

“The Three Most Important Features of My Country’s Legal System that Others Should Understand”

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“The Three Most Important Features of My Country’s Legal System that Others Should Understand” are:

- that the US legal system has a love-hate relationship with international law;
- that US law contains extensive due process protections, but that these protections are often ineffective for vulnerable groups; and
- that, in the US federal system, the bulk of the applicable law is generated at the state (political subdivision) level.

I. International Law & the US Legal System

The US legal system, at first glance, would seem to be more monist than dualist. The U.S. Constitution declares that treaties made under the authority of the United States, together with the Constitution and federal law, “shall be the supreme Law of the Land.” The US legal system appears equally amenable to customary international law. As the Supreme Court in *The Paquete Habana* case famously proclaimed, “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.” The practice of courts, however, has diverged significantly from this fairly monist conception.

Notwithstanding the status of treaty law as “supreme Law of the Land,” it is rarely applied in US courts. One reason for this is that the courts have developed a doctrine of self-execution, whereby a treaty is to be regarded as “equivalent to an act of the legislature” only when “it operates of itself without the aid of any legislative provision.”¹ Such a self-executing treaty would not require any additional legislative act to render it applicable as part of U.S. law. However, “when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”² This doctrine of self-execution has been invoked to deny domestic legal effect to numerous treaties, in particular those of a human rights or humanitarian character.

Even when a treaty provision is not self-executing, however, this does not mean that it is legally irrelevant to litigation in U.S. courts. According to the “Charming Betsy” rule, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”³

The status of customary international law as comprising part of US law was recently reaffirmed by the Supreme Court in *Sosa v. Alvarez-Machain*, a case involving application of the Alien Tort Claims Act (ATCA). Writing for the majority, Justice

1. *Foster v. Neilson*, 27 U.S. 253, 254 (1829).

2. *Id.*

3. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1808).

Souter recalled that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations,” citing, among other cases, *The Paquete Habana*. The Court expressly recognized this to be the case with respect to international norms “intended to protect individuals.” At the same time, however, the Court set a fairly high bar for recognizing new causes of action derived from international law and actionable on the basis of the ATCA’s jurisdictional grant, and cited numerous reasons why federal courts should be hesitant to do so. This corresponds with the general reluctance among U.S. courts to apply international law, as the courts themselves have noted.

The reasons for this reluctance are many, and in part, self-perpetuating. One reason is simply that U.S. law schools do not regard international law as central to legal education, and, as a result, most American lawyers have no exposure to international law. Thus, the bar is unable to educate the judiciary on the extent to which international law forms part of the applicable law in any given case. And the perceived reluctance of U.S. courts to consider international law is of course a factor in the relegation of international law classes to the periphery in American legal education.

Some have speculated that the increasing dualistic tendencies of the U.S. legal system correspond to its increasing hegemonic status. The originally more monist framework of a young United States was developed at a time when the US was a new subject of international law, a time when the norms of international law dovetailed well with the short and longer term interests of the fledgling republic (as well as those of its political elites). However, a strong international legal order may be perceived to bring fewer advantages as states become more powerful. That the rule of law as applied to the king is in the king’s interest is not readily apparent, particularly when the king’s election cycles are of relatively short duration.

Another significant factor is the tendency of U.S. courts to conflate international law with foreign law. For Justice Scalia, the distinction between these two types of law is not particularly meaningful in cases before U.S. courts. In his *Sosa* dissent, he remarked, “We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law” For him, there is no legally relevant distinction between foreign law and customary international law since neither has been adopted as U.S. law through the normal U.S. legislative process.

II. Due Process

US law contains extensive due process for individuals caught up in the US legal system. A cornerstone of the US system is that cases are decided based upon the applicable law, with facts presented to a neutral arbiter. Procedural due process provides a set of rules that are conceived as increasing the likelihood of a fair proceeding. Some of the most basic protections include the right of access to court, to

know charges, obtain evidence, confront witnesses, have an attorney, public trials, etc.

However, other factors, typically defined by power or lack thereof, impact proceedings in a way that often prevents these protections from being effective. The power of the state crashes against often-indigent defendants in criminal proceedings. Many poor litigants in civil cases appear without counsel. Most cases in the high volume courts (e.g., eviction, family, collection cases) never go to trial. Some dockets have a high default rate. Parties that do appear are often pressured to settle, with poorer litigants signing away their rights.

III. Federalism & the Applicable Law

A peculiar feature of the US federal system is that the vast majority of substantive rules are generated at the state (constituent state of the United States) level. Thus, contract law, commercial law, tort law, criminal law, and property law are primarily locally created, and vary significantly from state-to-state. In addition, each state has its own constitutional law.

While federal constitutional questions do arise from time to time, and power does shift back and forth between the central government and the state governments, the responsibility for regulating these areas of life continues to rest primarily with the constituent states.