

The Three Most Important Features of My Country's Legal System that Others Should Understand

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My area of research and teaching specialty is public law, both from an American and comparative perspective, so I am going to write about three notable features of the American *public law* system that distinguish it from the public law systems of the other major legal systems.

Constitutional Review

First, one of the most notable and recognizable elements of the American legal system is its robust system of “constitutional review.” By “constitutional review,” I mean the power of a judicial institution to issue some form of coercive relief to invalidate the actions of the executive or legislative branches. The institution of pure “judicial review”—meaning the ability of a judicial institution to review administrative regulations for compatibility with statutes, and invalidate them, or to exercise other judicial powers—is not as historically unique to the United States. However, the idea of “constitutional review”—meaning that a court invalidates the actions of another branch of government as being inconsistent with a higher law, and the other branch of government cannot do anything about it (short of an always difficult effort to secure a constitutional amendment)—is more historically unique to the United States.

The Constitution of the United States does not explicitly mention the power of constitutional review. However, there are many signs that it was understood at the time of the drafting of the American Constitution that American federal courts would have the power of constitutional review. The United States Supreme Court eventually decided, in *Marbury v. Madison* in 1803, that American federal courts did have the power of constitutional review. Even before the famous *Marbury* case, though, there were several decisions issued by other courts that seemed to indicate that courts were exercising the power of constitutional review.

Throughout the eighteenth and nineteenth centuries, American federal courts were essentially the only long-lasting, successful courts in the world exercising the power of constitutional review. In some countries, such as Austria, Czechoslovakia, many countries in Latin America, and even pre-fascist Germany and Spain, constitutional review existed, but it was used so infrequently and was so heavily politically contested that it was little of a practical reality. The American federal courts essentially stood alone in exercising the power of constitutional review.

With the failure of these models of government to prevent the rise of authoritarianism, constitutional review quickly became a much more common practice around the world. Right after the end of World War II, the three Axis powers created regimes of constitutional review,

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led first by Japan (1947) and then shortly thereafter by Italy (1948) and Germany (1949). Another wave of systems of constitutional review spread the globe at the end of the 1980's, with countries in the former orbit of Soviet power, and many Latin American countries, starting to feature for the first time either the formal or the actual exercise of constitutional review. Courts exercising the power of constitutional review are also in the middle of many controversial debates, such as the recent elections in Italy, or the controversy over the Supreme Court in Pakistan, or the debates about AIDS in South Africa.

Interestingly, although the power of constitutional review might be the one truly unique American contribution to ideas of government around the globe, the exact manner in which the United States has structured constitutional review has largely not been copied. First, in the United States, constitutional review is housed in generalist courts, which have jurisdiction over constitutional law as well as other bodies of law; very few countries have such a system of constitutional review in place that permits courts to address both constitutional and other legal issues. Second, the United States remains distinctive in spreading the power of constitutional review among a range of courts, rather than housing it in a single constitutional court (such as in Germany). Third, even though more American courts have the ability to address constitutional issues, they have this power in a narrower range of cases, because they are only allowed to address constitutional issues in their "concrete" rather than "abstract" forms (meaning that they can only address constitutional issues in the context of an adversarial disputes). Many countries, such as Canada, France and Germany, have permitted constitutional issues to be put to their courts even when there is not a live, concrete dispute. Fourth and finally, American judges hearing constitutional cases have an enormous degree of formal institutional independence. American federal judges have life tenure, with no mandatory retirement age. The far more common approach is to give a constitutional court judge a long term appointment, perhaps even allowing them to be reappointed, but also including mandatory retirement ages.

Separation of Powers

The American system of separation of powers remains one of its most distinctive and comparatively anomalous features. Among the twenty-one or so countries that have been stable democracies since the end of World War II, the United States has long been one of the few countries that has a chief executive who is elected independently of the legislature, and was not in any meaningful way accountable to the legislative branch. While the United States has always used this "presidential" model of government, very few other countries with stable, long-lasting democratic systems have used this presidentialist model. Instead, over history most other countries have adopted more of a "parliamentary" model of government, whereby the chief executive is politically accountable to the legislative branch, rather than independent of the legislative branch.

Two qualifications to this observation should be made. First, a new, compromise system of government, commonly called "semi-presidentialism," has been the fastest growing system of government around the world. In semi-presidentialism, there is one executive elected directly by the citizens (usually called the "President"), and then one executive politically responsible to a directly elected legislature (a figure usually called the "Prime Minister"). Although this idea had

been debated for some time, it found its first true—and most notable— institutional embodiment in the Fifth Republic of France in 1958, which combined a President and a Prime Minister of the semi-presidential variety.

This semi-presidential model has been spreading rapidly. After the collapse of the Soviet Union, the most commonly used form of government by the new democracies was semi-presidentialism (most importantly in Poland, Russia and the Ukraine). Around the same time, many countries in Africa and Asia also changed to semi-presidentialist regimes. Right now, then, a total of approximately fifty countries feature semi-presidential systems of government.

Second, even though parliamentary systems still remain in place in many countries, as a practical matter there has been a dramatic, and almost inevitable, transition towards what political scientists generally call “presidentialization.” One statistic often used to prove this point is as follows: A generation ago, about half of the world’s twenty-one countries who had been stable democracies since World War II had featured head-to-head, televised debates for the chief executive position. Now almost all of these countries have had such debates. The ability to govern by executive order and decree has spread rapidly; the formal power of legislatures has been shrinking gradually. So, however much the United States used to be the rare formal and real example of presidentialism, now as a practical matter many countries have trended in that direction.

Political Public Law

The American public law system is distinctive in how political it always has been and still remains in terms of how officials with formal legal authority come to obtain their positions. Many American legal officials usually either have to campaign themselves for their positions in competitive elections, or must solicit the favor of elected officials in order to obtain their positions. By contrast, many of the world’s other major legal systems feature more bureaucratic systems of appointment, where appointments are made based more on a career of specialized training and outstanding government service.

There are several levels at which this characterization of the American system is true. First of all, American prosecutors at the federal and state level are almost all essentially political officials. All but a few of the American states elect their chief prosecutors, as well as their local prosecutors. Given that essentially ninety percent of American criminal law transpires at the state and local level, this means that the overwhelming number of criminal prosecutions involve directly elected prosecutors. At the federal level, as has made the news recently, the U.S. Attorneys are appointed by the President with the consent of the Senate, and then can be removed by the President. Many of the leading political figures in the United States, then, are former prosecutors—current Republican presidential candidate Rudolph Giuliani and 2004 Democratic presidential nominee John Kerry, just to name two. By contrast, in the majority of other countries with successful criminal justice systems, prosecutors are professionalized bureaucrats, hired and fired in more of a civil service fashion. Prosecutors can often become public figures in other countries, but they usually operate more out of ministries of justice or

more autonomous prosecutorial governmental organizations.

Second, judges remain more political figures than they are in many other countries. At the state level, more than eighty-five percent of judges face elections. More than three-quarters of American states elect their high court judges and the large majority of their other judges. The consequences are clear, if not surprising: Money has a lot to do with who becomes and remains a state judge, and how states judges behave, and the large majority of the amount spent on judicial elections is by elite business or bar groups. As with prosecutors, this is quite anomalous: very few jurisdictions anywhere in the world feature direct elections of judges.

Third, federal judges—although not directly elected and instead appointed—are also political figures. American federal judges almost always have impeccable resumes and credentials and represent the best of the American legal profession. But in deciding who among the best of the American legal profession to nominate, the President of the United States often goes by who has the most political connections or experience. Recently appointed American Supreme Court Justices John Roberts and Samuel Alito were both employees of the Reagan Administration. Justice Stephen Breyer, an appointee by President Bill Clinton to the Supreme Court in 1994, was a close advisor to leading Democratic Senator Edward Kennedy. It is therefore not surprising that discussions in the American Senate about whether to confirm nominees for positions on the lower federal courts or the Supreme Court themselves have become political battles. And, again, this remains a largely distinctively American feature. The power of judicial appointment is spread out more broadly among the various branches of government in other countries than in the United States, and therefore more often involves a process of collaboration among several political parties—and a collaboration to appoint and confirm figures with more judicial and less political backgrounds.