

What Civil Law Attorneys Should Know About American Law: Why Does the American Constitution Work?

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In discussions regarding the comparative merits of various constitutions, I am often asked, or often hear, this question. As the Republic of Turkey wrestles with its own constitutional issues, perhaps this might be a time to look at other constitutions for some ideas.

As an American lawyer, I think the reasons for the relative success of our Constitution for the past 220 years lies in having three distinct branches of government, a supreme court, representation of the people rather than parties, a complex amendment process, a federal system and unlimited political speech. Let me address each one of those in turn. Some might be applicable, some might not, but that is for the reader to decide.

Three Distinct Branches of Government

The U.S. Constitution creates three distinct branches of government and prescribes exactly how they will work together to balance power between them and to provide a ‘check’ to ‘balance’ the other branches (its system of ‘checks and balances’).

The main difference from continental parliamentary systems is in the executive branch. Contrary to many governmental structures where the ministers come from parliament, the U.S. system elects a president who then appoints his own advisors separate from Congress – who are most often from his own party but that party may be different than the one holding the majority in Congress. When different parties hold Congress and the Presidency, the system works best to ensure maximum consul-

tation and compromise in governing the people and we avoid the ‘tyranny of the majority’ where a party wins one election and then proceeds to change many aspects of the country, its law, and political system because it controls all the power. The next election could then result in a victory for another party which could then proceed to change everything back – resulting in inefficient and unpredictable government.

The election of the president is done with by indirect election of the people by using essentially a weighted majority system called the “electoral system.” In this system, the winner has to get a majority of the electoral vote – the value of each state depends upon its number of congressional seats – both in the House of Representatives and the Senate. Each state has a minimum of three, with the maximum being California with 55. Without such a system, a candidate could win by campaigning in only a small number of states (California, Texas, New York, Florida, Illinois) and the more numerous smaller states would have essentially no voice in choosing the president. With the electoral system, each candidate has to campaign and address issues in the majority of the states and avoids having only certain regions dominate.

A Supreme Court

Having a Supreme (‘the highest’) Court eliminates the need for councils to synchronize the decision of various courts. Having a single, final court to address all types of cases allows for the consistency of decisions and the predictability of courts that is essential to the rule of law.

Representation of the People Rather than Parties

When American voters go to the polls, they elect people to particular seats in Congress, not parties. Each person they vote for is normally affiliated with a particular party, and the person will often vote with that party while in Congress, but the parties really do not control who gets elected – the voters do. The voters, as constituents of the politicians, never let the Congressional representatives forget who they really work for – the people.

The negative aspect is that the political parties cannot control representatives from introducing ill-advised legislation to benefit a particular faction that may be active in their district (the Armenian resolutions are the best example of that) but on average, the voting for a person rather than a party ensures that political representatives work for the people and not political parties.

A Complex Amendment Process

The process to amend the U.S. Constitution is really a two-step process – one national and one state. In short, a proposed amendment must pass the Senate and House of Representatives (both houses of the legislature) with a supermajority (2/3) in order to be sent to the states for ratification by a supermajority again (3/4). States may choose to have a referendum (vote by the people) on the proposed amendment before ratifying it.

This process is designed to ensure that the Constitution cannot be

changed easily to address a ‘fad’ but is instead done through a thoughtful process. This is another measure to avoid the ‘tyranny of the majority.’

The U.S. Constitution has been amended only 27 times in 220 years – and 10 of those were done at the start to address the rights of the people, so there have been only 17 actual changes over the years (and two of those regarding alcohol cancelled each other out). The Constitution can be informally amended through the process of interpretation by the Supreme Court. Although they may not change the text, the Court can give amplification and expansion to the words so that it is still applicable to the modern world. For this purpose, the comparatively smaller size of the U.S. Constitution, when compared to other countries’ constitutions, makes this process of evolutionary change easier and more important.

A Federal System

In a federal system (where a ‘federation’ exists), there is a definite set of responsibilities defined for each level of government. These create ‘lanes in the road’ to define responsibilities precisely so that the governments are not sidetracked into time-consuming ‘turf’ battles that detract from the business of government. The U.S. Constitution precisely defines where the national government may act; anything else is the responsibility of the state governments, with an emphasis to have as much as possible done at the lowest level – similar to the EU concept of subsidiarity.

This allows the states, as regional governments, to act autonomously from the national government on many issues, allowing them to tailor policies best in line with the desires of the people of the region. Therefore, many controversial issues can be dealt with at a lower level, and the people can choose to live in the region most comfortable to them.

Unlimited political speech.

Having the right to speak freely on any measure remotely connected with politics ensures a lively discussion on politics and the maximum participation of the people. In three levels of speech, political speech enjoys the highest protection, with only malicious and knowingly false speech proscribed. Even though politicians may be defamed in some manner by these political discussions, to try to limit such speech would ‘chill’ the political environment and discourage many from participating. For that reason, speech with any remote connection to politics will receive the highest possible protection from the courts.

This article briefly highlights those aspects of the American constitutional system I think are noteworthy. In my view, no constitution is perfect, but the American one might have some points to emulate, as the Turkish Constitution has. As Turkey wrestles with the future of its constitutional order, this article is meant to contribute to that discussion. By talking with and learning from each other we can make the political and legal systems better suited for the people.