

The United States and the Global Legal Community

AMERICAN LAW ACADEMICS SHOULD SPEAK AND WRITE about the role and influence of the American legal system in the modern legal world with some diffidence. In a sense, this is an issue that is better addressed from the outside. Foreign jurists, who experience the American legal system from the outside, are likely to be in a much better position to gauge the effect and influence of American legal institutions on the world legal order than is an American academic or practitioner.

On the other hand, as the end of what some have called “the American Century” has come and gone, the issue of America’s relationship with the other great and small lands, jurisdictions, economic and political systems, and cultures of the modern world has come very much to the fore. Questions that were often muted during the long years of the Cold War are now fueling public debate in the stark new world following the fall of the Berlin Wall, September 11, 2001, and the American invasion of Iraq. This is a time to talk and write frankly in the hope that honest dialogue will increase understanding and enable us to work better together to make the world a better place for all our grandchildren.

This chapter focuses on three main themes. The initial part discusses the various structural and political conditions and circumstances that define and affect the relationship of American law and the American legal system with the global legal order.

The second theme addresses the expansive role of American private law and the role of private litigants vis-à-vis the global legal order. The third part touches rather briefly on American restraint with respect to global legal institutions. It concludes with a few remarks on the potential role of American law in the world of the future.

A. THE AMERICAN LEGAL SYSTEM IN WORLD CONTEXT

Unlike Roman law, which exerted influence over the world's legal systems for nearly two millennia, or even English, French, or German law, which spread to much of the then-civilized world during the nineteenth and early twentieth centuries, American law and legal institutions were not given much cognizance by other countries until the middle of the twentieth century. This was largely because (1) in contrast to the major European powers, America did not found many colonies abroad; (2) America's early economic activity was focused on developing its own vast territory; (3) American law was not in a form that encouraged export and emulation; and (4) the international language of discussion and exchange was French, and in scientific matters, German. America's language was widely spoken only within the empire of its motherland and cultural competitor, Great Britain.

The first two of these circumstances are matters of history that are generally known and do not bear further discussion. However, it may be worthwhile to consider why American law has traditionally not been susceptible to easy export and emulation abroad. The answer may lie in two particular features of the American system: the uncodified common law form of much of American private law, particularly during the nineteenth and early twentieth centuries, and the peculiar and extreme form of American federalism.

American private law in the basic fields of contract and tort began as common law inherited from England. Unlike codified civil law, which predominates in most of the world, common law was created by the decisions of judges. Published judicial decisions of innumerable individual cases, knitted together by the rule of *stare decisis*, gradually produced rules of decision that can be finely attuned to differences in operative fact. Americans, as well as Britons, point with pride to the judicial creativity represented by accretions of case law centuries old that gradually have evolved and adapted to the changing requirements of a modern economy and society.

The problem is that common law is difficult to export except to a colony of the mother country that can use the mother country's body of decided case law to serve as a reservoir of doctrine until the offspring system has built up a system of case law of its own. To take an actual example, when Japan decided to modernize its economy and political institutions and looked for a body of doctrine and procedural law, it could scarcely be expected to have adopted some thousands of preexisting decisions of English or American courts, have translated them into Japanese, and then asked Japanese lawyers and judges to use this mass of case law as the source of legal principles for the reformed Japanese legal system. It is not at all surprising that Japan adopted German codified civil law and civil procedure law in the late nineteenth century. The codified doctrines of civil law in Europe were and continue to be much more susceptible to comparative study and adaptation by foreign nations seeking to improve their legal systems than the case-law solutions of the Anglo-American world.

Moreover, America's unique history as a collection of British colonies that banded together to break free from the mother country and form a new federal state has resulted in a fragmentation of most private law and considerable public law among the fifty

states. In most private law questions, American law is the law of a particular state, such as New York, California, or Maine. This was even more the case in the nineteenth and early twentieth century before the movement toward uniform law and the growth of federal economic legislation resulted in some coherence in certain areas. Back in the "old days," an observer from abroad would be hard put to determine what was the American law on any given social or political issue and would be required to look at legal resolutions of particular states as well as the central government through the lens of a complex federalism. Again, it is not surprising that countries seeking to modernize their legal systems would turn more readily to the national private-law regimes of the legal systems of Europe than attempt this kind of an exercise.

Very likely, language also played a part in the early days, when French was the language of diplomacy and German the language of science. In the nineteenth and early twentieth centuries, persons interested in studying American law would have had to be conversant in English, common enough in the British Empire but elsewhere scarcely a language of first resort. The influence of this language factor has become much more important, and in the other direction, in the world of the third millennium.

Indeed, a survey of the worldwide influence of modern legal systems as of the beginning of the twentieth century would have disclosed that German procedural and substantive law enjoyed far greater worldwide credibility and attention than did the law of any of the then forty-eight American states or of its federal government. The influence of German law on such future economic and political giants as Japan, Korea, and China at the end of the nineteenth and beginning of the twentieth centuries means that even as of today, more people live in countries with German-influenced legal systems than in lands that have followed the American model. German influence even appears in America's own Uniform

Commercial Code, which was originally conceived and long brought forward by Karl Lewellan, who received his early legal education at the University of Rostock, Germany.

Some of this changed at the end of World War II. The political and economic strength of the United States following the war and during the latter half of the twentieth century have inevitably led to export of American public- and private-law doctrine in several forms. For instance, the concept of written national constitutions interpreted by the judicial branch of government, refined and developed over a century and a half in the United States, took rapid root in post-war Europe, especially the Federal Republic of Germany. Over the last fifty years, European constitutionalism has developed its own special character from which Americans can now in turn learn new ideas and approaches. Most would agree, however, that its modern-day roots were derived from the American experience, adapted to Europe in the late 1940s and 1950s.

Other ways in which American law has extended its influence in the post-World War II world have been more indirect. The case law format and American federalism have continued to be significant hurdles to widespread adoption of private-law doctrine and procedural law. By and large, Europe, as well as those countries in the rest of the world that were influenced by European law and legal systems in the late nineteenth and early twentieth centuries, have tended to stick with their forms of civil and criminal procedure in favor of wholesale adoption of American models. Basic civil and criminal law doctrine has also been pretty much unaffected by American solutions.

On the other hand, it is also true that in many important areas of present-day law giving and law practice, American influence is profound and ongoing. This is true both in private and public national law and in public international law, although in opposite directions.

B. AMERICAN PRIVATE LAW IN THE MODERN WORLD

Although there has been no widespread adoption in Europe or elsewhere of American state contract and tort law by foreign legal systems, nonetheless most present-day lawyers who practice international transactional law and engage in international litigation would be relatively helpless without a real knowledge of American substantive and procedural legal institutions. This is not because of any concerted governmental activity on either side of the Atlantic or Pacific. Rather, the current worldwide influence of American law and legal institutions is the result of (1) private negotiations in which American law is chosen to govern major transactions; (2) the role of international financial institutions, funded in part by the United States that condition financing participation on American-style legal arrangements; and (3) a more diffuse but not less effective transmission via educational and cultural means.

Probably the most significant expansion of the role of American private law has been to govern major financial transactions involving foreign entities. The almost universal rule that parties to transactions can pick the law to govern their relationship has permitted American banks, investment banks, major corporations, and other financially significant actors on the world economic stage to require that American law apply to transactions in which they participate. This has partly been out of necessity — from the American side. Many Americans have been and continue to be unfamiliar with any foreign languages. American lawyers, by and large, have little familiarity with the civil-law-based systems that govern most of the world. It is no wonder that they insist on application of the American law with which they are familiar when their client's economic power enables them to do so.

This kind of economically based law export does not necessarily reflect the relative objective merits of the American model compared with other legal regimens that could have come into

consideration. Many European lawyers have expressed bemusement at the awkward constructs needed to create binding contractual obligations because of the Anglo-American requirement of consideration. Frequently, the extremely detailed form of American contracts and financing instruments have seemed odd to Europeans, who can document transactions with simpler instruments because of a more robust doctrine of good faith and commercial reasonableness.

American private law began to become relevant in London, Frankfurt, and Paris because of increasing internationalization of major American enterprises. For the reasons suggested previously, American firms doing business abroad, merging with foreign entities, and forming foreign subsidiaries tended to prefer to be subject to American law wherever possible. American law firms formed branches abroad to provide these clients with American law support and to help manage their relationships with the foreign legal environments in which they were doing business. It is significant that, up to very recent times, many of these American branch offices abroad tended to provide most of their legal services to American clients and, to a large degree, on questions of American law.

This export of American private law to protect American economic actors has been intertwined by a form of law export that is connected with the kinds of economic and financial transactions themselves. The economic expansion of the post-World War II era has seen the development of many kinds of capital and financing transactions that were unknown beforehand. Such major elements of the modern commercial economy as equipment leasing and financial derivatives were first brought to commercial significance in the United States based on the structures and institutions of American law. American lawyers and law firms developed a high level of expertise in these new kinds of commercial transactions and instruments. These kinds of transactions came to the world

economy not through the writings and teaching of academics but rather through their practical use by American lawyers in international transactions. As these kinds of transactions became commonplace in the international arena, it is not surprising that American law and legal forms would continue to be applied wherever they could and that there would be a degree of foreign adoption of American legal structures to govern foreign counterparts of these new elements of the commercial financing world.

Another example in this general area is the American law of bankruptcy reorganization. The concept of corporate reorganization had been a part of American bankruptcy law since before World War II, but was brought to a new level of sophistication and utility in the Bankruptcy Reform Act of 1976. This may have been an example of an idea whose time had come. In other parts of the world, it was becoming evident that traditional liquidation and apportionment bankruptcy regimes could result in unnecessary losses when corporate enterprises experienced financial difficulties. The American solution was at hand. It is not surprising that other governments found it a useful model and patterned their own reorganization legislation, to some extent, on it.

Another vehicle for the dissemination of American legal doctrine and institutions has been the activity of certain international financing organizations, particularly the International Monetary Fund (IMF) and the World Bank. The major role of the United States since World War II in the financing and operation of both of these organizations has resulted in a degree of law export by virtue of the requirements laid down by them as preconditions for loans or grants. For instance, following the fall of the Berlin Wall and the opening of the economies of Eastern Europe in the early 1990s, the World Bank provided loans to many foreign governments to update elements of their public economies, from transportation equipment to computers. However, those loans were only granted if the grantee nation had in place government

procurement laws and other legal institutions that would give reasonable assurance that the grant monies would not be frittered away or diverted in corrupt transactions. The laws and legal institutions proposed to the grantee governments were typically American in form and drafted by American jurists. Often, they were translated and adopted rather uncritically to facilitate the desired grant or loan.

A similar form of law export has been connected with the activities of the World Trade Organization (WTO). Membership in the WTO requires a domestic legal system that protects many forms of property, including intellectual property. Although the law of intellectual property is old and developed in many nations, the United States has been very ready to insist that the local law of members of the global trading club must protect intellectual property to an extent similar to such protection in the United States.

The dismantlement of the Soviet Union resulted in a need in Eastern Europe and Central Asia for modernization and improvement of law and legal institutions to facilitate democratization and the functioning of market economies. It is not surprising that many of the Eastern European and Central Asian nations turned to American models to regulate their new private-enterprise economies. The U.S. State Department, in cooperation with the American Bar Association, has been active in providing consulting assistance and training for lawyers and judges to governments interested in American-style legal and governmental institutions. This effort has met with some success in such areas as stock market, bank, and utilities regulation. However, more idiosyncratic American institutions such as civil jury trial have not met with widespread acceptance. Instead, most of these lands rejuvenated and modernized their pre-Soviet civil law systems, many of which were based on the German model.

Taken together, this expansion of American law that is linked with America's strong position in the world economy cannot fail

to affect the legal regimens of every developed and undeveloped economy that does business with American interests. This is the primary reason why large law firms in every country of the world need jurists who are familiar with American law to advise their major domestic clients.

C. AMERICAN LITIGATION ABROAD

Another area in which American law has made itself felt abroad, sometimes to an inordinate extent, is the field of civil litigation. A certain expansiveness in American concepts of international jurisdiction has brought peculiar features of American tort law to the doorsteps of the rest of the world, where it is not always very welcome. Again, the bulk of this development has occurred since World War II, more specifically in the last thirty years of the twentieth century.

American law of international jurisdiction has been historically informed by its law of interstate jurisdiction. The United States is a union of independent states, each exercising its own civil and criminal jurisdiction. From the nation's beginnings, it has been vital that the rules of interstate jurisdiction not unduly burden interstate commerce or fracture the unity of the American economy. Such concepts of general jurisdiction, minimum contacts, tag jurisdiction, and the effects doctrine grew out of the need to foster interstate economic activity. Such generosity in interstate jurisdiction was not particularly problematical considering the relative similarity of the American states and continually improving means of communication among them.

America may have been a bit naive in applying such generous jurisdictional concepts to international civil jurisdiction as well. Legal doctrine, social priorities, economic conditions, and cultural values differ to a much greater degree among nations than among

American states. Respect for national sovereignty and differences in language are also important. America's generosity in recognition of foreign judgments is little compensation for a civil jurisdiction that is seen by many foreigners as onerously expansive.

Part of the expansiveness of American civil jurisdiction is undoubtedly fueled by the economic conditions that gave rise to the spread of American transactional law abroad. The multifarious activities of American economic elements in all the world may have made it seem easier to expand the reach of American courts as well.

The unwelcome expansiveness of American civil jurisdiction is complemented by American choice of law doctrine that sometimes causes American legal norms to be applied to circumstances and transactions that seem much more closely related to the legal and social priorities of another modern jurisdiction. Should the question of what duty is owed to a passenger on a ski lift in Austria turn on whether the passenger was an American or a German?

Finally, the expansive American civil jurisdiction sometimes brings to foreign actors legal liabilities and responsibilities to which they have not consented. In the commercial transactions realm at least, it can be said that American law is generally applied with the consent of the foreign party. In the field of tort law, however, American procedural and sometimes substantive law can be foisted on a foreign enterprise that has certainly not bargained for it. That makes it all the more onerous in the experience.

Two areas may serve as examples. American substantive as well as procedural law have been applied to products liability claims filed against foreign enterprises for injuries sustained by both American and foreign consumers. In the human-rights area, American courts recently were the theaters of several major efforts to secure compensation for various groups of victims of the Nazi regime and World War II, most of whom lived in Europe. Similar suits have

been filed by victims of apartheid and of totalitarian regimes in the Philippines and other parts of the world.

These latter suits may seem somewhat ironic in view of human-rights issues over American treatment of persons in detention at Guantánamo Bay and in Iraq. However, American courts are open to these persons as well, some suits are pending, and when called on to do so, American courts have provided relief.

Parties abroad who become embroiled in American civil litigation are also offended by American discovery procedures, which often result in incredible costs and sometimes invade the realm of information considered confidential by foreign enterprises. Foreign responses to the expansiveness of American civil justice have not been effective to ease the friction. To be sure, American judgments for punitive damages will not be enforced in Germany. However, that does not help the German firm that has operations and assets in the United States from which judgments can be satisfied there. Blocking statutes designed to protect European company secrets from the prying eyes of American discovery have similarly failed to prevent U.S. district judges from requiring European parties to American litigation to cooperate with American discovery procedures.

The most disappointing recent development in this area has been the failure of the delegates to the Hague Convention on Jurisdiction and Recognition and Enforcement of Judgments to come to agreement on principles and limits of international jurisdiction that are symmetrical on both sides of the Atlantic. Perhaps what we have learned in this dialogue will enable us to reach more common ground in the next round, whenever that may occur. An encouraging development is the adoption by UNIDROIT and the ALI of *Principles of Transnational Civil Procedure*, an effort by European and American academics and practitioners to identify principles for conduct of civil litigation that would be acceptable on both sides of the Atlantic.

D. AMERICAN PUBLIC LAW AND THE MODERN DEMOCRATIC WORLD

A word should be said about the influence of American public law and legal institutions in the modern world. Many aspects of American democracy and its public legal order have been admired abroad since the times of de Tocqueville. Some of them, such as the written constitution and the notion of judicial elaboration of that constitution, have served as models for similar developments worldwide. Some of this emulation was voluntary as formerly colonial or even Soviet countries evolved into self-governing democracies. In some cases, the American constitutional model was promoted to former enemies emerging from post-war occupations.

It should be stressed again that American constitutionalism and much of American public law does not lend itself to easy adoption. America's peculiar form of federalism, largely a product of its own colonial history, is not susceptible to easy transplantation. With the possible exception of Switzerland, the United States is the most thoroughly federalized nation in the modern world in the sense that power is more deeply and fundamentally divided among state and federal governments than anywhere else. The result is tremendous complexity and overlap between jurisdictions and responsibilities of states and the federal government. Institutions and responsibilities of public law are fragmented and divided both horizontally and vertically. Because so many areas of public law are within the overlapping competencies of state and federal governments, in many important areas of public concern there is no unitary system with a clear set of policies and social priorities.

Take, for example, criminal law. The fifty states plus the federal government all have separate and complete systems of criminal justice. The same conduct can be punished under the law of one or more states and under federal law. There is some variation in

criminal procedure (subject to constitutional minima) and considerable variation in criminal and penal policy among the states and the federal government. Some states have not had capital punishment for more than a century; others are killing hundreds of convicted persons each year. There is no wonder that this hotch-potch does not commend itself to easy study and emulation by other nations.

To be sure, there are some underlying themes of public law that have found widespread resonance abroad. The concept of judicial review of the constitutionality of legislative action is now embodied in the legal orders of several leading nations of the world, albeit in different institutional forms.

The institution of jury trial was developed in England but, in the last century, America became its leading proponent. Since jury trial was first praised by de Tocqueville in the 1830s, it continues to awaken interest abroad, at least in criminal cases. The nineteenth and twentieth centuries saw a number of experiments with jury trial in France, Japan, and other countries. Currently, Russia and Korea are experimenting with forms of jury trial as reforms to their criminal justice system. On the other hand, efforts of the American trial bar to export jury trial in civil cases have met with a cool reception.

Finally, in those areas where American public law has developed to manage and govern a modern economy, there has been a degree of influence based on the actual merits of the solutions reached. Examples include the influence of American federal legislation for regulation of financial markets and bankruptcy. As indicated previously, sometimes this influence has been intensified by the requirements of international financing or regulatory bodies such as the World Bank or the WTO, which have required American-style regulatory regimes as conditions to financings or membership.

One interesting example of U.S. influence on public law in Europe started with the adoption by the U.S. military

government in Germany of anti-trust regulations in 1947. The German Parliament replaced these by a comprehensive anti-trust law in 1958, which was based in part on the American anti-trust legislation and reflected American anti-trust theory. The U.S. influence can be traced to the fact that some of the top jurists in the German Federal Cartel Office received some of their legal training in the United States. Currently, elements of American anti-trust law are once again under consideration as the European Union and its Member States consider whether private anti-trust remedies like those available in the United States should be expanded in Europe.

E. AMERICA AND THE WORLD LANGUAGE OF LAW

The influence of American law and legal institutions throughout the world had been immeasurably furthered by the general acceptance of English as a world language. In recent years, English has also become the world language of law.

The intimate relationship between law and language is well known. All legal precepts are embedded in language traditions that give them meaning. Legal principles and terms are difficult to translate to persons not familiar with the language in which they were created. That is why comparative law scholars must be equipped with skills in multiple languages to properly understand and analyze the legal systems or norms that they are comparing.

The nearly universal knowledge and use of the English language makes American law and legal culture immediately accessible to practically anyone in the world who has a good secondary education. Not only academics and legal scholars but also ordinary lawyers, business people, and journalists can learn about American law in the language in which it is created. The huge secondary literature about American law is similarly accessible. So is the immense American popular culture involving the law,

discussed in greater detail herein. For instance, when the American book, *A Civil Action*, was assigned for reading by a class on American civil justice at the University of Freiburg in 2001, the great majority of the class chose to read it in English rather than the easily available German translation.

The accessibility of American law and legal thinking to persons who use English as their second language is enhanced by the nature of American law as a law of practical outcomes rather than abstract principle. By and large, American common and statute law focuses more on desired policy outcomes in specific real-world circumstances than on abstract, logically coherent principles. Dialogue concerning these policy issues and outcomes does not require a knowledge of the many nuances of English language and rhetoric that might be required for discourse on abstract philosophical legal principles, where the exact meanings of words and terms would be more important. Its lack of theoretical structure makes American law more accessible to persons not imbued with the English language from birth.

This universality of English as a world second language means that jurists throughout the world can talk not only with Americans and other native speakers but also with each other about American law and legal culture. The commonality of English language enables American law to become a common element of discussion among world jurists in a way that no other law can be.

F. AMERICAN LEGAL CULTURE ON THE WORLD SCENE

The influence of American law abroad is closely related to the spread of American popular and general culture throughout the world. Spurred by such interrelated factors as America's economic success in the last half of the twentieth century, the presence of substantial numbers of Americans in Europe during the Cold War, and the universality of the English language, American culture has

had a profound effect – for good and for ill – on the general culture of the twentieth- and twenty-first-century world.

American media culture in particular has projected images of American life, including American law, in every land. Boys and girls, young men and women learn early from movies and television about American notions of the law and lawyers. At the turn of the twenty-first century, as many members of law classes in Freiburg, Germany, were aware of the American TV lawyer programs *Allie McBeal* and *LA Law* as were members of similar classes in Cambridge, Massachusetts. Young Europeans and East Asians are exposed to jury trial, (American) constitutional rights, and cross-examination at about the same time in their cultural development as are young Americans. The relative prominence of legal drama in American popular culture means that foreign consumers of this material are all the more likely to get a lot of it early.

One byproduct of this “soft-law” export is that foreigners may be coming to form their own images of lawyers and what they do partly in the American image. One would think that foreign-trained jurists might face such American practices as witness examination and cross-examination by lawyers, or argument to a jury, with some reluctance and difficulty. Whatever may have been the case in the past, in recent years, the experience in American skills training programs such as the Harvard Trial Advocacy Workshop makes clear that foreign jurists now have no difficulty whatsoever in adapting to the cultural role of the American lawyer. In the early years of the twenty-first century, foreign LLM students from East Asia as well as Europe have shown themselves to be indistinguishable from Americans in their ability to function in the hurly-burly American trial process.

This phenomenon of popular culture is complemented by the immense interest of foreign jurists in exposure to American legal education. Each year, American law schools provide post-graduate education to more than a thousand outstanding jurists from

foreign lands in American as well as global law and legal doctrine. They come not only because of the attraction of the American economy and the lure of the fruits of free enterprise, they come also because American law schools offer instruction in English, a language that many peoples of the world understand and use, and because American law schools provide programs specifically designed for foreign jurists.

These young jurists return to their native lands with an appreciation of the positive aspects of American law and, hopefully, leave most of the negative features behind. Many become leaders in the bench, bar, and governmental administrations of their native countries. It is not surprising that their exposure to American law and legal thinking should inform their future careers in these capacities at least to some extent.

Sometimes the glitz of American popular culture or the mind-opening experiences of foreign LLM students will generate enthusiasm for particular features of institutions of American law and a desire to transplant those institutions abroad. This kind of enthusiasm resonates with the enthusiasm of most Americans for their own legal system so that there are, from time to time, efforts to introduce such individual features as American jury trial, contingency fees, and class actions in other parts of the world. The discipline of comparative law teaches, however, that piecemeal adoption of individual legal institutions without particular regard for the function of the system as a whole is not likely to be successful and may disturb fundamental systemic balances or cultural values.

For instance, the entrepreneurial lawyer, who works on contingency fees, is an important guarantor of access to the American system of civil justice. Introduction of such a figure into the German legal culture, however, might seriously undermine the institutional role of the lawyer as a professional organ of the system of justice and upset the systemic equilibrium founded on this concept.

For another example, one can look to recent developments in Korea. There, the recent upsurge in democratic government has engendered an interest in American-style jury trial as a means of introducing democratic values and legitimacy to the activities of the judicial branch of government. Past experience has shown that the jury is not easy to transplant. Any effort to do so requires reexamination and adaptation of a number of judicial and societal institutions. Jury trial procedures are based on a certain relationship of lawyer and judge. Adoption of such procedures may require reexamination of such fundamental issues as lawyer training and compensation and the status and work of judges in the justice system.

G. AMERICA AND WORLD PUBLIC LAW

America's outward orientation with respect to its own institutions and rules of private law is not matched by a corresponding receptivity toward international law and supranational legal regimes governing all nations of the globe, including the United States. Many of America's friends around the globe are disappointed and concerned about the reluctance of the United States to recognize the applicability of international legal norms and to participate in various organs of world governance. The so-called hegemony of American law is perceived as all the more onerous because the United States steadfastly refuses to subject itself to international norms that virtually all other modern regimes have embraced. This tendency seems to have reached an extreme during the first years of the twenty-first century.

At the outset, it should be observed that America has historically been somewhat reluctant to embrace international treaties and alliances. In his departure speech, George Washington admonished the young nation to eschew foreign alliances. Throughout the nineteenth century, the Atlantic and Pacific Oceans seemed to

obviate the need for the kinds of treaty alliances that maintained the balance of power in Europe at the time. America came into World War I very late and refused to participate in the League of Nations, despite President Wilson's key role in helping to found that organization. Americans' reluctance to entrust national interests to supranational institutions has deep roots.

World War II brought the United States out of its traditional isolation. By the end of that global conflict, it was clear that oceans were no barriers to modern weapons and that world security depended on strong and reliable multinational organizations such as the North Atlantic Treaty Organization (NATO) and the United Nations (UN). The Cold War, which arrayed two vast alliances against each other in a political and military standoff, confirmed the importance of international institutions to American interests. The United States entered into bilateral and multilateral treaties and organizations at a level of engagement that would have scarcely seemed imaginable a generation before.

American engagement with international law and legal institutions began to diminish after the disastrous experience in Vietnam. Although that was scarcely an exercise in international cooperation, the Vietnam debacle caused many Americans to look inward and concentrate on American culture and institutions, to try to recapture the good old American way, to reassure themselves that America was still the very best place in the world to be. Professor Detlev Vagts commented regretfully on this trend in 1988 at an international law conference in Thessaloniki, Greece, in the following terms:

It has been since the disastrous venture in Vietnam and particularly during the presidency of Ronald Reagan that observers have begun to see signs of a new United States deviation from the general understanding of international law.

Professor Vagts cited increased American dissatisfaction with UN agencies as well as the American withdrawal from the jurisdiction of the International Court of Justice with respect to the Nicaragua controversy and noted that American international law scholars seemed at the time to be more concerned with defending the actions of the American government than addressing norms of universal applicability.¹

The fall of the Wall and the removal of the Soviet Union as a serious contender for military world domination left the United States for the time being as the single strongest military power. The phenomenon of American exceptionalism has come into full bloom. United States political leadership currently seems reluctant to exercise America's current measure of economic and military power only within the framework of international institutions and alliances focused on global security, such as the UN. Instead, there has been an unseemly flexing of American military muscles and an unfortunate attitude of "America first" that has undermined the U.S. image in the world and has failed to support and promote global security through international cooperation. The ideas that every country except the United States should be subject to international war-crimes jurisdiction, or that the rest of the world can agree to restrict emissions but that the world's largest energy consumer will not, are as distasteful to many Americans as they are to people in the rest of the world.

History is full of examples of how relatively overweening economic and military power has brought a tendency to dominate rather than support, a tendency to believe in the importance of one's own interests rather than the common interest, a certain arrogance of power. Many Americans had hoped that America's

¹ Detlev Vagts, *Nationalism and International Lawyers: Centrifugal and Centripetal Forces in the International Legal System* (Thessaloniki Institute of Public International Law, 1992).

history, its fundamentally democratic form of government, its values of freedom and equality would have made us immune to this historical human failing. Many still hope that the lessons of history, international dialogue, and greater understanding of the interdependence of all citizens of the modern world will bring the American people quickly to a realization of the folly of any belief that America can carry on this way for long and to a mitigation of the consequences of what has happened so far.

Sad to say, it cannot be denied that America's recent actions have tended to undermine the influence of American institutions of public law in the world at large. American constitutionalism has been a beacon for the development of constitutional democracy throughout the world. Its delayed and insufficient response to the excesses of Guantánamo Bay and Iraq certainly diminish its light. The continued use of the death penalty in the United States undermines America's voice in human rights. Results of the 2000 presidential election make American electoral democracy somewhat suspect.

Present conditions pose an interesting dichotomy. Over the second half of the twentieth century, American influence on private law and legal culture and, to a lesser extent, national public law has been profound and is ongoing. At the same time, American engagement in international law and legal institutions is now seen as rather negative and in disrepute. Is the current situation tenable? Or is the world in a time of transition that will lead to a new role of the United States in the world legal order?

H. AMERICA AND THE LEGAL WORLD OF THE FUTURE

What will be the ongoing influence of the United States on private, public, and international law in the world of the future? Although the outlook seems very uncertain, some predictions can be hazarded.

To the extent that influence on private law is based on economic power, such as cases in which investment banks insist that the law of New York apply to international financings, the influence of American law will continue to depend on relative economic power. To the extent that American investment banks continue as preeminent in the fields of corporate acquisitions, mergers, and major corporate financing on a worldwide basis, American law will continue to be exported in such transactions.

On the other hand, if and when economic players associated with some other legal culture obtain the economic power to specify the law that will apply, the law chosen by these players will gain in influence. This evolution will, of course, be affected by intrinsic merit of the respective rules and regimes. Some non-American investors or deal makers may be accustomed to and comfortable with American law based on the recent history. In the long run, choice of law will follow economic power.

It is difficult to imagine that the United States will maintain the degree of influence exercised over the last fifty years as a source of national public law. There are many functioning democracies in the world. There are many ways fundamental human rights can be recognized and safeguarded. America can no longer claim to be the foremost guardian of freedom and equality. American legal institutions are and will continue to be one among many choices for public-law solutions and institutions.

American law's influence will continue to be promoted by the use of English as an international language. Easy access to law in its original language facilitates comparison and adoption immeasurably. That factor cannot be denied and should not be underestimated.

American civil litigation will come reluctantly in line with the rest of the world. The American system of civil dispute resolution lies well outside the world mainstream in terms of complexity and expense. Too much of America's national resources are expended

on making this highly privatized system work. American public civil justice will have to move more in the direction of the systems of civil justice in the civil law world in order to survive as a viable institution on the international stage as the world gets ever smaller and the world economy becomes more integrated. The developments in England, which reformed its civil justice system substantially in the direction of continental Europe at the end of the last century, may show us the way.

That is not to say that there will not be influences both ways. As we watch the actual use of jury trial diminish in the United States, Korea, and Russia, consider how forms of this institution can be introduced into their legal systems. Europeans skeptical about American-style entrepreneurial class actions are considering various forms of collective litigation to make civil justice remedies more accessible and efficient.

Scholars from Europe and the United States are developing principles of transnational civil procedure that embody both European and American elements. As we approach a unified world economy, differences among the civil justice systems that serve that economy will tend to diminish. This tendency has been discernable for some time now and will certainly continue. Disappointments such as the recent Hague impasse should be regarded as temporary setbacks rather than any indication of a divergent future.

Finally, it seems clear that American exceptionalism vis-à-vis international public law is a phenomenon of finite duration. The United States will not continue indefinitely as the world's predominant economic and military power. History has shown that no country has ever been able to maintain such a position for a long time. Maintaining a role of world economic and military leadership is exhausting. Inevitably, some other power or combination of powers will rise to challenge the hegemony. When it is clear that America's unilateral power will not protect American interests and

guarantee its security, it seems highly likely that American leaders and the voters who elect them will see the value of international institutions and relationships that do.

The past challenges of World War II and the Cold War caused the United States to abandon go-it-alone policies in favor of membership in international alliances and organizations to recover and maintain world peace. It is already becoming clear that America's current adventure in unilateral foreign policy through war is much more expensive and difficult than ever imagined by our leaders. Current American overtures to Europe reflect more than a desire to have Europeans and Americans smile at each other again. It is also clear that challenges posed by the rise of China as an economic and potential military power, by the activities of regimes such as North Korea and Iran, and indeed by the entire imbroglio in the Middle East, can only be solved by concerted activity of the world's leading nations. No single nation, no matter how powerful at a particular time, can serve as policeman for the world.

It is to be hoped that the decline of America's comparative economic and political power will occur in such a manner as to preserve international order and spare current and future generations of American citizens the consequences of violent or precipitate readjustment. However, it seems inevitable that it will come and that as world relationships change, the value of international law, international legal organizations, and an international legal order will become more apparent to even isolationist America.

Throughout recorded history, various countries and civilizations have enjoyed times of preeminence when their economic, legal, and cultural institutions exercised great influence in the remainder of the then world and were sometimes seen as hegemonic. Ancient Rome, seventeenth-century Spain, eighteenth-century France, and nineteenth-century England spread culture,

political thought, and law far beyond their traditional national borders. These influences have persisted and enriched the world long after the political and economic power that originally projected them had receded and dissipated. Perhaps the influence of American law and legal institutions on the global legal order will be seen in this light by the world to come.