

**THE THREE MOST IMPORTANT FEATURES OF MY COUNTRY'S
LEGAL SYSTEM THAT OTHERS SHOULD UNDERSTAND**

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Introduction:

This paper discusses three areas of the United States' legal system that provide much insight into American society and the way the law operates. The three areas examined are slavery, immigration and the U.S. invasion of Iraq. These three areas often reveal the dark side of the American legal system. They were chosen as examples of what other countries should seek to avoid but they are also examples of how law can restrain the worst instincts of society. The American system of law is rightly praised for its careful attention to limits on the power of government and its balancing of legislative, executive and judicial powers. The examples discussed below are cogent reminders of the fact that no matter how philosophically appealing the structure of a legal system may be, even with a calibrated system of checks and balances among the branches of government, no system can deliver justice without laws that treat all people fairly and that are based on a fundamental respect for every human being no matter where they may be located. Nor can a system deliver justice without the political will of the people to ensure that justice is done. Values are a necessary part of any legal system.¹

Slavery

The system of slavery, under which Africans were forcibly shipped to the United States as property, was well established during the period when the United States was a colony of Great Britain. Although attempts were made to abolish slavery in the drafting of the U.S. Constitution, ultimately the Constitution, which was proclaimed as duly ratified in 1789, recognized the institution of slavery in a number of its provisions. Article I, section 9, clause 1, for example, prevented Congress from banning the importation of slaves before 1808.² Article IV, section 2, clause 3,³ the fugitive slave clause, required that a slave who escaped from an owner must be returned, even if the slave had escaped to a state that prohibited slavery. "Slavery was

¹ During the apartheid era in South Africa, the court system remained generally uncorrupted and applied the laws in an orderly fashion. The overall quality of the administration of justice was high. The problem was that the laws passed by the legislature, applied by the courts and enforced by the executive were fundamentally unjust.

² "The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importations, not exceeding ten dollars for each person." On March 2nd, 1807, Congress prohibited all importation of slaves from January 1, 1808. Ch. 22, 2 Stat. 426.

³ "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

very much a part of the fabric of the Constitution....”⁴ In 1857, the Supreme Court of the United States had upheld the notion of African Americans as property in the infamous *Dred Scott* case⁵ and declared that all persons of African descent, even if free, could not be citizens. In 1884, the Court also ruled that American Indians were not U.S. citizens.⁶ It was not until the adoption of the XIIIth Amendment in 1865 that slavery was abolished,⁷ even though Britain had curbed and finally abolished slavery between the years 1807 and 1833.⁸

The Thirteenth Amendment, which legally abolished slavery, sadly, did not end effects of the institution. The XIVth Amendment, adopted in 1868, declared: “All person born or naturalized in the United States... are citizens of the United States and of the state wherein they reside.” It also prohibited states (and later, by implication through the Fifth Amendment, the federal government) from denying “to any person within its jurisdiction the equal protection of the law.” Nonetheless, in 1896, the Supreme Court upheld the legal separation of black from white in the case of *Plessy v. Ferguson*.⁹ As a result, much of the United States was constructed along apartheid lines until well into the 1960s. Virtually all public and private facilities were racially segregated in most states, whether by law or in practice. Schools, juries, drinking fountains, railway carriages, buses, hotels, restaurants, dance halls and colleges were racially segregated. Finally, the Supreme Court declared public segregation to be illegal in the case of *Brown v. Board of Education*¹⁰. However, it was not until the widespread civil rights riots of the 1960s that the *de jure* and *de facto* pattern of racial segregation started to be dismantled. Although the Fifteenth Amendment, which was adopted in 1870, guaranteed the right to vote regardless of “race, color or previous condition of servitude,”¹¹ it was not until the Voting Rights Act of 1965¹² that the federal government began to shut down the variety of barriers enacted by the states to prevent African-Americans from voting.

⁴ Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 5 (2d ed. 2002).

⁵ *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

⁶ *Elk v. Wilkins*, 112 U.S. 94 (1884).

⁷ “Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

⁸ Abolition of the Slave Trade Act, 1807, made it unlawful for British subjects to capture or transport slaves. In 1833 the Slavery Abolition Act liberated all slaves in the British Empire and paid compensation to slave owners.

⁹ 163 U.S. 537 (1896).

¹⁰ 347 U.S. 483 (1954).

¹¹ U.S. Const. amend XV, §1: “The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color, or previous conditions of servitude.”

¹² 42 U.S.C. §1973 et seq.

The long and sad legacy of slavery remains with the United States in almost every aspect of its life. In every measurement of well being, African Americans lag far behind their white counterparts in such areas as education, wealth, access to healthcare, employment, and life expectancy.

What can be learned from this brutalizing tale? First, the law was a major instrument in facilitating slavery as an institution and a way of life. Second, and much more hopefully, law can be used to abolish or change systems that have spread misery. Law can be used to undo the wrongs of the past but laws alone will seldom achieve broad-scale societal change. New ideas and people willing to fight for those ideas, whether peacefully or violently, are usually a necessary component of major changes that seek to redress fundamental wrongs. Finally, law can ensure that newly won protections and freedoms remain in place provided the political will of the people remains vigilant in ensuring even handed enforcement.

Immigration and Citizenship Law

The second area of law crucial to understanding the United States is immigration and citizenship law. This area is also informative for anyone thinking about how law influences the make-up of society. Apart from American Indians, all the other races in the United States trace their ancestry from some other country. People came to the United States for a variety of reasons. Some, such as African Americans and convicts, were forcibly transported. Some came to escape religious or political persecution. Many came to escape famine, war and repression of all varieties. Large numbers came to build a better economic foundation for themselves and their families. There are indeed some elements of truth in the idea of the United States welcoming the world's poor, rejected and downtrodden. And yet this is only one part of the story. The story has also been one of exclusion. When the federal government began to regulate immigration at the end of the nineteenth century, it rapidly barred all Chinese laborers from entry¹³ despite a treaty with China permitting free access to the United States for Chinese citizens.¹⁴ The national origins quota, which lasted from 1921 to 1965, ensured that mainly only northern Europeans could immigrate to the United States. The quota system was finally abolished by the Immigration and Nationality Act of 1965.¹⁵

In the area of citizenship, it took the 1868 Fourteenth Amendment to ensure citizenship for African Americans,¹⁶ and a 1940 federal law¹⁷ to ensure citizenship for

¹³ Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504; see also Act of May 6, 1882, ch. 126, 22 Stat. 58.

¹⁴ Burlingame Treaty, July 28, 1868, U.S. – China, 16 Stat. 739, T.S. No. 48; Supplemental Treaty, Nov. 17, 1880, U.S. – China, 22 Stat. 826, T.S. No. 49.

¹⁵ Pub. L. 89-236, 79 Stat. 911.

¹⁶ U.S. Const. amend. XIV, §1.

¹⁷ Sec. 201(b), Nationality Act of 1940, 54 Stat. 1138.

American Indians. An early case, *United States v. Wong Kim Ark*,¹⁸ surprisingly ensured citizenship for all children born in the United States regardless of the citizenship of their parents, although Chinese citizens were barred from naturalization until 1943.¹⁹ It wasn't until 1952 that all racial and national origin limitations were removed from the naturalization laws.²⁰

The United States history of immigration and citizenship laws has been beset by waves of anti-immigrant sentiment since before the founding of the republic. Sentiment against particular groups at particular times has been a feature of the immigration admission laws and of the citizenship requirements. Over time, the laws have been moved in the direction of more equal access and wider inclusion.

Few other countries have harbored as many aliens as the United States. This great mixing of races and cultures may have given a certain dynamism to American society but it may also have contributed to its violence. It has been said that the lack of a universal health care system (or other forms of social services generally found in developed countries) is traceable, in part, to the polyglot nature of American society. If my neighbor speaks a strange language and doesn't look like me, I tend to feel less responsible for his/her welfare. I fail to appreciate that my neighbor's welfare is part of my welfare. Human beings seem to crave a sense of belonging to a community they know intimately and that remains largely the same, but rigidity in a social system can stifle creativity and crush the human spirit. New immigrants often provide the yeast and energy that is necessary to sustain our rapidly changing, ever more globalized world. It is also becoming apparent that they inject younger work forces into rapidly aging industrialized societies. Understanding the legal regime that has created American society through its immigration and citizenship system is key to understanding the composition of the United States and offers many lessons for anyone thinking about how their own society should structure membership in the community.

The United States' Invasion of Iraq: Power to Wage War

The third area of United States' law to be discussed is the legal regime surrounding the use of military force, focusing on the invasion of Iraq. The U.S. is party to the United Nations Charter which governs the use of force between states and which supersedes any internal law.²¹ The Charter prohibits the use of force to settle international disputes²² and only permits force if a state is responding to an armed attack²³ or if authorized to use force by the U.N. Security Council.²⁴ Many scholars

¹⁸ 169 U.S. 649 (1898).

¹⁹ Act of Dec. 17, 1943. ch. 344, §1. 57 Stat. 600.

²⁰ Immigration and Nationality Act of 1952, ch. 2, §311, 66 Stat. 239 (as amended INA §311).

²¹ U.N. Charter, arts. 2, para. 4, 33, 41, 42, 51 & 103.

²² *Id.* at art. 2, para. 4.

²³ *Id.* at art. 51.

argue that the Charter requires an actual armed attack before the right of self-defense is triggered.²⁵ Other scholars maintain that there is a right of anticipatory self defense encompassed by the Charter's language of "the **inherent** right" to individual and collective self-defense found in article 51, but that it requires, at the very least, a credible, imminent armed attack.²⁶ Under this theory, if the suspected armed attack turns out to have been a false alarm, the state exercising anticipatory self-defense would be required to withdraw and its right to self-defense would evaporate. The United States has recently promulgated a new doctrine maintaining the right to use force preemptively against any perceived future threat, regardless of whether the threat is imminent or not.²⁷

Under the United States Constitution, the President is designated as the "commander in chief of the army and navy,"²⁸ but the Congress is given the power "[t]o declare war",²⁹ "[t]o raise and support armies"³⁰ and "[t]o provide and maintain a navy."³¹ On first reading the Constitution, it looks as if the legislature was given the authority and responsibility of raising funds for the military together with the power to determine when the troops should engage in war, and the President was given the day-to-day command of troops once they were engaged in armed force. History has proved more complicated however, with numerous examples of the executive launching the use of force without a Congressional declaration of war. The interpretive and political battle over which branch of government has the power to determine that the military shall engage in the use of force against a foreign state continues to this day with vigorous proponents for both sides of the argument.

In the case of Iraq, any conflict between the legislative and executive branches disappeared when Congress passed the Authorization for Use of Military Force Against Iraq Resolution of 2002³² which specifically permitted the President to "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to – (1) defend the national security of the United States against the continuing threat posed by Iraq...."³³ The President's office had informed the

²⁴ *Id.* at art. 42.

²⁵ See, e.g., Hans Kelsen, *The Law of the United Nations* 914 (1950); Ian Brownlie, *International Law and the Use of Force by States* 278 (1963).

²⁶ See, e.g., D.W. Bowelt, *Self-Defence in International Law* 817 n. 1 (1958).

²⁷ White House, *The National Security Strategy of the U.S. of America* 15 (Sept. 17, 2002).

²⁸ U.S. Const. art II, §2.

²⁹ *Id.* at art. I, §8.

³⁰ *Id.*

³¹ *Id.*

³² Pub. L. 107-243 (Oct. 16, 2002).

³³ *Id.* at §3(a).

Congress and the nation that Iraq possessed “weapons of mass destruction” and that these were going to be used against the United States and Europe.³⁴ All of this information proved to be false. Despite U.S. urging, the Security Council did not authorize any use of force against Iraq.³⁵ Nonetheless, the United States, together with the United Kingdom and several other countries, invaded Iraq in March, 2003. The war is still raging. Coalition military deaths now number above four thousand and estimates of Iraqi military and civilians deaths are above half a million. The death and destruction in Iraq is vast and, whatever the final result, has brought misery to thousands and is likely to have a devastating effect on the stability of the whole region.

What lessons can be learned from this disasterous action? Some scholars believe that, at least with respect to the use of military power, law is irrelevant in the context of a unipolar world.³⁶ While it is true that law alone can seldom restrain great economic and military power, law, together with a culture that promotes careful conformance with international obligations as well as a boldly articulated belief in negotiation and peaceful settlement of international disputes, can restrain raw power. States need to pay great attention to the internal mechanisms of restraint on war making powers as well as understanding and complying with treaty obligations not to use force except in the rarest of circumstances as permitted by the U.N. Charter.³⁷

The overall lesson of the Iraq invasion is that the U.S. legislature and citizens must play a more active and critical role in limiting Presidential war-making powers and the world community must find a more effective way to limit powerful states from using military force.

Conclusion

By examining the areas of slavery, immigration and citizenship law, and the power to wage war as they operate in the U.S. legal system, this paper has tried to convey that the mechanisms of government play an important role in shaping society but that the substantive context of the laws and vigorous enforcement systems backed by the support of the people is ultimately the only guarantee of justice.

³⁴ The National Security Strategy of the U.S. (Sept. 17, 2002) available at <http://www.white-house.gov/nsc/nss.pdf>.

³⁵ S.C. Res. 1441 (Nov. 8, 2002), 42 I.L.M. 250 (2003).

³⁶ See, e.g., Michael Glennon, Why the Security Council Failed, *Foreign Affairs*, May/June 2003, 16-35.

³⁷ Although the Charter system is undoubtedly flawed, especially with respect to the veto power given to China, Russia, France, the United States and the United Kingdom, U.N. Charter, arts. 23 & 27, that system can hardly be said to penalize the U.S. or the U.K.