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Aller au sommaire du numéro

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Common Law

*H. Patrick Glenn**

The notion of common law is well-known in the world and is usually explained as the law developed by the judges of England. It is therefore often defined as case law, with its attendant notions of precedent, *stare decisis*, and *ratio decidendi*, and is often contrasted with the written or codified law found in many jurisdictions described as civilian in character. This common law of England has now become worldwide in importance, a residue of the English empire and the success of many instances of English settlement.

This English concept of common law is, however, only one instance of a much wider phenomenon of common laws, of still greater importance in the world. The most widely known example of another common law is that of the *ius commune*, originating in medieval Italy and Germany on Roman law foundations and also spreading through much of the world. Beyond these two traditions of law which are expressly designated as common, it has also been the case that many other laws have functioned as have the common law and the *ius commune*, either in their European place of origin, in the course of transferral abroad, and in some cases both. This was the case in French, Spanish, Dutch, and German law, as we now know them, each of which maintained a common law and did not simply exist in national form. There was a *droit commun*, a *derecho común*, a *gemeine Recht*. The Dutch variant became known as Roman-Dutch law outside of Europe. So the notion of common law is one which transcends particular forms of law and has operated in many legal contexts. What are its essential characteristics?

It was necessary in the European context to deal with large movements of population and the new arrivals in many places had notions of retaining the law they had known. The English moved into Wales and Ireland, the Dutch and Germans moved east, the Castilians moved into previously Islamic lands. They all saw their law as moving with them; the

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territoriality of law had yet to be announced in the late seventeenth century by Huber in the Netherlands. This meant that in all cases it became necessary to distinguish the law of the recent arrivals, seen by them as common, from the local or particular laws they encountered. Law thus became known as common, not because it was of uniform application in a territory, but in order to distinguish it from law that was clearly local in character. Both types of law coexisted and it is not clear where the expression "common law" originated. In all cases, however, it coexisted with its *ius particulare*, local customs, or even local legislation. It quickly became omnipresent as a concept in Europe. The great legal task was not one that is known today as the conflict of laws, since there were no rules of allocation of cases to territorially-supreme powers. It was rather the case that the application of the common law or the local law was a matter of interpretation. "Odious" statutes were therefore restrictively interpreted as local laws, and in the world of the English common law all statutes were seen as odious in some manner. They were exceptions to the generality of the judge-made common law.

The notion of a common law was important not only within Europe but also within the empires which the westernmost European powers constructed. Its essential character became even more evident. The European authorities were much involved in the process of constructing territorial states, and the principle of territorial application of a single law became more and more accepted. A common law came to have the connotation of a uniform law, applicable everywhere within a territory. Abroad, however, there could be no question of a single, territorial law. The imperial law encountered many local forms of normativity, from unwritten law to obstreperous local forms of legislation. The spirit of the times was perhaps best captured by the expression of local authorities in the Spanish empire, in response to the commands of central authority: "I obey, but do not execute" ("*Acato pero no cumplo*"). Imperial authority was unquestionable authority but simply unable, given the distances and particularities involved, to impose its will. The common law, the law of settlers and imperial authority, was unquestionably law but it yielded to many unavoidable forms of local norm. The European notion of common law, law not binding in authority but with unquestionable prestige and authority, thus came to be replicated abroad. The common laws were not constant in authority; they yielded to local, imperative law. They have been seen as supplemental law but it appears more appropriate to see them as relational, since they are in constant relation with a particular law and do not possess any inherent content. All of their content may yield to local rules, in which case they go into a kind of suspended animation, like the Cheshire Cat in *Alice's Adventures in Wonderland*. In the language of the new logics, they were and are nonmonotonic in character, in that they are not constant in application. This was the case even in codified jurisdictions, as the code of imperial authority came to be (at least theoretically) of con-

stant application in the mother country; yet abroad it became yet another element of the common law which settlers were able to resort to in the absence of any controlling law of their own. So the French Civil Code, meant to be of uniform territorial application in France, became much-cited, though purely persuasive, authority in many jurisdictions abroad. In the same way, English judgments are often cited abroad, German doctrine is of great importance in many places where a German-style codification has been enacted, and the old Dutch Code remains the object of instruction in Indonesia, though it is "binding" law nowhere in the world.

The common laws of the world are thus a recognizable phenomenon, a multivalued or multivalent, nonmonotonic form of normativity. They stand in contrast with the allegedly uniform and binding law of states of the nineteenth and twentieth centuries. They remain vigorous in judicial practice in the vast majority of countries today, and are instructive as to how different forms of normativity may coexist within a single territory. In federal jurisdictions such as Canada and the United States there has been appropriate denial of a particular federal common law which somehow attaches to federal fields of legislative authority, since common law in its historical sense is available to all potential users and does not belong to any particular legislative authority. Though of ancient heritage, common laws appear appropriate instruments in a time of globalization when many different forms of normativity are being urged upon national authorities.