

2. SOURCES OF U.S. LAW

Any reader who has come across the topic of the Anglo-American legal system in any form is most certainly aware of the common roots of the English and of the U.S. legal system. The history of the United Kingdom and of the United States of America is the very fundamental reason why the legal systems of both countries have so many features in common. It is needless to say that one of the common points of both legal systems are the sources of law. However, at this point, one could pose a question. Are the sources of law in both countries still the same? The answer is quite simple: no, they are not! As suggested above, in the past the UK and the USA were linked to each other by almost unbreakable ties. These ties, however, were not absolute. This is indeed commemorated by the Americans every year via the “Independence Day” which is a federal holiday in the USA and is celebrated on July, 4th. By this holiday, Americans are commemorating the adoption of the Declaration of Independence on July 4, 1776, declaring independence from the Kingdom of Great Britain. This independence eventually leads to the differences in the legal system that we can identify today.

Most importantly, **the United Kingdom is a constitutional monarchy**. The formal head of the country is the **Queen**; however, her roles are ceremonial. Most sources of law are made by the British Parliament. On the other hand, **the USA is a republic**. This suggests some differences already. However, what makes the issue even more interesting from the point of academic discussions is the fact that the USA is a **federal** republic consisting of 50 states forming a union – the United States of America. As a result of this, we must bear in mind that in the USA, there are 51 legal systems.⁵

The major governmental and legal division in the USA is the federal-state division of authority. There is a federal system of government, which means, governmental responsibility is divided between one national government and a coexisting set of state governments. “Federalism” refers to the relationship, often one of dynamic tension, between the federal

⁵ KURUCOVÁ, Z., DEMOVIČOVÁ, A., ROZINA, E., BOJSOVÁ, P. *English For Legal Purposes*. Žilina : Eurokódex, 2013, p. 47. The legal systems may vary from one state to another, but there is one legal system common to all 50 states.

and state governments which share governmental functions in the United States.

The principal source of this division of power between the federal and state governments is the U.S. Constitution.⁶

In the United States, the law is derived from various sources. These sources are:

- constitutional law,
- statutory/enacted law,
- treaties,
- administrative law,
- common law.

At both the federal and state levels, the law of the United States was originally largely derived from the common law system of English law, which was in force at the time of the Revolutionary War.⁷ However, U.S. law has derived greatly from its English ancestor both in terms of substance and procedure, and has incorporated a number of civil law innovations. Thus, most of the U.S. law consists primarily of state law, which can and does vary greatly from one state to the next.

Constitutional law

The Constitution of the United States of America is the **supreme** law of the United States, and provides the **legal framework** for the organization of the United States government and for the relationship of the **federal government** with the states and its citizens.⁸ Amendments to the Constitution may be proposed by a two-thirds vote of both houses of the Congress and must be ratified either by the legislatures of three-fourths of the states or by conventions in three-fourth of the states.

In addition to the U.S. Constitution, all 50 states have their own **state constitutions**. The constitution of a state is subject to valid federal legislation, but it is the paramount authority within the state itself. State consti-

⁶ JOHNS, M. Z., PERSCHBACHER, R. *The United States Legal System - An Introduction*. Durham : Carolina Academic Press, 2007, p. 76-77.

⁷ The **American Revolutionary War** (1775 - 1783), also known as the **American War of Independence** and the **Revolutionary War** in the United States, was the armed conflict between Great Britain and thirteen of its North American colonies, which had declared themselves the independent United States of America.

⁸ <https://www.translegal.com/lesson/7990>

tutions are often more detailed than the federal Constitution and require more frequent amendment process.⁹ The state constitutions may give the people of that state greater rights than the U.S. Constitution, but they cannot restrict the rights guaranteed by the U.S. Constitution. The U.S. Constitution in that respect is supreme, but more importantly it sets minimum standards that must comply with by all governmental officers in dealing with people.

The U.S. Constitution begins with the **Preamble**, and is further subdivided into **7 Articles** and **27 Amendments**, the first ten of them are collectively known as the **Bill of Rights**. They contain many of the most fundamental rights enjoyed by the American people.¹⁰

The Preamble sets a tone and lays out the goals of the Constitution, but it is worth noting that the Preamble itself, unlike the rest of the Constitution, is not regarded as part of the supreme law. It is merely an introduction.

The articles that follow after are called:

- **Article I – The Legislative Branch,**
- **Article II – The Executive Branch,**
- **Article III – The Judicial Branch,**
- **Article IV – The States,**
- **Article V – Amendment,**
- **Article VI – Debts, Supremacy, Oaths,**
- **Article VII – Ratification.**

Statutory/enacted law

The second most important source of law are the **acts** and **resolutions** of Congress, which are **interpreted by the courts**.

Statutory law falls into three categories – **federal statutory law**, **state statutory law**, and **local statutory law**. The federal statutory law is found in the United States Code. The state statutory law is found in the state code enacted by the legislative body that governs that state. Local statutory law is found in local codes and ordinances. Those local codes may

⁹ FARNSWORTH, E. A. *An introduction to the legal system of the United States*. New York : Oxford University Press, 2010, p. 70 – 71.

¹⁰ ROCHE, B. A. *LAW 101: An essential reference for your everyday legal questions*. Naperville : Sphinx Publishing, 2004, Illinois, p. 3.

be country codes, city codes, or town codes that are enacted by the local governing body.¹¹

The U.S. Constitution gives Congress the power to “*make all laws which shall be necessary and proper for carrying into execution*”¹². The federal statutes enacted by Congress are subject only to the Constitution, and a statute will be interpreted, if possible, so as to avoid constitutional questions.¹³

Even though Congress has the power to legislate under the Constitution, its power is not exclusive, and the 50 states have the concurrent power to make legislation. They make laws on matters on which federal legislation has not occupied the field. State laws are subject to valid federal legislation and to the state constitutions.

Constitutional violations can only be committed by the government or its representatives. Where Congress enacts a statute that **conflicts with** the Constitution, the Supreme Court may find that law **unconstitutional** and declare it invalid. A statute does not disappear automatically merely because it has been found unconstitutional; a subsequent statute must delete it.¹⁴ However, under the principle of **stare decisis**, no sensible lower court will enforce an unconstitutional statute, and the Supreme Court will reverse any court that does so¹⁵.

Treaties

Third to the Constitution come the treaties made with foreign powers. Treaties made under the authority of the Constitution are declared to be the supreme law of the land, and therefore **binding** on all U.S. courts. As America’s chief diplomat, the president has the power to make *treaties* to

¹¹ ROCHE, B. A. *LAW 101: An essential reference for your everyday legal questions*. Naperville : Sphinx Publishing, 2004, Illinois, p. 11.

¹² These unspecified congressional powers emerge from the Clause at the end of Article I, Section 8 of the US Constitution

¹³ FARNSWORTH, E. A. *An introduction to the legal system of the United States*. New York : Oxford University Press, 2010, p. 70 – 71.

¹⁴ <http://www.thedickinsonpress.com/content/there-are-too-many-laws>

¹⁵ Source: Boundless. “Primary Sources of American Law.” *Boundless Political Science*. Boundless, 26 May. 2016. Retrieved 09 Sep. 2016 from: <https://www.boundless.com/political-science/textbooks/boundless-political-science-textbook/the-judiciary-14/origins-of-american-law-91/primary-sources-of-american-law-500-5814/>

be approved by the Senate. A treaty must be approved of with the consent of two-thirds of the senators voting.

Administrative Law

Administrative law is concerned with the powers and procedures of those organs of government, other than legislatures and courts that affect private interests of individuals.¹⁶

Congress and state legislatures enact laws, but they do not usually specify how those laws should be used. The U.S. government uses special agencies in order to administer the law. These agencies, known as **administrative agencies**, issue rules and regulations to determine how a law will be applied and enforced. These **rules and regulations** are a type of administrative law.

All administrative law is run through government agencies. The U.S. government is made up of numerous **administrative agencies**. At both, the state and federal level there are administrative agencies. Most of the agencies are part of the executive branch of government.

The second type of administrative law includes **administrative decisions**. Government agencies issue their own decisions regarding the application and enforcement of rules and regulations. A government agency has the power to conduct its own hearings and render its own opinions and orders. Rulings are made by **administrative law judges**. These decisions are also a type of law.¹⁷

There are hundreds of federal administrative agencies, with such various concerns as airlines, nuclear energy, banking, immigration, labour relations, old age pensions, trade, environment, etc. They originated rapidly under New Deal legislation in the 1930 s during the administration of President Roosevelt.¹⁸

Because American government is not a parliamentary democracy, the heads of government agencies have no formal political connection to Congress. They are appointees of the president, usually of the president in

¹⁶ FARNSWORTH, E. A. *An introduction to the legal system of the United States*. New York : Oxford University Press, 2010, p. 169.

¹⁷ <http://study.com/academy/lesson/administrative-regulatory-law-definition-example-cases.html>

¹⁸ FARNSWORTH, E. A. *An introduction to the legal system of the United States*. New York : Oxford University Press, 2010, p. 169.

office at any given time. Departments are usually led by a secretary, and agencies are usually headed by an administrator who is usually appointed by the president who is in office and these appointees terms are usually at the “pleasure“ of the president and they are expected to be replaced when a new president is elected. Commissions, boards and some agencies, however, are led by presidential appointees of fixed terms, and their appointments are designed to continue into and perhaps through the terms of later presidents.¹⁹

The most typical examples of administrative agencies are: Food and Drug Administration, the Department of Justice, the Department of Agriculture.

American Common Law

The doctrines of **stare decisis** and **precedent** are the foundations of the American common law system.

Common law is generally **uncodified**. This means that there is no comprehensive compilation of legal rules and statutes. As common law courts, U.S. courts have inherited the principle of **stare decisis**. *Stare decisis* is a Latin term. It means ‘to stand by things decided’. *Stare decisis* is a **doctrine** used in all court cases and with all legal issues. It simply means that courts look to past, similar issues to guide their present decisions. The past decisions are known as **precedents**. Precedent is a legal principle or rule that is created by a court decision. This decision becomes an example, or authority, for judges deciding similar issues later. *Stare decisis* is the doctrine that obligates courts to look to precedent when making their decisions. These two principles allow American law to build case-by-case, and make their legal system a **common law system**.

These precedents are maintained over time through the records of the courts as well as historically documented in the collections of case law known as **yearbooks** and **reports**. The precedents to be applied in the decision of each new case are determined by the presiding judge. As a result, judges have an enormous role in shaping American and British law.²⁰

¹⁹ FARNSWORTH, E. A. *An introduction to the legal system of the United States*. New York : Oxford University Press, 2010, p. 170.

²⁰ <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>

Common law functions as an **adversarial system**²¹, a contest between two opposing parties before a judge who moderates. A jury of ordinary people without legal training decides on the facts of the case. The judge in a criminal trial determines the appropriate sentence based on the jury's verdict.²²

Tasks

1. Answer these questions.

Are the sources of law the same in the USA and the UK?

What does the "concept of federalism" refer to?

Where are the sources of the U.S. law derived from?

Define the composition of the U.S. Constitution.

What power is given to Congress by the U.S. Constitution?

What is the scope of work of administrative agencies?

Who are administrative agencies headed by?

Define the concept of precedent.

What happens if a statute conflicts with the Constitution?

2. Fill in the correct preposition

the adoption _____ the Declaration of Independence, independence _____ the Kingdom of Great Britain, statutes enacted _____ the Congress, a statute that conflicts _____ the Constitution, treaties made _____ the authority of the Constitution, binding _____ all U.S. courts, treaties approved _____ the Senate, political connection _____ the Congress, department is led _____ a secretary, administrator is appointed _____ the U.S. president

²¹ The adversarial system is a legal system where two attorneys represent their parties' positions before an impartial person or a group of people, usually a jury or judge, who attempt to determine the truth of the case. As opposed to that, the inquisitorial system has a judge (or a group of judges who work together) whose task is to investigate the case. On the continent of Europe among civil law systems (i.e. those deriving from Roman law) the inquisitorial system is used where it is a judge who investigates the case.

²² <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>

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3. Match the word from the first column with the word from the second column in order to make a collocation:

| | |
|----------------|-----------|
| constitutional | law |
| federal | system |
| Supreme | power |
| executive | democracy |
| stare | agency |
| parliamentary | monarchy |
| administrative | Court |
| common | republic |
| adversarial | decisis |

4. Select from the given terms those that can be combined in a natural way and use them for forming sentences.

issue rules and regulations render

 enact Congress statutes

 lower court's decisions administrative agencies

 reverse Supreme Court verdict

Jury