## What Sets the U.S. Legal System Apart?

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History, culture, language, economics, and other related factors strongly influence the development of any legal system. That has also been true for the United States. The U.S. legal system has its genesis in the English legal system, both of which are categorized as common law systems because of the importance they place on judicial decisions for the development of the law. While the U.S. and the English legal systems continue to retain many common features, substantial differences have arisen between these two major common law countries. European Union law has increasingly influenced the English legal system while the U.S. legal system has increasingly emphasized its own uniqueness. Even though U.S. courts frequently cited English law and analogous English cases throughout the 19th century, the importance of such comparisons declined over the years, and today it is rare if a U.S. court cites to a contemporary English decision.

English law, despite its historical importance, however, is not the only legal system that has influenced the development of U.S. law. Spanish and French law has impacted different areas of the United States and continues to exert some influence; German expatriates had a profound impact on the development of some aspects of the U.S. legal system following World War II.

As the U.S. legal system has changed since the founding of this country, so have the legal systems of other countries. Certain features of the U.S. legal system that have made it most distinctive historically, such as, for example, the notion of the review of the constitutionality of legislation through the judiciary, have become less important as a hallmark feature of the U.S. legal system as other countries have adopted them. While the details of judicial review, for example, differ dramatically between countries -- as, for example, all U.S. judges remain empowered to adjudicate constitutional questions -- the concept itself has become widely recognized, if not accepted. Nevertheless, a few features of the U.S. legal system that go back to the beginnings of the Republic remain characteristic and difficult to understand, perhaps even more so today than in the late 1700s.

The United States was born out of an agreement between independent states. That origin explains the distinctive state-federal structure with its resulting differences between states in judicial systems and substantive laws and procedure. It has also led to disputes between states and the federal government over their respective spheres of influence and has had a troubling impact recently on the relationship of the United States to international tribunals.

At its founding, the United States consisted of a group of thirteen states which came together to form a more “perfect union.” In its early years the country was shaken by a dispute between those who insisted on states’ rights, the Federalists, and those who believed firmly in the need for enhancing federal power. Initially the debate was settled in favor of the

Federalists. Beginning with the Civil War and culminating in the New Deal legislation of the 1930s, which regulated the national economy, the power of the federal government began to expand dramatically. It was in the 1930s when the U.S. Supreme Court acknowledged the power of the federal government to legislate working conditions and prevailing wages and to build a limited social-services network. The consolidation of federal power continued and escalated with the war on drugs and the war on terror, starting in the 1980's and increasing throughout this century. Despite the federal deregulation of various areas of the economy, federal coercive power increased through the expansion of the criminal justice system, initially focused on street crime but increasingly expanded to economic offenses.

Nevertheless, tension remains over the allocation of power between the federal and state governments. A current example stems from the increasing involvement of local and state entities in the regulation of immigration, much to the chagrin of the federal government. In a host of late 19th century Supreme Court cases, the Court declared immigration the sole province of the federal government. Because of the recent heavy influx of immigrants – legal and especially undocumented – some states and local governments have taken the position that the federal government has either abdicated its responsibilities or is incapable of fulfilling them. In either case, they are permitted to fill the void. Therefore, they have passed legislation in the housing, language, education, and law enforcement areas that have a direct impact on the immigrant population. One district court that has heard a direct challenge to such a local ordinance has declared it unconstitutional because immigration falls solely within the sphere of the federal government.

The states retain substantial legislative, executive, and judicial powers. All states have their own legal systems with varying court structures, state-specific licensing examinations, different ways of selecting judges, and ultimately different substantive laws and procedures. While much harmonization has occurred throughout the last century, differences remain, especially regional differences which may be quite pronounced. Some of these differences are caused by the specific legal influences exerted on states at their founding – Spanish influence in California and Florida; French influence in Louisiana – and by different economic or historical developments. For example, the death penalty is entirely outlawed in some states; in others, while in existence, has not been used in decades; and finally, in a few it is used with great regularity.

The death penalty has also provided the most recent challenge to the power of the federal government in the international arena. As a signatory of the Vienna Consular Convention, the United States has subjected itself to a number of judgments by the International Court of Justice (ICJ) holding it in violation of its treaty agreements. The cases arose in conjunction with the convictions and death sentences of foreign nationals who had not been informed of their right to consular access in a timely manner. As a result, the ICJ demanded that the United States guarantee effective post-conviction processes to re-consider the sentences. Some of the states with foreign nationals on death row, however, have refused to abide by the ICJ's ruling, arguing that they are not bound by it. The U.S. Supreme Court has yet to resolve this issue.

The clash between state and federal rights may make the relationship between the United States and foreign states less predictable than one may expect. It may also create increasing problems with respect to the effective power of international tribunals in a federal system. A foreign attorney must therefore be aware of this inherent tension as well as the differences between individual states in their legal systems and laws.

The second characteristic of the U.S. legal system is the party-driven nature of the legal process, which is often referred to as an adversarial system. Despite their inherently powerful position in shaping the law, U.S. judges play a relatively limited role in the development of a case and may even be restricted in their influence on its ultimate resolution.

Judges in many states are elected to their positions, usually after a career as prosecutors, government attorneys, or private lawyers. In other states, governors appoint judges who are often subject to retention elections. Federal judges are nominated by the president and must be confirmed by the U.S. Senate. This selection of judges tends to favor the politically connected. Moreover, with the increasing disparity between judicial salaries and the salaries of well-paid lawyers in private practice, parts of the judiciary have become the refuge of the lesser qualified and/or the very wealthy. The long-term effect of this development on the judiciary cannot be assessed at this point.

Judges are relatively uninvolved in the development of a case and will merely be brought in to resolve disputes, to referee the trial, should one occur, and to rule on matters of law. In a civil case, lawyers develop the case through pleadings and discovery. The latter is generally negotiated between the parties, with only limited judicial involvement. Any civil case may be settled between the parties, with or without the assistance of the court. In fact, most civil cases are settled before trial. The criminal system also often involves the settlement of a case between prosecution and defendant in the form of a plea-bargain. While the judge must approve the plea-bargain in the criminal case, the bargain itself will circumscribe her sentencing powers. Between 90 and 98 percent of all criminal cases, depending on the state, will lead to a conviction through a plea bargain. Nevertheless, good attorneys develop their cases with the possibility of a (jury) trial in mind. The existence of jury trials dominates the collection of evidence and the credibility assessment of witnesses. As juries find the facts in a case, the appearance of witnesses and the quality and coherence of written documents are determinative. Moreover, the rules of evidence, so crucial to the U.S. legal system, exist because of the jury trial which is viewed as an adversarial battle between the two parties, refereed by a professional judge.

Because of the party-driven nature of the process, the quality of legal counsel is decisive in the U.S. legal system. A well qualified attorney can command high fees which are largely unregulated by the state. In addition, the party focused system allows for contingency fees in certain civil cases which basically permit an attorney to put a bet on the strength of the legal case and her own legal abilities.

The third characteristic of U.S. law which differs from that of other countries is the way in which it reflects the existence of a multicultural society and its past and present race-

related challenges. Because of its history as a slave-holding society, the United States has experienced difficult race relations since its founding. It was not until after World War II that the Supreme Court abolished race segregation in public spaces. In the 1960's the U.S. Civil Rights movement took off, including the development of affirmative action policies. To this day, the legacies of race discrimination and affirmative policies have played a dominant role in the U.S. legal system. While much of the discussion, for historical reasons, focuses on the black-white disparity, increasingly other racial groups have also been recognized as racial minorities, often because of past discrimination, and have benefited from affirmative policies.

Substantive laws focused on remedying segregation and race discrimination have triggered long-standing legal disputes, many of which have culminated in Supreme Court opinions. Race has played a role in environmental cases where companies have been accused of locating waste dumps in black neighborhoods; in criminal cases where prosecutors picked juries to exclude all potential black jurors; in school cases where school boards have ordered the busing of students to create more racially integrated schools; and in employment cases where employers have been accused of failing to hire racial minorities for discriminatory reasons. Even in cases where race may not be of legal significance, it may play a powerful role in an attorney's decision as to whether and how to proceed, for example with respect to jury selection. In rape cases, for example, the race of the victim and the defendant may be determinative in how to prosecute a case, whether to agree to a plea bargain, and how to present a case to a jury.

Determining the most unique characteristics of the U.S. legal system depends on one's perspective and vantage point. The most important and most difficult to understand features, from a non-U.S. perspective, should be the differences between federal and state legal structures and the respective allocation of powers, which go back to the founding of the Republic; the party-driven nature of the system which originated with the English influence on U.S. law but appears to have gained more strength in U.S. law; and the role race has played in substantive and procedural developments, a role that, while originating with the Founders, has morphed with the changes in the treatment of race relations throughout U.S. history.