LEGAL SYSTEMS

Legal Systems—Linking Legal Institutions

The dynamic interaction of related structures can be viewed as a system that ties them together for a common purpose. A systems analysis of law includes describing the relationships between and interactions among legal concepts, ideas, and institutions, the operations those institutions conduct, the functions the legal system is expected to carry out, and the observed results. We can thus say that a legal system is expected by society (its “environment”) to help maintain peace and stability (its “functions”) by producing just decisions (“outputs”) in response to legal claims (“inputs”). The term “justice system” is also sometimes used, most commonly in relation to criminal law, as in “justice will be done”—for example, the Justice System Journal, which has been published since 1974, focuses in large part on criminal law, procedures, and administration.

Learning how legal systems operate through the work done in interconnected legal institutions should be part of a comprehensive legal analysis in pursuit of justice. If you believe a particular law or legal rule is unfair and want to do something about it, legal analysis will help you find out what type of law it is (where it fits in the structure of law), plus how the law came to be as it is, and who has the power to change it (how the legal system innovates). For example, if the rule or principle has been accepted by the highest court in the
legal system, we will see that lower courts cannot adopt a different approach. Legal analysis helps us to understand both the potential for change in legal systems and the constraints on it.

Critical analysis may also discover faults in the legal system, such as systemic biases and discrimination that can affect the justness of outcomes in particular cases and constrains overall system change. Concerning such systemic deficiencies, Susan Silbey asks, “Why do people acquiesce to a legal system that, despite its promises of equal treatment, systematically reproduces inequality?” Perhaps the answer to that question partly lies in the public’s general lack of legal literacy skills, including a limited ability to engage in critical analysis of law and its institutions. I noted in a previous chapter that using legal processes to pursue worthy goals does not always result in the intended outcome. When this happens, a critical perspective of legal institutions and the legal system may reveal aspects of them that suppress legal innovation or discourage criticism of prevailing practices. A critical analysis may reveal the need for institutional and systemic change before real progress can be made in using law to improve society. This critical perspective will seldom be heard if most people lack analytical skills in relation to law.

Perhaps the fact that most people are only ever involved in a few (if any) legal cases in their lives also limits the possibility of taking a critical perspective on the legal system as a whole. A person who has lacks experience in a series of legal cases has little basis to make any general observations about the state of the law and its institutions. One of the aims of critical legal studies is to accumulate information and data so that critical analysis may benefit from a broader and longer-term view of the working of the legal system.

A legal system is just one of many systems within a complex society, and can therefore be considered a subsystem of the overall social system. Think of other important systems: health care, education, economic, and political. Historically, many have claimed that the legal system is separate and autonomous from these and other social systems, that it is independent and unique, especially from politics. Although judicial institutions are considered a branch of government, they are expected to operate independently and without influence or direction from the legislative and executive branches. Many now challenge this claim made by courts that they are independent from politics, as we will see later in this chapter, but the legal system continues to draw boundaries between what is considered a “legal” matter and what is not. In this way, the
legal system tries to maintain itself as a separate, self-sufficient system with a unique sphere of operation. In the concluding section of this chapter, we will consider how that description should be modified or expanded to provide a more comprehensive view of the legal system as one of many interacting subsystems in society as a whole.

Functions of Legal Systems

Most people, whether they consider themselves to be inside or outside the legal system, would probably agree that one of its main functions is to help establish and maintain social order (not forgetting the contributions of morality, etiquette, and surveillance cameras). But what order means, and how a legal system contributes to it are difficult questions to address, and the answers to them have changed over time.

The most familiar form of law is a set of rules for behaviour: “obey the speed limit,” “no smoking,” “pay your taxes.” Rules help to maintain order and security in everyday life, for example, by making it possible to drive safely on the roads, to live in a healthy environment, and to pay for police who enforce the rules. Law in the form of rules is one method of social control that governs our actions. Under the principle of the rule of law, we expect all members of society, whether politicians, billionaires, or celebrities to obey legal rules—everyone is equally subject to this form of social control.

However, it is important to note that legal systems have very few means of physical coercion over people—the armed forces are not part of the legal system, and not that long ago there were no organized police forces. Outside the courtroom itself, in which order can be forcibly maintained if necessary, a judge relies on the force of her words to exert control over society. In practice, control by legal systems is only possible through society’s support of decisions and orders that are considered legitimate (legally proper). This principle of legitimacy is what impels most people in society to obey the courts, although in a few cases, actual force may be necessary. In criminal matters, control is more obviously exerted by the corrections system following the decisions and directions of the courts.

From time to time, it may become necessary for the legal system to conspicuously reassert control so as to reinforce the rule of law. The most dramatic form of such control is finding someone in contempt of court. A person commits contempt when he or she fails to follow the order of a judge and demonstrates
lack of respect for the rule of law. Such conduct is considered by the courts to be particularly serious when it is the executive branch of the government flouting the law. When that situation occurs, it challenges the legal system to maintain the force of the rule of law in the face of other sources of power in society. An Alberta case is one contemporary example of how the legal system continues to take such matters very seriously, especially when orders of the court are not obeyed. In that case, the court declared a high-ranking government official to be in contempt of court for not following a court order concerning a child. Contempt can result in serious consequences, such as a fine or imprisonment.

Another function of legal systems is to resolve private disputes between members of society so that people do not “take the law into their own hands” and engage in acts that can escalate into violence. Government, through its judicial institutions, thus offers methods of dispute resolution through court proceedings that help to maintain peace and stability in society. Under the rule of law, everyone in society should have access to the courts so that those who refuse to abide by their legal obligations may be summoned to court to answer for their actions and suffer the consequences if found responsible. Most individuals will likely accept adjudicated decisions resolving disputes and comply with them without the use of force if they are made according to accepted legal procedures that are considered legitimate within the legal system. However, if a judicial decision involves payment of money by one litigant (party to a lawsuit) to another, it may still be difficult to collect the money owing. In such cases, the property of the judgment debtor (party required to pay by court order) may be seized and sold, with the proceeds paid to the judgment creditor (party to be paid under court order). Government officials acting with the authority of a court order thus take actions that avert the possibility of confrontation between the litigating parties.

It is now widely recognized that the number of trials in court is declining as a proportion of the number of lawsuits commenced. This seems to indicate that adjudication is becoming a less favoured way of resolving legal disputes. It should be noted, however, that trials as a way of ending disputes have always been exceptional, especially with regard to the great number of potential claims in society that never even become disputes, let alone lawsuits. Most disagreements between people do not become disputes, and most disputes do not become legal claims. The legal system is the last resort for people who cannot obtain what they believe they are entitled to from others, and there are
many informal, private dispute resolution methods used in society, such as an intervention by friends or relatives. This might well be the best way of resolving the dispute between the uncle and nephew in the previous chapter. More formal, organized alternative systems such as alternative dispute resolution (ADR) also exist and play a role in the decline in the number of trials; they will be discussed in another section of this chapter.

The dispute resolution function of courts is another way that the legal system indirectly contributes to order in society. Court decisions in specific cases have a radiating effect, which means that they can influence others who are not parties to the lawsuit, but who may be in similar circumstances. Knowing the prior decision, others may alter their behaviour with the expectation that doing so will better assert or protect their legal rights. Similarly, people may expect those they deal with to act in accordance with the standards courts have laid down in resolving disputes. This is the spillover effect of individual court decisions; people act in the shadow of the law as it has been applied in other cases. In this way, the legal system contributes to establishing and maintaining a set of normative expectations (beliefs about what people should do) for society. People tend to act lawfully, and expect others to do likewise based on common knowledge of how the courts would likely treat them in resolving a dispute.

Some legal experts express concern that the decline in trials will weaken the role of the legal system in supporting the normative expectations of society. Those who hold this view argue that trials, as a public display of legal order, are necessary to reinforce the willingness of the public to abide by the law. Some take a different view of the decline in the number of trials. Perhaps courts are finding it difficult to reconcile contemporary developments in society, such as the complex interactions and relationships between people that are facilitated by the Internet, with traditional legal concepts and ideas. Disputants, recognizing such gaps in the legal framework, consequently may take their disputes to other non-legal forums for resolution. Critical legal studies can help us determine whether legal systems are willing and able to embrace appropriate new concepts and develop the normative expectations of a global society.

**Court Systems**

Judges in Western legal systems are expected to be independent, to exercise their own best judgment based on the law and the facts of the case before them.
They are not to take directions about how to decide cases from governments, fellow judges, or anyone else. And yet in the previous chapter, court systems were described as hierarchies, with some judges lower in ranking than others. There is an apparent contradiction in describing judges as being independent, while at the same time subordinate to other judges. Two mechanisms help to reconcile this contradiction: the system of appeals, and the doctrine (accepted principle) of precedent.

Most legal systems provide for appeals where the decision of a judge in a lower court is reviewed by one or more judges in a higher court. Many legal systems allow for multiple successive appeals from one level of court to another, so that theoretically a decision made in the lowest court may eventually be considered by the highest court in the system. This system of appeals allows higher courts to correct what they believe to be errors made by lower courts. The court that finds an error will usually just substitute a new decision, and that becomes the final judgment in a case. Occasionally the appellate court (court hearing the appeal) will order a new trial so that the process begins again.

There is an important limitation in many legal systems regarding the potential errors that may be corrected by way of appeal. The decision of a trial judge (or, as we will see in the next chapter, occasionally a jury) includes findings of fact (conclusions about what happened) and findings of law (conclusions about what the law means and requires to be done). Facts must be proved by evidence (information) brought before a judge, such as the testimony (statements in court) of witnesses. Usually there is no right to appeal against findings of fact—these conclusions reached by the original judge about what occurred are respected. The trial judge is considered to be in the best position to decide what facts have been proved by the testimony of witnesses and other evidence. In such a system, appeals therefore are limited to questions of law—whether the trial judge made a mistake in interpreting or applying the law.

The appeal system thus helps to reconcile the independence of judges with a hierarchical court system. Appeals allow errors to be corrected after decisions are made; they do not involve giving directions in advance to lower judges to decide cases in a particular way. The independence of judges is thus preserved. But only a small proportion of decisions are actually appealed. How is the hierarchy of courts maintained if judges are free to make decisions that may be wrong, and probably won’t be challenged?
The doctrine of precedent supplies the other mechanism that maintains hierarchies in court systems. According to it, similar disputes in similar circumstances should be decided in the same way. Most people agree that consistency in decision-making is fair and to be expected from a legal system that is operating properly. Precedent thus serves other functions for society as a whole. When judges follow precedent (make decisions that are consistent with previous ones), they demonstrate that people are being treated equally by the legal system, and are not being discriminated against for irrelevant reasons. If you are in the same legal situation as Jane, you should not be treated differently by a judge just because your name is Joe. Similarly, if you receive a decision from a judge today, it is reasonable to expect that if your case were brought back before the same judge (or a different one in the same court) tomorrow, the result would be the same. These reasonable expectations are supported by the doctrine of precedent.

In hierarchical court systems, the doctrine of precedent requires that judges must decide cases in the same way as higher-ranking judges have decided very similar ones. Because court decisions have been recorded for hundreds of years, it is possible for a court to be guided by a very old judgment if it was made in a similar legal situation. A judge today might theoretically consider a case decided as long ago as the year 1220 as a precedent because the decision in an English case from that year is now available online. With its decisions, the highest court in a legal system thus creates binding precedents for all courts below it. For instance, in the case of R. v. Oakes, the Supreme Court of Canada established a precedent for the interpretation of the wording of Section 1 of the Charter of Rights and Freedoms. In that case, the Supreme Court set out a series of questions all courts in Canada must answer when deciding the scope of “reasonable” and “justifiable” limits on freedoms protected by the Charter.

The doctrine of precedent thus sets some limits on judicial independence. Judges are not always able to decide cases in the way they think best if there is a binding precedent they must follow. Precedent is justified by the value of predictability it brings to the law. The benefits are well defined by William O. Douglas: “Uniformity and continuity in law are necessary to many activities. If they are not present, the integrity of contracts, wills, conveyances and securities is impaired. And there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon.” Precedent helps to create the shadow of the law I mentioned above, but indeterminacy makes
the edges of that shadow quite fuzzy. Frederick Schauer points out that the doctrine of precedent is based on an exercise of judgment about which cases are sufficiently similar: “No two events are exactly alike. For a decision to be precedent for another decision does not require that the facts of the earlier and the later cases be absolutely identical. Were that required, nothing would be a precedent for anything else.” Thus it is not only identical cases that should be decided the same way but also those that are sufficiently similar. This approach opens the way for courts to adapt old decisions to new situations that arise as society changes, but it also calls into question what we mean by “sufficiently similar,” thus raising the issue of uncertainty in decision-making that I discussed in Chapter 1. Chapter 9 also pursues the problem of deciding what counts as precedent and what does not when making legal arguments.

When there are significant differences (of fact or of law) between a previous case and the present one, the decision in the earlier matter may be distinguished (found to be dissimilar), and thus rejected as a precedent that should be followed. When a judge reasons this way, he or she asserts judicial independence. It is usually easier for a judge to distinguish a previous decision by concluding that the facts rather than the legal issues of the cases are different. Although laws may change, legislation such as the Canadian Charter of Rights and Freedoms rarely does, and therefore a case such as R. v. Oakes is likely to remain a binding precedent in Canadian courts for many years to come.

**Administrative Systems**

Government administration is not usually considered part of the legal system, although for many citizens the distinction is blurred. The principle of separation of powers (different functions for different institutions) has been accepted for hundreds of years, according to which judicial functions are allocated to the legal system, and executive functions to the administrative branch of government. Such a division has helped to establish the semi-autonomy of the legal system, so that judges can impose the rule of law on government officials.

Today, however, government administration is involved in a multitude of areas defined by legal rights and obligations, including human rights and discrimination, immigration and refugee claims, unemployment benefits, workers’ compensation, and labour relations. Today the wide variety of administrative agencies found within a modern government make many more decisions than
courts do that have a direct legal impact on people in their everyday lives. In recognition of this fact, legal systems have adopted a body of rules and principles to guide and supervise administrative agencies known as administrative law. Two important operations carried out in government administrations are making quasi-judicial decisions (those which impact people’s legal rights and obligations) and following procedures that are consistent with natural justice (the basic rules of fair procedure). Legal systems ensure that administrative systems make quasi-judicial decisions according to the rules of natural justice through hearing appeals from administrative decisions, or conducting a judicial review of administrative decision-making.

Because of their impact on people’s legal rights and obligations, we can consider administrative agencies that make quasi-judicial decisions to be part of the legal system. These bodies are sometimes called tribunals to differentiate them from courts, although they may also be called boards, commissions and other names. Administrative systems often operate in a similar way to courts, with appeals from a lower level to a higher one in a hierarchy, possibly with an ultimate appeal to a court. Administrative systems differ from courts, however, in relation to the use of precedent. Precedent is less important in administrative decision-making for several reasons.

First, some administrative agencies are primarily guided by policy rather than specific rules set out in legislation. Legislation may give discretion (authority to decide what should be done) to officials so they can achieve the best result without strictly following rules laid down in advance. An example of a general policy (expressed as a purpose) which is intended to guide administrative discretion is that provided in Alberta’s Municipal Government Act in relation to zoning and construction: “The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted . . . without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.” This section identifies an area of administrative regulation where relying on precedent might hinder planners and planning tribunals from achieving the best results with regard to policy changes or perceived changes in the public interest.

Second, administrative agencies do not rely on precedent because they are expected to pay more attention to the unique details of each case than the courts, which categorize cases more broadly. As Frederick Schauer puts
“some decision-making environments emphasize today the richness and uniqueness of immediate experience. In those environments we seek the freedom to explore every possible argument or fact that might bear on making the best decision for this case, for it is precisely the thisness of the case that is most vital.” In administrative agencies, there is a stronger presumption that each case is unique; therefore past decisions are less helpful as a guide.

For these reasons, administrative systems usually do not follow the doctrine of precedent. However, quasi-judicial decisions achieve a degree of predictability through application of the principle of consistency. Administrative decision-makers often consider the value of consistency in dealing with similar cases, although they are not bound by precedent.

Administrative decision-making systems look much like the judicial system when they follow the procedural requirements of natural justice. For example, some tribunals may adopt rules and procedures for evidence similar to those of courts, such as requiring witnesses to swear an oath or to make a non-religious affirmation having the same effect. Chapter 5 examines the processes and procedures of courts and tribunals.

ALTERNATIVE SYSTEMS

The idea that two or more legal systems might exist within the same territorial jurisdiction is known as legal pluralism. Western legal systems have resisted such pluralism because it seems contrary to the principle that every person is equal before the law and that the law applies to everyone. If some members of society are governed by a different legal regime, then they may either unfairly benefit from it or be at a disadvantage compared to others. Further, such pluralism tends to erode the autonomy of a legal system by making its boundaries less certain. Nevertheless, alternative legal systems have existed throughout history and continue to function today. Some examples are the canon law followed within the Roman Catholic Church in the Middle Ages alongside national secular laws, and Muslim Sharia law that applies today to members of that religion in the otherwise common law country of Malaysia. In some developing African countries, modern legal systems exist together with traditional ones that predate colonization.

From a critical legal studies perspective, we should keep an open mind as to whether legal pluralism may be an appropriate arrangement for certain
members of society in some jurisdictions. Another alternative to national legal systems that goes back hundreds of years is *arbitration* (decision-making provided by a person the disputing parties both agree to appoint) for business disputes and religious courts. However, the legal system of the nation-state has often tried to suppress or control these alternative systems by declaring that the decisions they make can be overturned by their courts.

Today, examples of legal pluralism are also found where ethnic or racial communities within states assert rights to their own legal systems. This is usually described as providing *self-government, self-determination, or autonomy* for such groups. In Canada, First Nations have asserted the right to separate legal systems, and there is ongoing debate and discussion about how that goal might be achieved within a sovereign nation-state. Critical legal studies can help us to develop mutual understanding and constructive relations between coexisting legal regimes and positive interactions between indigenous, national, and international legal systems.

Another important alternative today to the dominant national legal system is *alternative dispute resolution* (ADR). ADR was originally viewed as a remedy for the defects in the court systems that made them slow, expensive, and disempowering for the average person. The complexity of law and the adversarial methods employed were criticized for making courts into an ineffective and sometimes inappropriate forum for resolving disputes. Some of the alternatives provided by ADR are *mediation* (negotiation assisted by a third person called a mediator), *conciliation* (where a third person suggests solutions), and hybrid processes such as *med-arb* (mediation followed by arbitration, if necessary). Over the last twenty years, many ADR methods have been adopted by Canadian governments and courts, which have introduced a process called *judicial dispute resolution* (or *judicial settlement conferencing*) that does not involve a full trial.

Alternative dispute resolution processes are now found in almost all Canadian courts and many administrative boards and tribunals. From its beginnings as an “alternative” to formal adjudication, ADR has become part of the mainstream of the legal system in a process of integration known as “institutionalization.” Perhaps it is now more accurate to say that ADR is virtually the norm and not an alternative, uncommon way of resolving legal disputes. The widespread availability of ADR today may be one explanation for the decline in the number of trials.
Many ADR processes encourage the disputing parties to craft creative solutions that could not be ordered by the courts and do not reflect strict legal rights and obligations. Although ADR should not result in unlawful agreements, it is accurate to state that settlements through ADR are often indifferent to the law, paying more attention to the commercial or emotional needs of the parties. In some forms of mediation, the legal rights of the parties are debated and weighed in the process of trying to reach a settlement. Nevertheless, a consensual decision reached by the parties in ADR is not a court decision, and does not become precedent for use in future similar disputes. In fact, most ADR processes are private and confidential, so they cast no shadow for the guidance of the rest of society. From a critical legal studies perspective, we might conclude that ADR represents another path to justice that remains an alternative to the path according to law.

State legal systems today face competition from alternative systems of law, and alternative methods of dispute resolution not based on formal law or precedent. The challenges presented by these alternatives are part of the continuing struggle of legal systems to remain relevant and adequate to the needs of the societies they serve.

CRITICAL SYSTEMS ANALYSIS

The phrase legal system, like legal structure, has a reassuring ring to it. It suggests there is a logical, efficient, and effective approach to resolving legal issues in our society. But like the concept of structure I discussed in the previous chapter, the systems approach to law has been criticized. Even if one accepts that a system may be valuable in principle, the way in which it actually functions may still be questioned.

A system can take many forms—from biological (ecosystems), to economic (capitalist or socialist), to digital (artificial intelligence systems). Consequently there are a variety of intellectual influences on systems-based analysis, from evolutionary theory to cybernetics (systems using feedback). All of these related fields have been used to analyze and critique the functioning of law as a social system. Some of the important concepts associated with systems theory are that of the boundary and its associated idea of the external environment beyond the boundary in which the system exists. For a legal system, the environment is the society (which can itself be considered a system) that
exists in the territory over which the legal system asserts jurisdiction. If law is intended to serve society, then we can ask questions about how a legal system preserves its boundary while maintaining positive relations with surrounding society. This is one way of examining the tendency of a legal system to consider itself as detached and autonomous within its social environment. As we have seen, there is an advantage to the judicial branch in separating itself from other branches of government, but from a critical perspective we should ask whether such autonomy may also prevent the needs and concerns of society from being recognized and acted upon through law.

Before moving on to other issues, let us look at the question of how to recognize the boundary of a legal system. The problem is much like that posed by the concept of the health system. Should we include health food stores, fitness clubs, and food inspection agencies in the health system? Or is it limited to nurses, doctors (and other practitioners like chiropractors and acupuncturists), and hospitals? Similarly, should we include law schools, building inspectors, and divorce mediators in the legal system?

The traditional approach to defining the boundaries of a legal system revolves around the courts—the more they are removed from them, the less a person, official, or agency is considered part of the system. According to the Alberta government, for instance, the following are participants in the legal system (called the justice system): government ministers of legally related departments; judges, police, lawyers, legal aid, Crown prosecutors, correctional services, non-governmental organizations, victims, and the public. Although people in the last three categories may have contact with the courts, usually it will be brief, and often exceptional. Perhaps the best way of describing a legal system is that it is a network of subsystems (courts, lawyers, police, corrections, government legal offices, and law schools) each with its own dynamics, but all sharing overarching motivations concerning law in society. Viewed in this way, the public is not part of the legal system. So the question is, how do they become participants—how do they cross the boundary?

For those accused of crimes, participation in the legal system is non-voluntary. They are required to attend court and participate in criminal proceedings by police action. People who wish to assert or protect their rights (as plaintiffs or suing parties in civil proceedings or lawsuits), however, must enter the legal system on their own initiative by commencing a lawsuit. Once a civil lawsuit has been started, the legal system will compel the person being sued (the defendant)
to respond, or risk having a decision made against him or her if absent. If criminal or civil proceedings are underway, witnesses (people with information about the case) may be compelled by the courts to attend a trial and give their testimony. In these senses, the legal system is open to public involvement.

However, the quality of participation by the public in legal processes is another matter. Critics of the legal system have voiced their concerns by questioning whether participation gives the public real access to justice. An entire scholarly journal has been devoted to this topic: the Windsor Yearbook of Access to Justice. Some of the concerns raised by the movement for increased access to justice include callous treatment of the victims of crime at trial, the stress caused to parties by adversarialism among lawyers, the length and complexity of legal processes and procedures, and the barriers created by legal jargon and terminology. All of these factors make it more difficult for members of the public to use the legal system to their advantage.

As I discuss in Chapter 6, the inability to understand the unique language used in the legal system may prevent members of the public from effective participation in it, and thus impede their access to justice. Further, if assistance is required to make sense of law and follow its procedures, it comes at a cost. The legal profession (lawyers) has borne its share of criticism for the high expense of bringing or defending legal proceedings. Governments have responded by providing subsidized services (or legal aid), and lawyers by offering free assistance (pro bono) work. However, access to justice for those who are poor has always been problematic, and today even those with average incomes can hardly afford a lawyer. Cultural barriers to participation may also exist for those who have no or little understanding of English or French. Similar concerns about access to justice are echoed in legal jurisdictions throughout the Western world.

A significant feature of some systems is that they act to maintain a stable state of affairs (homeostasis) to preserve the smooth functioning of the system. This means that the status quo is given priority over change, which can risk destabilizing a system. For social systems such as law, this conservative bias can lead to conflict between the legal system and the society around it. The question thus arises—how does law remain responsive to changes in society?

Several mechanisms can bring about change in the legal system, including passing new legislation that reflects current views in society, promoting law reform by agencies formed for that purpose, and through courts being open to
new legal concepts such as that of Aboriginal land title. However, it is probable that society will change faster than the legal system. One of the reasons for this slowness to change may be that vested interests prefer current laws that give them valuable rights (think of copyright law), and recalling Foucault, these will shape public discourse against change. Another source that slows change in the law is the weight of habit, ritual, and routine associated with legal processes that has accumulated over hundreds of years. For example, in some common law jurisdictions lawyers are still required to wear horsehair wigs in court, and in Canada, superior court judges are still addressed as “My Lord” and “My Lady,” terminology rooted in the feudal past. Finally, as a relatively closed and autonomous system, the legal system is better insulated against change than many other more open and permeable social systems that quickly react to the rapidly changing social, political, and economic environment. A legal precedent may be in development over many years through cases won and lost, but a blog may discuss an idea that topples a government virtually overnight.

A final question relating to the concept of homeostasis is how to define the optimal operating condition of a legal system. How accessible should it be, and how much litigation (civil lawsuits and criminal proceedings) should it process? In the 1970s, many people expressed the view that society (especially in the United States) was too litigious (keen to start lawsuits) and courts were finding it hard to keep up with the volume of cases. Law professionals and scholars called a major conference (the Pound Conference of 1976) where they proposed reforms to the American legal system, and some of these (such as alternative dispute resolution) were implemented. Since that time, the number of trials has declined steeply, prompting new concerns that too little litigation is also unhealthy both for law and society. Some observers fear that legal disputes involving important legal rights such as freedom from discrimination are being settled privately so that they have no impact on wider society. Legal scholars fret that trials and judgments are necessary to produce precedents that will keep the common law relevant and useful. In relation to criminal litigation, it is probable that the volume of cases entering the legal system depends significantly upon the level of police activity, a response to people’s attitudes toward crime and their willingness to pay for enforcement of the law. The “optimal” amount of litigation will remain a contentious issue in any society that seeks a balance between the needs of its people and the responsiveness of its legal systems.
Chapter Review

After reading this chapter you should be able to:

• explain what is meant by social systems and how that concept has been criticized
• describe some features of the relationship between legal systems and society
• describe the doctrine of precedent and explain how it affects court systems
• list some of the functions of court and administrative systems
• explain what is meant by alternative systems and give examples of them
• research and describe the legal systems of a particular territorial jurisdiction