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## 5 American law (United States)\*

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### 1 The role of law in the United States

Understanding US law is impossible without first understanding the role law plays both in its political system and in the consciousness of its citizens. Law is ubiquitous in general culture: literature, cinema, television (Raynaud and Zoller, 2001). On first impression, its status appears paradoxical. On the one hand, there is an almost mystical faith in the power of law to transcend all conflicts: the rule of law (as opposed to the rule of men) was the American formula for a just society, in opposition to the absolutist European government of the time. The US Constitution was the founding document for the nation, and law has ever since had a defining character for the country and its self-perception as a beacon of democracy and individual freedom. While there are struggles within the law, the rule of law and the Constitution themselves seem beyond discussion: they provide an almost unquestioned framework for debates (Levinson, 1988). On the other hand, and for similar reasons, the distinction between law and politics is much less clear than in European countries. It is acknowledged – sometimes cynically, sometimes approvingly – that law incorporates and serves the political ends of those who shape it. The traditional American distrust of government encompasses distrust of any claims of neutral, objective, natural law. Public reactions to the US Supreme Court decision in *Bush v. Gore* (2000) demonstrate both these aspects. When a majority of five Republican-appointed Justices held for Republican presidential candidate Bush, and four less conservative Justices held against him, there were widespread complaints about the politicized judiciary, and the court's split along partisan lines. Yet hardly anybody seriously questioned the binding nature of the decision, which in effect determined the presidency.

The political character of law also explains why law, and in particular litigation, is often seen as a tool for proactive social change, not just for the retrospective resolution of individual disputes. Supreme Court decisions like *Brown v. Board of Education* (1954), which abolished school segregation and implemented civil rights, and *Roe v. Wade* (1973), which established a constitutional right to abortion, were not only mileposts in legal development, they are also part of the country's cultural identity, familiar

\* See also: Accident compensation; Constitutional law; Statutory interpretation.

to every schoolchild. The reason is that public regulation was relatively weak for a long time; as a consequence the task of enforcing standards of conduct was left to private parties who would act as private attorneys general. This is true for areas as diverse as antitrust, civil rights, environmental regulation, products safety standards and many others. There are one million lawyers in a country of roughly 300 million inhabitants not only because Americans are more litigious than others, but also because litigation serves broader purposes than elsewhere.

A good example for regulation by private litigation is the law of damages for accidents. Compensatory damages for tort victims are often substantially higher than elsewhere; in addition plaintiffs can often claim 'punitive' damages over and above their actual injury, meant to deter and punish defendants. What looks to foreigners like an undue mixture of private and criminal law and an inappropriate enrichment for plaintiffs must be understood with regard to three functions. First, the function of tort law, and especially of punitive damages, is as much regulatory as compensatory. Because damages are a cost of doing business, they must be high enough to ensure that the regulated conduct becomes unattractive for defendants. Giving these damages to plaintiffs is justified as an incentive for private individuals to perform this ultimately public regulatory function. A second reason for high damages under US law is often overlooked: US law usually provides for one-time lump sum payments of damages, equitable remedies like both specific performance and recurring payments are only exceptionally granted, because courts are unwilling to oversee complicated enforcements. Hence a one-time sum must not only cover attorneys' fees but also all future costs to the victim. These costs can be substantial, because the social security and healthcare systems in the US are much weaker; costs of accidents, which are borne, in European countries, by the state, must here be provided through damages. This leads to a third and last point. In the United States, accidents are seldom seen as a matter of fate that must be borne either by the victim or by society at large; rather, injuries can and should be compensated by the responsible person or corporation, provided that defendant is rich enough ('deep pocket theory'). Private law and litigation thus perform functions of regulation and of redistribution, which are performed, in other countries, by public law.

While small claims can often not be brought because litigation is expensive and legal aid restricted, big private suits are attractive, to plaintiffs and their lawyers, for several reasons. Under a system of contingency fees, a plaintiff need not pay her attorney unless she wins (winning fees can be considerable, and must be paid from the award). Class actions enable multiple plaintiffs with similar grievances to pool their claims and bring suit together. Far-reaching discovery enables plaintiffs to substantiate their

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claims. Juries decide even in private law. In recent years, though, regulation through litigation has come under attack; it remains to be seen whether this development changes the role of law, and lawyers. Litigation (and lawyers) are often criticized; litigation is often avoided through arbitration and alternative dispute regulation.

It is therefore inaccurate to say, as many do, that US law prioritizes the individual over community more than other systems. Indeed, there is on the one hand a strong emphasis on rights, especially civil rights (Glendon, 1991). Individuals bear the burden to defend their interests because the state will not do this for them. Criminal defendants, e.g., will be sentenced, sometimes to death, because they neglect to pursue procedural rights. On the other hand, these individual rights and responsibilities are enforced largely because they serve as incentives for welfare-maximizing conduct; they exist for the benefit of the community. It would be more accurate to say that US law prioritizes overall social welfare over equality.

## **2 Characteristics of US law**

### *2.1 Sources of law*

Law schools are professional schools. Students attend them after graduating from college, and learn how to argue as attorneys. This is crucial in shaping US lawyers' understanding of their own legal system's identity. Students are taught the law as a line of cases, and as a forum for constant struggles between arguments and counterarguments rather than as a substantive whole (except for bar exams). Statutory interpretation is often only taught in the course of cases. This is why the US legal system is perceived, by insiders and outsiders alike, as a system mostly shaped by case law: not a fully accurate picture.

The most important and distinctive legal source in US law is the US Constitution of 1787. It is brief and incomplete, often unclear, and antiquated (Dahl, 2002): It has only seen 27 amendments since its drafting, ten of which – the Bill of Rights – by 1791. Despite, or perhaps because of, all this, the US Constitution is still the founding document of national and legal identity to the same degree as the French Civil Code in France, a testament to the respective importance of public and constitutional law in the United States, compared to that of private law in Continental Europe. The Constitution is comparable to the Code in another sense: it provides a superior normative framework for legal development.

Large areas of US law are still based on case law, developed by the courts through the system of precedent. Courts, in deciding a case, will look at previously decided cases as authority and guidance. The binding force of precedent ('stare decisis') is not absolute: courts are not strictly bound by their own earlier decisions, and they are more willing than their English

counterparts to develop the law in accordance with social reality, a reflection of the higher relevance of extralegal considerations for the law (Llewellyn, 1960).

At the same time, however, the number and importance of statutes in the United States is, in all likelihood, rather higher than lower compared to civil law countries, the density of regulation in some is considerable and the readiness of US courts to deviate from a statute's meaning is lower than in Europe (Calabresi, 1982). Contrary to the perception of both insiders and outsiders, the role of legislation vis-à-vis the judiciary is comparable to that in Europe.

The important difference is the relative lack of codification. US law has never been codified to the same degree as European legal systems (Herman, 1995/1996; Weiss, 2000). Proposals to codify the private law of individual states in the 19th century either failed (e.g. in New York) or became irrelevant (e.g. in California, where the code was soon ignored by the judiciary). Louisiana is an exception; it has a civil code that is applied. A codification was not necessary as a national or even a state symbol (the constitutions played this role), and a general American distrust in government meant that, unlike the situation in France, democratic values were expected more from judges, less from parliament. However, the lack of a codification should not be overestimated in its importance. First, several areas of the law are codified, especially on the state level; this is true e.g. for civil and criminal procedure. Often they are modelled on national model codes, the most prominent example being the Uniform Commercial Code which codifies (and unifies) wide areas of commercial law. Second, the American Law Institute has, since the beginning of the 20th century, compiled 'Restatements of the Law' with the goal of restating, ordering and (to some extent) unifying the law. These Restatements, though not binding, are often cited in court decisions and fulfil, partly, the systematizing function fulfilled by codes in Europe. Finally, much common law doctrine has become so refined by now that large areas of the law are as clear and systematic as in codified systems.

## 2.2 *Federal system and plurality of law*

In an important sense there is not one US American law but many: the laws of the 50 states, the District of Columbia, and the territories, plus federal law. The individual states not only have their own legislatures and executives, as in other federal systems; they also have their own judiciaries. There are therefore two parallel strands of judiciaries from first instance courts to Supreme Courts: state courts and federal courts. The scope of federal law is limited: Congress has only limited competence to legislate and, since the 1990s, the Supreme Court has enforced these limitations more strictly. Furthermore, federal courts are restricted in their ability to generate federal

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common law (*Erie Railroad v. Tompkins*, 1938). Similarly limited is the jurisdiction of federal courts: They have exclusive subject-matter jurisdiction only in some areas, especially admiralty law and federal antitrust law. Their jurisdiction is concurrent with that of state courts in two important areas: most federal law questions – matters of federal law – and diversity jurisdiction, when plaintiff and defendant come from different states (to avoid bias of state courts). Otherwise, jurisdiction lies exclusively with state courts. The federal system is built on an idea of competition, rather than coordination, as in European systems (Halberstam, 2004).

This plurality of laws is otherwise not unlike the one in the European Union, where EU law has a limited scope, and competences remain largely with the member states. But there is an important difference: the different laws in the United States, including Louisiana, share the same methodology and inductive legal style, while there are often significant differences in substance. In fact, federalism is often praised as providing a laboratory for policy experiments. The states are seen to be in regulatory competition, most notably in areas like environmental law, but also in corporate law. In Europe, on the other hand, comparative law has recently revealed remarkable similarities in substance (especially, but not only, in private law) as a consequence of a less instrumental understanding of law, while differences in style and methodology between legal systems are still significant.

### 2.3 *Legal actors*

The US Constitution adopted Montesquieu's concept of the separation of powers, and distinguishes among executive, legislative and judicial functions. Yet, while in Montesquieu's conception different institutions perform the neatly separated executive, legislative and judicial functions, the US Constitution, fuelled by mistrust in government, establishes an elaborate system of checks and balances of institutions upon each other, under which no single institution should be able to have too much power, and compromises are necessary. This is true between the branches of government, but also within each of them. Thus the most important executive position in the federal government is held by the President, yet numerous administrative agencies perform executive functions often in considerable autonomy. The legislative function is allocated to the Congress, which consists of two chambers: the Senate and the House of Representatives. The Senate is made up of two senators from each state, no matter how big or small, while the House represents voters from each constituency more or less equally. However, so-called gerrymandering, creative redistricting typically implemented by the majority distorts results to a degree unknown in Europe. Finally, the judiciary consists, on the federal level, of judges appointed by the President for life, and allocated to three levels of courts: district courts,

courts of appeals and the Supreme Court. While the state constitutions differ, sometimes considerably, from the US Constitution (which some of them predate), the same approach can generally be found there; judges, however, are often elected by the public.

The system of checks and balances has two important consequences. First, the government speaks with many voices, which makes it weaker than the sum of its powers should suggest. Second, law, especially public law, is not a rational system of substantive rules, but more a procedure for a constant power struggle (or the outcome of such struggles), not only between the federal government and the states, but also within each of these systems. This has spurred an emphasis on process instead of substance. Government is restrained by procedure and by the system of checks and balances, not so much by substantive constitutional law.

#### 2.4 *Legal style*

Legal style and legal method in the United States are different from those in other countries, even common law countries (Atiyah & Summers, 1991). On the one hand, especially in statutory and constitutional interpretation, there is still a remarkable degree of textualism and formalism reminiscent of European law in the 19th century. There are two reasons. First, the judge is not supposed to implement the will of the legislator (although, somewhat paradoxically, many oppose the use of legislative materials). This resembles the otherwise rejected concept of the judge as 'mouth of the law'. Second, legislation often represents a compromise as the result of hard bargaining, judges should not second-guess such a compromise to reach seemingly more rational results. This judicial restraint may also explain why proportionality tests are relatively unpopular, not only in criminal law, where punishment is often unusually harsh, but also in other areas, where balancing is considered inappropriate for judges. On the other hand in case law, US law and legal thought have, perhaps more radically than most other legal systems, rejected a formalism that was still en vogue in the 19th century, and have supplemented it with open policy considerations to an extent unknown in most European legal systems. Law is not usually understood as a coherent and systematic whole, but rather as a hodgepodge of court decisions and statutes; therefore systematic arguments carry little weight, and legal reasoning is both more case-specific and more inductive than in Continental European systems. Americans doubt that there is 'one right answer' to every case that can somehow be distilled from the legal system as a whole: court decisions are the result of the better argument made by the winning party, not by logical deductions from a coherent system of law.

A consequence of the political substance of the law, and of the fact that law is the fruit of political determination rather than of systematic and

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neutral goals, is that law often embodies either extreme positions or ad hoc compromises. For example, positions on abortion (both by individuals and by lawmakers) have always been either 'pro choice' or 'pro life'; compromises seem harder to achieve than in other countries (Glendon, 1987). Homosexuality sees similar extremes: in the same year (2003), Texas still criminalized homosexual conduct (overturned by the US Supreme Court in *Lawrence v. Texas*), while in Massachusetts homosexuals attained the right to marry, because anything short of that would have been a violation of equal protection rights. The middle ground of registered partnerships seems unattractive to both sides in the debate. While such oscillation between extremes may look unattractive in the short run, the upside is that US law has traditionally been more open to change and reform than either English common law or continental European law. Bad laws may be frequent, but a process of trial and error keeps their detrimental effects to a minimum, and the US is quicker than others to change its law.

### 2.5 *Legal thought*

US legal thought in the 19th century (often called 'classical legal thought'), was traditionally formalist and conceptualist, comparable to, and influenced by, legal thought in Europe, especially Germany (Hoeflich, 1997). In the beginning of the 20th century, formalism was rejected by legal realism, a development which in turn was influenced by developments in Europe: German 'Freirechtsschule' (Herget & Wallace, 1987), French social theory of law, but in more radical fashion. Legal realism rejected formalism with its emphasis on logical deductions, on two grounds. First, formalism was inconclusive: legal concepts do not have inherent meanings and thus do not yield definitive outcomes to solve cases and problems. Second, the autonomy of law as a discipline was questioned on normative and empirical grounds. Law was influenced by and in turn had influence on real world issues, and therefore was and should be influenced by insights about the real world. Politically, legal realism often came with a progressive social agenda and was instrumental for the New Deal and social legislation.

Legal Realism spurred an array of schools of legal thought, mostly interdisciplinary in nature (Duxbury, 1995). The most influential of these has been Law and Economics, which can now be considered mainstream and often serves as a kind of substitute for the lack of legal doctrine. A politically radical offspring from legal realism was Critical Legal Studies, a loosely connected movement that combined the antiformalism of legal realism with leftist political ideas (often drawing on Marxism or the Frankfurt Critical School) and modern/postmodern philosophical methods (Joerges & Trubek, 1989). Critical Legal Studies spurred other movements, including Critical Race Theory, Law and Feminism, and several other

politically progressive and/or methodologically postmodern groups. All in all, the rejection of formalism and of doctrine means that an interdisciplinary approach is almost required now in legal writing, although approaches other than law and economics have rarely been influential on judges (Zimmermann, 1995/1998).

### 3 US law and other legal systems

#### 3.1 *Influences of foreign law on US law*

The United States received English (common) law, with the exception of those parts not in accordance with the principles of the new Republic, in particular Constitutional law, the division of barristers and solicitors, and feudal elements of property law. English law remained influential after the foundation of the nation; decisions of English courts are still, though more rarely, cited as persuasive authority. But English law was not the only influence. The law in Louisiana is still based to a large (though sometimes over-estimated) degree on French and Spanish (civil) law; private law is codified (Palmer, 1999). Similarly, the law of Puerto Rico still has strong roots in Spanish law. Moreover, the 19th century saw considerable influence from German law (Pound, 1937). At the same time, continental philosophical ideas, particularly from the French and Scottish Enlightenment, were far more influential on the United States than on England. Its written Constitution, and judicial review of legislation, represent a significant difference from 'purer' common law systems. Thus the United States is rather a mixed legal system 'sui generis' than a pure common law system (von Mehren, 2000) and the quip about England and the US being 'separated by a common law' is not inaccurate.

#### 3.2 *Influences of US law on foreign laws*

In the 20th century, as the United States became simultaneously more self-confident and more parochial, while Europe seemed far less attractive as a model, US law developed in more isolation. European émigrés found that, while they were often welcome, their legal traditions were not (Graham, 2002). Foreign influences are now often forgotten or played down in the United States; Karl Llewellyn, e.g., had to conceal the German origins of the Uniform Commercial Code. Since the two world wars, the desire to learn from others has been outweighed by the desire to teach others, and US law has in turn influenced many legal systems worldwide, a process not unlike the reception of Roman law in Europe (Wiegand, 1991, 1996). The most important influence was in constitutional reforms and drafting: constitutionalism, judicial review, enforceable civil rights and a system of checks and balances between the branches of government have been influential in numerous countries. A second important area, moved by business and big

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law firms, has been commercial law: antitrust law, securities regulations, accounting standards, corporate governance, bankruptcy and also consumer protection and products liability law. There has been notably less influence in criminal law (with the exception of criminal procedure, e.g. the right of the accused to remain silent) and traditional areas of private law, especially property law, family law and law of succession. Reception is rarely pure. Often US institutions are adapted for their new local settings, influence is more in rhetoric than in substance, and receiving countries pass laws with no will or ability to enforce them (Archives de Philosophie du droit, 2001).

US law has also been extremely influential on commercial legal practice. US law firms have long been big enough to 'go global' and open offices all around the world; US clients have been strong enough to influence the day-to-day work of non-US attorneys. Many modern contract types (leasing, franchising, barter) stem from the creativity of US lawyers. The drafting style has become more American: long, detailed contract documents are more and more replacing the brief documents other legal cultures were used to.

The reason for adopting US law is not always its (perceived) superiority. Another important reason lies in economics (Dezalay & Garth, 2002): a US interest, in part altruistic in part not, to bring other countries up to US standard, and the desire of developing countries to appease such pressure, a process that has been described as hegemonic (Mattei, 2003). Adoption is sometimes very successful, sometimes not at all. Often the lack of similarities regarding culture and infrastructure of the United States means that laws on the books were either ineffective (e.g. corporate governance reform in Vietnam) or outright disastrous (reform of capital markets in Russia). Lack of sensitivity on the side of American exporters, and desire to please (the US government and foreign investors) on the side of receiving states often contribute to unsuccessful legal transplants (Carrington, 2005).

### 3.3 *US law and international law*

The nation's founders, inspired by a strong desire to be accepted by other sovereign nations as an equal, gave international law the status of 'supreme law of the land' (US Const. Art. VI, §2). Since then, the United States has become stronger and, as a consequence, less eager to enter into international treaties, and to be restrained. Americans trust their own institutions and mistrust supranational institutions that take powers and competences away, even (or in particular) if those institutions aim at enforcing essentially similar values to those embodied by the US Constitution. This does not merely represent disdain for, or ignorance of, international law. First, international law is considered federal law, and foreign politics is a domain for the federal government. Consequently the states have little say in its creation

and fear loss of competences; courts are prevented, by the separation of powers, from using international law to overrule statutes. International law is dealt with as a matter of constitutional law. Second, the United States has always been eager to justify its actions in legal terms; it is trying to develop (or revolutionize) rather than simply break or ignore international law. This is congruent with the general US view of law as shaped by process in accordance with societal needs rather than as a transcendent and depoliticized natural law body.

### 3.4 *Comparative law in the United States*

In the beginning of the republic, US courts saw themselves in the Continental European *ius commune* tradition and frequently cited European, not just English, authors as well as Roman law sources (Hoefflich, 1997). Comparative law was relevant; the Second World Congress of Comparative Law (the first after the Seminal Congress in Paris, 1900) took place in 1904 in St. Louis (Clark, forthcoming). In the 20th century, however, perhaps with growing self-confidence in US law, comparative law became less fashionable in the United States. While there is much comparison between different state laws, internationally comparative law was taught at some universities only, originally mainly by European immigrants, later by some US American pioneers to the field. Today, comparative law is considered of vital importance, no doubt owing to perceived demands posed by globalization, and is taught at almost any law school. But it is considered a field separate from general law classes, and frequently its content is a very basic introduction to (often stereotypical) basic characteristics of various legal systems (Bermann, 1999; Reimann, 2002).

Lack of interest in comparative law is not so much due to the (often exaggerated) parochialism of the United States in general. Rather, the main reason lies in legal education. In particular the first year of law school emphasizes 'thinking like a lawyer', which means thinking like a US lawyer. This often suggests, albeit not deliberately, that thinking like a US lawyer is a universal way of thinking, and that the results of this reasoning, like the results of developments in case law, are somehow natural and optimal results of any legal systems. As a consequence, foreign law is often seen with a strong US bias, and differences from US law are easily seen as deficiencies. Only in recent years, and in large part through the influence of other disciplines (anthropology, sociology, economics) has there been renewed interest in foreign and comparative law on the one hand, methodology of comparative law on the other. Unfortunately, theory and practice of comparative law do not always supplement each other. Paradoxically, while US law may be the most important reference point for many comparative law studies, US comparative law itself is still in development.

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