

FUNDAMENTAL ASPECTS OF THE US LEGAL SYSTEM

GERALD TORRES, UNIVERSITY OF TEXAS

It is impossible to reduce the fundamental qualities of the US legal system to a simple list of its attributes. So much of what is central to its character is bound up in the ideas of legality that circulate throughout the culture. These ideas are not necessarily coherent and are often in tension with one another, but they describe a range of beliefs that can be said to be distinctively American in this way: legality is rooted in the popular will, but that popular will is limited by the restrictions (some structural, but otherwise unstated) on the institutions of government. The constitution is a repository of rights that are, for the most part, unstated, but operate to limit political power at all levels; courts not only resolve disputes, but also say what the law is and this statement will always reflect the other two aspects of legality in order to be legitimate, to do more than this is to act lawlessly.

Were I obligated to produce a list that summarized these ideas, and that included only those ideas that were specifically legal it would have to include the following: legality rooted in democratic legitimacy (embodied in a constitutional structure that reflects this form of legitimate authority), a constitutionalism rooted in federalism and a division of governing function and judicial review. In the following pages I will elaborate each of these, but, of course, I will only suggest points for discussion rather than attempt to exhaust the topics.

The first item might be called democratic legality. This means that what is legal is a matter of both pedigree and generally accepted social convention. By pedigree all I mean is that the if the authoritative statement that purports to be law cannot be traced to an enactment undertaken according to the correct procedures and by the correct authorities for producing law, it hardly matters how many people treat it as law or how vigorously it is enforced; it is not lawful.

I want to stress, however, that democratic (as suggested by the formulation “will of the people”) does not require a commitment simple to majority rule, but conditions majority rule by reference to basic respect for the agency of all of the members of the polity. The legitimacy of our legal system requires that the people have an opportunity to participate actively, consciously and collectively in the formulation and interpretation of the law and that this participation cannot be limited to elections.

Yet, the critical question is, of course, what does “correct” mean in that formulation? In order to be correct, procedures must reproduce a commitment to democratic accountability, and it is the presence of that accountability that allows us to identify whether coercive authorities are legitimate. It is not enough to say that there is an obligation to obey the law because of the state’s monopoly on violence. Prudence may dictate such a result, but the desire to avoid bad consequences is insufficient to support the conclusion that there is an obligation, moral or otherwise, to conform your behavior to the dictates of the powerful. It is only through the mutual recognition of authority between the people and their agents that grounds commands in legality. This is the problem of power that the law is supposed to manage as a substantive and

procedural matter. Yet both the substance and procedure are supposed to be rooted in the authority of the people to govern themselves. A deviation from that premise undermines the force of the obligation to obey the law.

Second, the division of governmental power and function is understood to be essential for the efficient functioning of government and to restrain any particular level or branch of government from aggrandizing power. Federalism implies that power will be distributed to those levels most conducive to the reinforcement of democratic legitimacy. The power of subordinate levels of government is, however, contingent on the congruence between the local exercise of power and the general limitation of power required by popular sovereignty as conditioned or limited by the institutions of constitutional governance. Since power is not statist in origin but only in execution there are implied as well as express limitations on the exercise of legislative or executive power.

The subunits within the federal structure are free to use whatever tools of democratic experimentalism are at their disposal, but they are not completely free. They are restricted by the superior power of the union that comprises the central government. Nonetheless, these subunits retain prerogatives that act as institutional limits on the power of the central government. This tension produces boundaries on the exercise of centralized state power and reconfirms the importance of the ultimate sovereignty of the people. The antagonism between the levels of governance reflects both the structural safeguards against the agglomeration of power and a check on its unlawful use. The federal structure that is found in the constitution reflects both express and implied spheres of power. If the idea of legality referred to earlier is sound, then the federal structure is designed to promote democratic legality rather than merely confirm the powers of levels of the state.

The division of governmental power between branches of government serves a similar function. There are a number of points at which ambition will be arrayed against ambition as a structural matter as well as places where redundancy allows for considered second thoughts. In my view, these features reinforce the idea that although the institutions of government produce their own interests (the perpetual problem of state power) by creating impediment to efficiency as the dominant norm the role of democratic legitimacy is reinforced by recognizing that streamlining power in a way that excludes the chance for the people to respond to power carries with it the danger of unmooring law from the people.

The final feature is judicial review. For most of my legal training, the legitimacy of judicial review occupied a great deal of energy and class time. How is it, the question was put, that a non-democratic governmental institution can declare a democratically arrived at conclusion unacceptable? Of course, I think and thought then that this was the wrong question. One of the redundancies that our legal/constitutional system constructs is that each branch gets to make a decision as to the legitimacy of its actions in furtherance of democratic governance. Admittedly, the what the branches are doing is different: legislatures make policy decisions, the executive enforces those decisions consistent with its understanding of the requirements propounded in the legislation, the judicial branch applies rules of decision to resolve disputes arising

over the execution of a legislative policy decision. When a court decides a question it is typically merely resolving a dispute, but what of those cases when the court determines that the policy judgment is impermissible because it is in some fashion beyond the power of the legislature or the executive to act in the way it did? (This, of course, applies to the levels of government as well.) Is the court powerless to act? Must it merely ratify the impermissible act by restricting its actions to deciding who should prevail if the policy judgment were valid? The answer, of course, is no. It would not be fulfilling its obligation to democratic legality if it were follow that course. It might use what have come to be called the passive virtues to avoid making the ultimate decision and thus throwing the conflict back onto the political branches (what has also been called “legislative remand”). But when it must decide, it should not shrink from the task. In fact, the structure of constitutional interpretation that flows from undertaking that obligation becomes a component of legality that belongs to everyone not just trained experts. This is necessarily true because the legitimacy of the decisions of the constitutional court depends in large measure on the extent to which those decisions reflect the ethos of the culture. In that way, the entire people become the gauge of the legality of the decisions. The authoritative interpretive community consists of all who have an opportunity to participate actively, consciously and collectively in the formulation of the law. The history of constitutional interpretation in the United States is replete with examples of this. The civil rights movement, the women’s movement, the property rights movement, the new federalism are all examples of the creation of interpretive communities that have had an impact on saying what the law is and, in that way, recurring to the democratic foundations of its legitimacy.