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6

Most Important Lessons about America's Judicial System

The U.S. legal system is a beacon to the world because of its many strengths, but it can be perplexing.





6 Important Lessons About America's Judicial System

The U.S. is a nation of laws, but the way the legal system is structured can perplex a foreign attorney. Here's a guide to help understand it.

BY KATIE THISDELL

It's one thing to learn the laws of your own country. It's another thing to master the legal system of a country you're not as familiar with. And the United States has a system that's surprisingly different from other countries.

Take impeachment. If you fully understand that process, go to the head of the class.

"It takes a while to absorb just how different the system is," said William Ewald, a professor at University of Pennsylvania Carey Law School in Philadelphia.

Ewald has taught a class called Foundations of the U.S. Legal System for the past 25 years. He said most LL.M. students want to learn how the U.S. legal system functions from the point of view of a practicing attorney.



Most LL.M. students already have experience working at law firms, and they want to increase their skills, particularly in international business law.

Here, we looked at six important — and surprising — lessons students can learn from the U.S. legal system, no matter what their future career goals may be.

1. Common law versus civil law



Yes, America's common law system is different from the legal systems of civil law countries. And yes, the differences permeate how each

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I experienced the U.S. legal system during my LL.M. year of 2016-17 in San Diego. I found myself fascinated by the frictions and quarrels that a federal system of rules can entail.

One particular example I encountered was the Control, Regulate and Tax Adult Use of Marijuana Act, which Californians voted for in 2016 in order to permit the recreational use of marijuana products at the state level.

In the U.S. federal system, a change in law at the state level does not affect the legal situation at the federal level. At the federal level, marijuana has always been classified in the highest narcotics class (Schedule I of the Controlled Substances Act).

One interesting way to look at this topic is from the angle of federal income tax. (I am a tax lawyer, and my LL.M. studies revolved around tax classes.)

The conflicting criminal laws collide for income tax law purposes. Federal income tax is regulated by federal law. It is therefore above the law of the individual states in the hierarchy of norms.

The U.S. Internal Revenue Code (IRC) generally provides for a deduction of “ordinary and necessary business expenses.” A trader’s operating expenses, such as for the purchase of goods or the rental of a shop, would in principle be easily deductible from the income tax base.

The IRC makes an exception to this principle: Under this provision, a deduction for business expenses is excluded if the business works in the trade or distribution of narcotics listed in Schedule I or Schedule II of the Controlled Substances Act. As a result, the trade in marijuana products, for U.S. income tax purposes, continued to be considered illegal — irrespective of the fact that selling marijuana products has been legalized in California.

The tax consequences have been disappointing for small retailers in California as well as for multinational tobacco companies.

This example vividly illuminates the frictions for which solutions are necessary in a federal regulatory network in order to give businesses a reliable legal frame.



legal system operates. But the dividing line isn't as distinct as one might think.

Everything you've heard about common law versus civil law, and that it's the key characteristic that sets countries like the United States apart — forget it. It's not that simple.

While the philosophy behind the two systems is important, there's not a distinct dividing line.

When the discipline of comparative law arose in the 19th and 20th centuries, the codification movement was in full swing.

In a 2001 lecture, Ewald said: "In these circumstances, it was natural for comparative lawyers

to lay great emphasis on codes and the rules of private law, and thus to elevate the differences between England and the Continent into a difference between two 'legal families' — the 'common law' and the 'civil law.'"

This is fine for contracts and tort law. But for other areas, such as tax law and criminal law, the distinction doesn't always work.

"People got stuck talking about these two," Ewald said during an interview. "But for LL.M.s, it makes very little difference."

Indeed, there has been an increase in the melding of the two systems. Civil law traditions have drawn from common law, and vice versa. There are differences, for sure, but once you learn what they are and how they impact the way a country operates, you can move on.

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One of the courses in my LL.M. curriculum was the U.S. Constitution, and I realized very quickly that I was going to spend the entire semester trying to interpret what the framers intended.

As a foreign student, I grappled with the idea that the lawmakers felt strongly about upholding the spirit of a document that came into effect in 1789. The more case law I studied, the more confused I was as to why the Constitution was not overhauled to meet the needs of the current century.

As time has gone by, I am coming around to the idea that perhaps it was written with a broad enough framework, allowing the generations the opportunity to draw their own conclusions and mold it to their current needs.

But the task of interpreting the Constitution is left to the Supreme Court, which is not without its share of problems. Although the justices do not represent political parties, in the last few years, Supreme Court vacancies appear to have been filled based on politics.

Based on recent decisions from the Supreme Court, there appears to be a significant correlation between judges' political affiliations and their voting. We rely on the separation of powers for a system of checks and balances, but that divide seems to have blurred over the last few years, and I can't help wonder if there are portions of the Constitution that need to be revisited.



2. Mediation can streamline a judicial system



When your car's engine needs a repair, you take it to a mechanic.

When your court needs a tune up, you call Judge Clifford Wallace, senior judge of the 9th U.S. Circuit Court of Appeals.

"I'm kind of the mechanic that goes out and helps them," said Wallace, who has worked with more than 80 countries to help them improve their judicial systems.

With decades of experience — 15 years as a lawyer followed by 50 years as a judge — Wallace knows a thing or two about how courts work.

When a judge or a government calls him, he doesn't tell them how to fix their system. Instead, he presents the best ideas he's gathered from the U.S. and countries around the world. Then, they can pick what will fit their specific needs.

"The idea is to be more efficient, to be quicker, so the rule of law is improved," Wallace said.

One way to do that is through more effective mediation programs. And, about 90% of federal cases in the U.S. are settled through mediation.

Wallace said there's an especially strong mediation program at the Court of Appeals for the 9th Circuit in San Francisco.

The eight full-time mediators are attorneys from a variety of practices with extensive training

and experience in negotiation, appellate mediation and 9th Circuit procedures. There are strict confidentiality rules, so mediation is shielded from the rest of the court's operations.

The court offers the mediation service at no cost.

"It helps resolve disputes quickly and efficiently and can often provide a more satisfactory result than can be achieved through continued litigation," Chief Judge Sidney Thomas wrote on the 9th Circuit website about the mediation process. "Each year the mediation program facilitates the resolution of hundreds of appeals."

In win-win mediation, a neutral third party helps the opposing parties find common ground, so they're then able to reach a settlement. This saves everyone time and money.

Being a mediator doesn't require knowledge of the law, Wallace said, but rather a gift for interacting and helping people solve their own problems.

It's important to make sure mediation is done right, however.

"If they don't have a concept, it turns into judicial head-knocking," Wallace said. "That's what's happened in some countries."

3. The American legal system is more adversarial



Some students love the Socratic method, and some hate it.

It's a staple in many American law schools. It prepares lawyers to think on their feet and argue effectively. So, to know the U.S. legal system, you must

know this is how U.S. lawyers are trained.

While the method is sometimes portrayed as professors interrogating their students — see the movie "The Paper Chase" — that is not the goal.

The University of Chicago Law School points out: "The Socratic method is not used at U Chicago to intimidate, nor to 'break down' new law students, but instead for the very reason Socrates developed it: to develop critical thinking skills in students and enable them to approach the law as intellectuals . . . The goal is to learn how to analyze legal problems, to reason by analogy, to think critically about one's own arguments and

those put forth by others, and to understand the effect of the law on those subject to it."

It's certainly a different style than you may be used to, depending on your country's education system. Many schools around the world rely on lectures, rather than on this type of back-and-forth

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After finishing my German legal education in 1986, I wanted to study a legal system that was completely different. As a student member of the German-American Lawyers Association, I was always enticed by the common law system.

My journey into common law territory was particularly enhanced by my LL.M. studies at the University of Georgia. My first surprises: The library was open 24 hours, and Dean Rusk was still alive and teaching classes at UGA. (He passed away in 1994.)

In the U.S., statutes play a much lesser role than in the German legal system, or for that matter, in the Continental legal system. Much more than the wording of the statute or the possible intention of the legislator counts. There is also the interpretation of the judge. "Judge-made law" versus "law in the books" was a challenge for us LL.M. students from Europe, Asia and Africa.

The perfect method for teaching this new approach to the law was the Socratic method. In German law school, we sat in lectures with sometimes 500 or more students in an auditorium so large that the professor looked very distant. At the U.S. law school, it was very different. Everybody had to prepare for class because the Socratic method basically means that the teacher is developing the student's knowledge through dialogue with the student and calling you up by name.

What did the LL.M. degree do for me in my professional career? Employers in the public sector, as well as law firms in Germany, appreciate that one can show a good understanding of the legal system of our most important political and economic partner in the world, the U.S.

Times have changed during the last 30 years. However, the basic motivation for getting an LL.M. is still the same: Broaden your "legal" mind, and spend a great year in America.



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Studying for my LL.M. in the United States influenced my professional career in a unique way. Among the many lessons learned, one of the insights that struck me the most was seeing how the system of federalism impacts businesses and the economy.

In the U.S., state and the federal governments have both exclusive powers and concurrent powers, which means that while Washington regulators determine impactful policy, states and localities certainly play an important role in setting regulations that affect the economy.

Indeed, state and local governments enact policies that define how economic activity takes place. These range from matters related to labor law to taxation. Therefore, for the economy to grow and for living standards to rise, it is crucial to have successful policy at all levels of government.

This interaction between the state and federal levels is embedded in the complex regulatory architecture of the U.S. financial system.

This complexity entails benefits and challenges, and consequently provides enlightening regulatory experiences that other countries can learn from. Even though other countries do not distribute their regulatory authorities to state and federal levels, over the last decades

the institutional architecture of financial policy in general has evolved because of globalization, innovation and diversification of businesses.

In such a context, it becomes even more relevant to learn about the complexity of the U.S. regulatory system, the challenges it has already addressed, the challenges that remain under debate, and the benefits that such architecture brings to local economies.

Moreover, aligning financial regulatory architecture with a country's needs is essential to promoting economic growth.

Knowledge of the complex federalist regulatory system of the U.S. and its experiences — whether successful or not — in dealing with its challenges is a powerful tool that I have been able to apply as a former regulator in Colombia and as a general counsel and executive vice president of an international financial institution.



learning.

Wallace is working with China to implement a training program for instructors to learn how to teach more interactively.

If you're not used to being called on during class, it can be intimidating, said Connie de la Vega, academic director of international programs at University of San Francisco School of Law.

There is not necessarily a right or a wrong way to teach and learn. A lot of the teaching style has to do with the country's legal system.

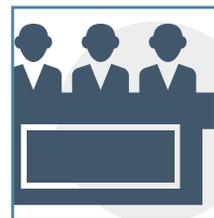
Derek Becker, a 2014 graduate of Marquette University Law School, wrote a blog post comparing his time studying law in the U.S. with his time as an exchange student at University of Copenhagen.

"While the Socratic method may be well-suited for education in a common law system, civil law systems appear to call for a different approach to teaching and learning," he wrote.

That's because the legal process in much of the European Union is not as adversarial, he noted.

"Courts do not need to be convinced of which rule should apply and whether an exception exists, and the absence of binding precedent in many civil law systems means that lawyers don't need to persuade courts that their client's position is in keeping with the existing case law," he wrote. "This less adversarial nature of the litigation process appears to be reflected in the legal education methods in Europe, and more emphasis is placed on learning what the law is, rather than on developing argumentation and litigation skills."

4. Jury trials are more common



Learning the preferred teaching style of the U.S. prepares you for the next topic: how a courtroom operates.

The key thing to remember is that we like to argue.

"A lot of them aren't used to the kind of oral arguments we have in the U.S.," De la Vega said about LL.M. students.

So, after a lesson about the cases that are on the docket, she takes students to see a court in action. This way, students can see the interactions firsthand. They see how the two sides interact with the judge and jury, and they see the role of

the judges and how they ask questions.

“The arguments are so different, and so are the questions the judge asks,” De la Vega said.

And then there’s the jury.

“There’s a lot of variety around the world in . . . adjudication,” said University of Pennsylvania’s Ewald. “In the common law world, we are an outlier because we still use jury trials for civil cases. And we use them as a matter of course.”

The Seventh Amendment of the U.S. Constitution codified the right to a jury trial in civil cases, meaning that even if the parties involved don’t actually want a jury, the rules and procedures in court must be organized around the possibility of a jury trial.

“It makes the whole system more complicated,” Ewald said.

In much of the rest of the world, it’s common to have civilian input in criminal cases. But for civil matters, such as contract disputes, a judge can make a unilateral decision.

How do LL.M. students react upon learning about the U.S. system?

“I think they react with horror,” Ewald said.

They tend to think, “You guys have got a really messed up legal system,” he said.

Ewald added that LL.M. students are interested in learning how a civil jury works but that it’s not something they plan to implement in their home countries. It’s a far more unpredictable system than they’re used to.

5. Mastering legal English helps prepare for international legal work



Most foreign LL.M. students already have a solid grasp of English, but are their English skills strong enough for practicing law on the international scene? To know the U.S. legal system, it’s imperative to know the language of the U.S.

legal system.

De la Vega co-authored the textbook, “The American Legal System for Foreign Lawyers,” and highlighted key legal words in each chapter. That way, students can learn the material and the

vocabulary simultaneously.

Of course, you don’t have to study in the U.S. to learn legal English. Many schools around the world offer courses in this area. But, if you have the chance to perfect your English while earning an LL.M. in the U.S., take it.

6. A country’s ideology is reflected in how it selects its judiciary



How do people become judges in your country?

Perhaps they take an exam to qualify. Or maybe they are appointed.

It’s unlikely that they are elected by the general population. But that’s how it works in the U.S. because

of our democratic heritage.

Many people from other countries are perplexed by the U.S. practice of electing judges and prosecutors — and the campaign process that’s involved, including financial contributions and political party support.

“They see that as incompatible with the rule of law,” Ewald said.

Even Sandra Day O’Connor, a former U.S. Supreme Court justice, was against the practice.

“No other nation in the world (elects judges), because they realize you’re not going to get fair and impartial judges that way,” she once said.

But, like it or not, it’s the way America was founded — and it’s key to the lessons you will learn during your education in the U.S.

“The American legal system, to a greater extent than any other Western legal system, encourages the direct injection of democratic values into the legal process,” Ewald said in a 2001 lecture. “Our legal system, like our society, places great emphasis on the value of equality.”