary for the expert to acknowledge this. It should be stated that the expert witness feels that some of the allegations have not been substantiated by medical records. However, the expert witness may find that the overall standard of care was below an acceptable level.

Each part of the case should be dealt with logically and in sequence, as often the series of events that occur is additive, and it is the total package of care the patient received that was unacceptable.

### Writing the Conclusions

Having the report, the expert should compile a summary of the main facts plus his/her opinion. This should be brief and positioned at the beginning of the report.

### Appendices

Any literature used to help form the opinion should be copied and appended to the report. In addition to the relevant section, the title page and publication details should also be supplied as information for the legal team and, after exchange, to allow the expert on the other side to see the literature review.

A single-page résumé of the expert should be appended to the report.

## See Also

**Expert Witness:** Qualifications, Testimony and Malpractice; Medical; Daubert and Beyond