

**The Three Most Important Features of My Country's Legal System that Others
Should Understand: Reflections from an African-American Legal Academician**

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It is an honor and pleasure to serve as a delegate to the 1st Conference of the International Association of Law Schools in Suzhou, China, appropriately titled: *Learning from Each Other: Enriching the Law School Curriculum in an Interrelated World*. On behalf of the Dean and faculty of the Florida International University College of Law, I extend to you my warmest greetings and an olive branch of peace and solidarity.

In preparing this paper I solicited suggestions from members of my trusted and capable law faculty, who forwarded several interesting and noteworthy observations. Although this paper will only highlight three of the most important features of the United States legal system, I will nonetheless briefly enumerate some of my colleagues' suggestions on the topic. As I suspect is the case with any law faculty, what was interesting about the solicitation exercise was the broad array of contrasting and complementary views expressed by a highly educated group of primarily American trained lawyers and academicians. Their responses engender issues that cut across the fabric of the United States legal system ranging from seemingly affirmative features such as the preeminence of the rule of law; separation of powers between the three major branches of government; independence of the judiciary and the institution of judicial review; legal adversarialism; supremacy of one federal judicial power and fifty independent state judicial powers; *stare decisis*; publication of dissension opinions; transparency through public records disclosure guarantees; access to courts and the ability to formally register dissent with factual and legal findings. Ostensibly negative aspects of the American legal system were also noted such as its failure to adequately domesticate binding international law; the politicization of the selection of judges at the federal and state levels; and over-criminalization, including the overlapping phenomena of incarceration rates far above global averages, mandatory minimum sentences, racial discrimination in the justice system, the erosion of Fourth Amendment freedoms, coercive plea bargaining practices, poor prison conditions and the abuse of inmates.

Perhaps, the wide spectrum of issues this topic elicited within the small cosmic of my law faculty best evidences that the idea of freedom in the rule of law is inherent in American legal culture—the rule of law being an organic and free flowing Milky Way galaxy where it and accompanying freedoms do not loom fictitiously, nor do they necessarily flow easily without blood sacrifice at the alter of legal equality which serves as the foundation of the American legal universe. In this universe the preeminence of the rule of law, independence of the judiciary, judicial review and the principle of *stare decisis* are among the most unique features of the United States legal system.

That said the rule of law itself is, perhaps, the quintessential feature of the American legal system. The Constitution of the United States is succinct and to the point. It is comprised of a preamble, seven articles and twenty-seven amendments and serves as the supreme law of the land under which 301 million people live in relative peace. The Framers of the United States Constitution understood that no society could reach its full potential and guarantee fundamental freedoms based on the notion of individual liberty without fashioning a robust rule of law that creates a system of protective checks and balances between a citizenry and its government.

The principle of a democratic rule of law can be traced back to Black Egypt in the First Dynasty (3100-2890 BC) beginning with the reign of King Menes as documented by Manetho, an Egyptian scholar and priest that lived in the 3rd Century BC, in his famous work *Aegyptiaca* (also referred to as *Aigyptiaka*), the "History of Egypt", and confirmed by Herodotus who claims that Menes, politically united Upper and Lower Egypt. It was not until the Twenty Sixth Dynasty (664 BC) that the Greeks came into contact with the highly civilized political and legal tradition of Egypt and acquired the ideas of liberty and democratic equality later espoused and further developed by Aristotle and Cicero. Greek and Roman conceptions of law greatly influenced its development in Europe, particularly in England. The common law system that forms the basis of the American legal system derives directly from England and was later embraced by the newly independent American states after the American Revolution.

Despite the racist and sexist tradition that underpins it, the United States was founded on a government of laws and not men where the rule of law serves as the foundational principle that constrains government and ideally empowers the governed. As international law is the paste of global society, in America the rule of law itself is the glue that guarantees predictability in human relations and relations between the state and the individual and among the state, individuals and institutions. A democratic rule of law is the essential ingredient of freedom in any socio-political and legal order preoccupied with peace, security, stability, development and individual liberty. While history reveals that the rule of law in America was historically intended to preserve white supremacy, at its core, the legal principles that underwrote the idea of freedom inherent in American legal culture were and are so potent and compelling that they empowered the very classes of people (i.e. enslaved blacks, women and other relegated groups) that the old law shamefully sought to oppress to fight for freedom and progressively reform the law.

The Framers of the United States Constitution intentionally sought to create a nation where both state and citizen would submit to the supremacy of the rule of law as the essential feature of its ordered liberty.¹ It is the brilliant and fervent character of America's ordered liberty where the will of the people is superior to federal and state government that distinguishes it from other democracies and those nations practicing totalitarianism. In the United States the rule of law is born out of the people and

¹ Thomas E. Baker and Jerre S. Williams (eds.), *CONSTITUTIONAL ANALYSIS IN A NUTSHELL* (2nd Edition) (Thomson West, 2003), at 4.

designed to shield citizens from tyranny and lawlessness, safeguard freedom and allow society to conduct itself for the general welfare. The principle of legal equality inherent in the American legal system is the enduring principle that has allowed the United States to progressively mature as a nation.

The judicial power, independence of the judiciary and the institution of judicial review are among the most important features of the American legal system. The judicial power inherent in the United States legal system is unparalleled as it is composed of two distinct but interrelated and interdependent sets of federal and states courts that coexist alongside one another. The division between the federal and state judicial branches is steeped in American history and due to the fact that the United States was founded as a union of thirteen autonomous colonies rather than one nation. The United States Constitution not only envisaged a separation of powers between the executive, legislative, and judicial branches of government that are supposed to check and balance one another through the enumeration of specific and shared powers, but also between federal and state law. Article III of the Constitution created the federal judicial branch and the Supreme Court, which is the only court established directly by the Constitution and sits atop the hierarchy of the American judiciary. It is endowed with the ultimate authority to review cases arising under the Constitution, the Laws of the United States, including all forms federal law, rules and regulations, treaties and controversies between states, states and the federal government, and finally, the United States and foreign states. It was therefore by design that at both the federal and state levels the judiciary would need to be completely independent given its critical role of safeguarding the integrity of America's rights-based rule of law and to ensure that actions taken by the executive and legislative branches do not exceed constitutional boundaries.

An independent judiciary that protects fundamental freedoms enshrined in the Constitution is the lifeline of American democracy and a necessity in any genuine liberal democracy that values the rule of law as the landmark desegregation case of *Cooper vs. Aaron* pointedly demonstrates.² In this ground-breaking case the Supreme Court spoke to the supremacy of individual liberties etched in the United States Constitution over the segregationist policy and law of the Governor and Legislature of Arkansas, which sought to “to use their governmental powers to bar children on racial grounds from attending schools” in contravention of the Constitution.³ It was the independence of the Supreme Court and the principles of freedom and justice engraved into the U.S. Constitution that empowered the Court to obviate the interests of the white majority in Arkansas by overturning the immoral status quo and ruling “that enforced racial segregation in the public schools of a State is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment,” and inconsistent with its holding in *Brown v. Board of Education*.⁴

² COOPER v. AARON, 358 U.S. 1 (1958).

³ Id. BROWN v. BOARD OF EDUCATION, 347 U.S. 483 (1954).

⁴ COOPER v. AARON, 358 U.S. 1 (1958).

This case not only speaks to the importance of an independent judiciary as the guardian of fundamental rights against tyrannical government behavior—but also demonstrates the critical role of judicial review and *stare decisis* (the principal that legal precedent is to be followed by other courts) in safeguarding basic rights. The principal of judicial review is another hallmark of the United States legal system. What the *Cooper v. Aaron* case vividly illustrates is that the Supreme Court is the final arbiter on constitutional issues and, as previously noted, “engages not only in judicial review of the constitutionality of legislation, both state and federal, but also of the actions of the executive branch, state and federal, as well as decisions of other courts both state and federal.”⁵

Finally, the principle of *stare decisis* is another critically important feature of the American legal system. The concept is simplistic: decisions of a higher court rule over those of lower courts. In the United States law is “made” by the legislative branches of government, whether at the federal or state level; however judges do in fact “make” law by interpreting its meaning and how it is to be applied. Much of American common law is the by-product of judicial decisions, particularly civil rights law and the law of property, contracts and torts. Today, as globalization deepens its roots in global society, international law is slowly being domesticated into the American legal system through, for example, judicial decisions on key issues such as trade, human rights and terrorism. Judicial decisions have the force of law in the United States and as a part of its legal culture are generally respected by government including the courts and society as a whole. Only the Supreme Court or a state supreme court within its jurisdiction has the authority to overrule a precedent when the facts of the case mirror an earlier one. This is precisely what the Supreme Court did in the *Brown v. Board of Education* desegregation decision when it overruled an analogous decision (*Plessy v. Ferguson, 1896*) that upheld the constitutionality of racial segregation under the doctrine of “separate but equal”.

The principle of *stare decisis* creates consistency in the rule of law by generating predictability of legal outcomes and the legal framework to treat all people equal under the law when facing the same or similar legal problems. However, it is the raw judicial power to overrule old precedent and establish new ones that, as the *Cooper v. Aaron* shows, has provided the United States judiciary with the flexibility to normatively help convert an unequal and unjust America into one that is more just and more equal.

The American legal system is far from perfect and like other states has needed time to evolve, but unlike many other nations, individual liberty backed by a just rule of law is the beacon of light that powers American democracy and freedom, and it is this vary brand of equality that is the principal reason why, irrespective of its racist and sexist history or tradition of military adventurism, the United States continues to be worlds most powerful nation and humanity’s most desirable destination.

⁵ Baker and Williams, *supra* note 1 at 53.