

. . .Guillaume's appears to be three-fold:

- 1) Americans are too process-oriented and lose the special character of law;
- 2) Americans believe everything is negotiable and manipulatable (and we French do not);
- 3) Americans are unilateralists unwilling to engage in true multilateralism.

Jouannet [also addresses] more rarified realms of philosophy where most Americans (not just law professors) simply won't go and also ends up invoking the need for attention to a set of grand abstract things

I end up sympathetic to Jouannet's notion that both the rationalist French and the pragmatist American legal cultures over-reach, but she does not offer an easily-understood way out of the problem—besides paying better attention to the abstract (non-legal) factors providing the context within which legal cultures grow and adapt and a suggestion that having multiple legal cultures is a good thing reminiscent of arguments for protecting biological diversity

I think the US-France divergence may be both larger and smaller than you and Guillaume plus Jouannet think.

Smaller: on both sides of 'the Pond' there is belief in rule of law, though the exact mix of consistency, transparency, accountability, and to whom accountable differs enough to cause lots of argument.

Smaller: civil law leads with the 'code,' but does have to admit interpretation. However, a maxim like the traditional Sicilian "the law is applied to an enemy and interpreted for a friend," if replicated elsewhere in Europe gives interpretation a much more negative spin than Holmes's "the life of the law has not been logic; it has been experience." (The common Law, p. 1.) In the great administrative reformation of the 19th and 20th centuries, in which even liberal societies had to develop stronger state mechanisms to deal with the negative side-effects of the industrial revolution and vastly larger populations, the common law states have had to adopt more statutes, so there is a lot more looking at the rules in common law states now than there was in the past. Yet a difference in the spirit of interpretation remains. As best I can tell, the civil lawyer's code comes with assumptions about being comprehensive and fully consistent that do not get picked up in the common law states' move to greater use of statute.

Larger: I think Jouannet is onto something in discussing the differences of political cultures (this is beyond legal culture, though she locates it mainly there). Rousseau was merely one of those who argued that there is some "general will" distinguishable not only from "individual will" but also from "the will of all." This notion of a seemingly human-

independent "will" is consistent with (I am not saying one caused the other) a European tendency to invest "the public" (adjective) or "the state" (as in ruling structure) with an aura Americans do not accord them. Americans have "the people" and certain notions of "inalienable rights" but as far as I can see, no human-independent "general will." (Wild speculation: this may be the result of avoiding designation of a state religion and therefore having to find some way to accommodate multiple notions of the ultimate truth by taking it outside of the public/political realm.) This difference does give European legal thought a collective emphasis that is absent in most American legal thought (Critical Legal Theory, being a North American outpost of continental philosophy, does not fit into this).

The whole discussion of law as rules vs. law as process rests on binary logic. Different people play with it in different ways. I notice Jouannet is not trying to advance either an Hegelian synthesis or a Foucauldian valued-devalued pair of elements. After some thinking about it I end up with the notion that the rules-process debate stems from a tension between two ways of trying to deal with worldly imperfection -- the impulse to establish processes so that there is consistency of treatment and the impulse to cut the cackle and do substantive justice in each particular case. (See Don Quixote: Don Quixote wants to do what is right, but constantly gets tangled up in the complications and tensions of ordinary human situations – as further obscured by his own way of seeing/not seeing things.) As we have not worked out whether, and if so which, imperfections are best handled thru process and which thru substance, we continue to oscillate between them. We need a theorist of a mixed system to bail us out, but no one has yet come up with a persuasive account of a stable mix.

. . . U.S. casebooks (even the self-consciously critical ones like Falk et al.) do emphasize US modes of understanding and using IL.

In my IL class I do something that would be regarded as bizarre in a US law school, and builds out from a prior decision that my undergraduates cannot cope with the mode of organization of a casebook (never mind the volume of reading). I use a Brit textbook (currently M. Shaw, International Law). True, on a global scale the Brits are at least a dualist as the Americans, but one gets a look at how a number of commonwealth countries handle IL domestically and the selection of issues is less US-centered.

I realize I am also working toward a way of affirming that law is both rules and process. I start the course with a contrast between the Austinian "law as command of the sovereign" versus Hartian "law as a type of social norm" argument to get the large number of my students who are legal studies majors away from what Inis L. Clause Jr called the "5Cs" approach to law that suggests legal systems must have "congress, code, cops, courts, and clinks." With the undergraduates, but even more with the graduate students I emphasize that legal systems have rules and rule-based notions at their core with making rules a primarily political process that occurs in political forums and uses political arguments and applying rules a legal reasoning process that starts with the rules and canons of interpretation/application, makes equity exceptions if needed but has to refer things back to the political process if the results of rule application kick

out issues that suggest a need for rules change. Part of this is inspired by the cognitive science and epistemic communities literature in political science International Relations theorizing.

Given the weak separation of political and legal institutions in international politics, I also emphasize the need to keep straight what sort of forum is at work, and with forums that perform both functions whether it is being mainly political or mainly legal at the moment. This is where I tend to part company with reformist international lawyers, who want to get as many rules and as much stuff into legal institutions as possible. I think legal modes of reasoning are distinct and have a sphere of application but that their proper sphere is not limitless. (This is an indirect riff on ideas in Walzer's Spheres of Justice).

In the discussion of "soft law" I find myself sympathizing with the French idea that it somehow lessens the obligatoriness of law. I think that effect is mainly the result of labelling (and I regard "soft law" as up there with "game theory" as a bad labelling). If one takes a Hart view of law as type of social norm, then there is room for other forms of social norms, including norms that are commitments though fall short of law. The problem is what to call them. "Soft law" stinks but it persists because no one has come up with anything better.

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