

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

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The Rule of Law, transparency and access are essential elements of the legal system in the United States (U.S.). The history and development of these concepts in U.S. law are essential to the understanding of the U.S. legal system.

The Rule of Law: The concept of the Rule of Law is generally thought of as synonymous with a constitutional democracy form of governance and the legal system established therein. However, each country has its own particular historical and cultural circumstances in which the Rule of Law must operate. As in most nations, the components of the Rule of Law in the U.S. have evolved over time. In the early development of the federal system in the U.S., constitutionalism and the separation of powers were fundamental components. Constitutionalism in the U.S. required a written document that imposed limits on the power of government generally and separation of powers embodied in the U.S. Constitution established three basic forms of government power within these limits: legislative power, executive power and judicial power.¹ The Rule of Law embodied the idea that governmental actions and decisions should be uniform, equal and predictable for the individual citizen. This desired predictability and certainty with respect to rights of individuals was aided by the inclusion of the Bill of Rights in the constitution.

The establishment of three branches of government and the accompanying system of checks and balances was meant to assure a division of governmental power. In this way, no one governmental body had complete power and each branch would help ensure that governmental power was exercised in a reasonable and non-arbitrary manner. While not explicit in the federal constitution, early in U.S. constitutional history, the principle was established that the Rule of Law in the U.S. requires an independent judiciary that can interpret and rule upon the constitutionality of actions taken by the other two branches. This differs from other constitutional democracies that have long-standing traditions which hold that the legislative branch possesses final authority to determine its own constitutional limits.

Another early essential component to the concept of division of governmental power was recognition of the fact that some powers were reserved to the individual states in the federal system. These states each created their own constitutions which are very similar in structure to the federal constitution.

Although now considered as a vital component of the Rule of Law, it was not until the 19th century when equal protection was so recognized by its inclusion in the Fourteenth Amendment to the U.S. Constitution.² It was during this time that groups who had been excluded from the polity were accepted into the sphere of those entitled to just law and equal treatment. These rights were initially extended to former slaves

¹ The U.S. Constitution was adopted by convention of States, September 17, 1787 and the ratification was completed, June 21, 1788.

² In 1868, the U.S. Congress adopted the 14th Amendment to the Constitution. Part one of the amendment provides that: "No state [may]... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and subsequently to women and other groups. The 14th amendment also provided that the Fifth Amendment in the Bill of Rights, which requires due process, applies to state governments as well as the federal government.

Transparency: Democracy works best when those governed have information about the government. As one commentator has stated it, “[f]or democracy to work, citizens must have access to information about what their government is doing and how decisions have been reached.”³ This is particularly applicable to the legal system. Openness in the legal system enforces the principles of the Rule of Law. When an individual is involved with the legal system, the desired uniformity, equality and predictability can only be achieved through knowledge about how the system operates and how others are treated. In the U.S., the transparency in judicial proceedings evolved in part from English common law, which generally provided the right to a public trial. In addition to public trials, the transparency is increased by the publication of judicial and administrative opinions, access to legal information about rights and obligations, active participation of citizens in the judicial selection process, and active participation of citizens in government proceedings.

Greater transparency makes it difficult for ill-advised laws to remain in existence or for the equal protection principle to be ignored. Even when an unpopular decision is made in the legal system, the decision is generally accepted when the process is transparent and the decision-makers can demonstrate that they are acted in accordance with the law. There are many actions that are taken to enhance transparency.

While judicial decisions have traditionally been available in law books and more recently in legal databases, their accessibility has greatly improved with technological advances. Many administrative agency actions and court decisions are now available at no cost on the internet.

Bar associations, private lawyers, court systems and various non-governmental organizations provide information to the public about their legal rights as well as the functioning of the legal system.

A transparent and merit-based appointment process for judges assists in achieving judicial autonomy and respect for the judiciary.

The right to a trial by jury facilitates the participation of citizens in court proceedings. Similarly, the participation of citizens in rulemaking proceedings that are engaged in by administrative agencies to clarify the duties and obligations imposed by the legislature enhances transparency of governmental actions that affect legal rights.

Conflict can arise in the context of transparency or openness when a proceeding involves issues of privacy. For example, an attempt to enforce the rights of one individual may involve delving into matters that another individual considers private and does not wish to have exposed in a transparent process. Also, governmental

³ Lotte E. Feinberg, “Open Government and Freedom of Information: Fishbowl Accountability?” in Phillip J. Cooper and Chester A. Newland, eds. *Handbook of Public Law and Administration* (San Francisco: Jossey-Bass Publishers, 1997), p. 376-7.

actions that may be viewed as necessary for the security and safety of the general population may involve the exploration of information that triggers a privacy concern. This type of conflict results in a careful balancing of the rights of individuals involved in the legal system. Confidence in a generally transparent legal system can accommodate some of these conflicts. One such occurrence might be when there is a belief that a fair and impartial judge has been selected through a transparent process so that individuals involved in a dispute have the necessary confidence to allow a judge to examine private information and make a determination as to the necessity to reveal the information.

Access. The Rule of Law is also aided by the concept of access in the U.S. legal system. Access can be divided into two smaller concepts—access to the legal profession and access to justice.

Access to the profession proceeds from the assumption that all citizens should have the opportunity to enter the legal profession and serve as attorneys, judges, or in other roles that require legal training. In order to achieve this goal, individuals should have access to the legal education required to enter the profession. U.S. history reveals that access to the legal profession has been controlled. Generally, this control has been exercised by state bar associations or state courts. Some issues of control involve the desire to ensure that those seeking to enter the bar were adequately prepared to serve as lawyers or judges. However, other controls were established to exclude some groups from the profession. At one time, women were refused the right to enter the legal profession because it was thought that the “natural and proper timidity and delicacy which belongs to the female sex” was not suitable for the legal profession.⁴ When apprenticeship was the primary method to obtain admission to the legal profession, African-Americans were excluded from the practice of law. Further, when the role of training for lawyers was assumed by law schools, many law schools refused to admit women and minority groups.⁵ Although the formal structural barriers have been removed, challenges remain that access is not equally available. Some of these challenges relate to admission standards and costs of legal education.⁶

Access to justice involves the concept of “equal access to justice”—that individuals have a right to representation in the legal system even if they cannot afford to pay a lawyer. It has been suggested that the legal system is extremely complex in part by the large numbers of lawyers in the U.S. but that even with the large numbers of lawyers U.S. citizens are underrepresented in the legal system because they cannot afford to pay lawyers.⁷ The lack of access has been addressed in a number of ways. The professional ethics for lawyers includes recognition of an obligation to provide pro bono legal service. In the U.S. pro bono has long been a part of the professional ethics of the lawyer. The Model Rules of Professional

⁴ *Bradwell v. Illinois*, 84 U. S. (16 Wall.) 130, 141 (1873)

⁵ See generally, *Carrie Menkel-Meadow, Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 *U.Miami L.Rev.* 29 (1987)

⁶ See generally, Vernellia R. Randall, *LSAT Discrimination and Minorities* online at <http://academic.udayton.edu/race/03justice/LegalEd/legaled01.htm>

⁷ See generally, Deborah L. Rhode, *Access to Justice* (2005).

Conduct, Rule 6.1 Voluntary Pro Bono Publico Service states that: “Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.” In this regard, large law firms often donate significant hours to assist individuals who might no otherwise be able to obtain legal representation. Legal assistance is also provided by legal service organizations that are both governmental and privately funded. Several state and local bar associations have created projects to study and develop methods to respond to opinions that some groups do not receive equal access to the legal system because of such as race, gender or ethnicity.⁸

⁸ *See generally*, Guidance on State Access to Justice Commissions and Structures, American Bar Association website <http://www.abanet.org/legalservices/sclaid/atjresourcecenter/atjmainpage.html>