

# *Fordham International Law Journal*

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*Volume 29, Issue 3*

2005

*Article 2*

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## Transnational Common Laws

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# Transnational Common Laws

H. Patrick Glenn

## Abstract

Today, the notion of transnational, or sometimes transsystemic, law has progressed well beyond Jessup's concept. It now includes the international law that Jessup generally dealt with – the (often) national law regulating actions or events that transcend national frontiers – but also now clearly extends to law that is transnational in origin, as opposed to application. The new transnational law can thus be applied to purely internal, and not only international, cases, and its transnational character is derived from the extra-national character of its source or sources. It is often seen in the form of “general principles of law,” which transcend the law of any nation-state or regional or international organization. It is law which is not formal in character, not formally endorsed by a state prior to its application within the state, not systemic or positive in character. It represents a major theoretical and highly practical challenge to concepts of law that have prevailed for the last two centuries. What theoretical and historical justification can be offered for it? In attempting a response to this large question, an initial field of inquiry must relate to the justifications offered for the exclusivity of state law. If exclusive state law is of only one or two centuries' duration, what preceded it? Are there notions of law which have been overlooked or pushed aside in the process of state construction which are once again relevant in a period of state decline? This article answers these questions.

## ESSAYS

### TRANSNATIONAL COMMON LAWS

*H. Patrick Glenn\**

The search for transnational law is hampered by the idea that the source of all law is the nation-state.<sup>1</sup> Though the idea is relatively new, having been with us for only the last century or two, it has been remarkably dominant in legal theory and has had considerable, though variable, effect on legal practice throughout the world. Since the state would be the source of all law, law beyond the state would be law to which the state consented ("positive" sovereignty), so the most obvious form of "international" law would be in the form of state contracts or treaties. Absent such formal national consent, "international" law, for many, would not be law properly so called. Private international law would have escaped this fatal flaw only by becoming national in character, a national law dealing with international cases.

When Philip Jessup proposed the idea of "transnational" law in the mid-twentieth century, he may not have been attempting much more than a neologism.<sup>2</sup> He was concerned only with law that "regulates actions or events that transcend national frontiers," and his discussion turned entirely around questions of public and private international law as classically defined.<sup>3</sup> A residual category of "other rules" would have applied to relations between private persons or corporations and foreign states; Jessup's background in public international law is evident in his difficulty in qualifying such relations as "international," because they were not between "nations."<sup>4</sup> Nothing in Jessup's treatment

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1. See PHILIP JESSUP, *TRANSNATIONAL LAW* 2 (1956). In accordance with the argument of this Essay, the words "nation" and "state" are not capitalized, as a means of resisting reification, objectivization, and closure.

2. See *id.*

3. See *id.*

4. See *id.*

of the subject was incompatible, however, with nineteenth- and twentieth-century ideas of the state as the exclusive source of law.

Today, however, the notion of transnational, or sometimes transsystemic, law has progressed well beyond Jessup's concept.<sup>5</sup> It now includes the international law that Jessup generally dealt with—the (often) national law regulating actions or events that transcend national frontiers—but also now clearly extends to law that is transnational in origin, as opposed to application. The new transnational law can thus be applied to purely internal, and not only international, cases, and its transnational character is derived from the extra-national character of its source or sources. It is often seen in the form of “general principles of law,” which transcend the law of any nation-state or regional or international organization. It is law which is not formal in character, not formally endorsed by a state prior to its application within the state, not systemic or positive in character. It represents a major theoretical and highly practical challenge to concepts of law that have prevailed for the last two centuries. What theoretical and historical justification can be offered for it? In attempting a response to this large question, an initial field of inquiry must relate to the justifications offered for the exclusivity of state law. If exclusive state law is of only one or two centuries' duration, what preceded it? Are there notions of law which have been overlooked or pushed aside in the process of state construction which are once again relevant in a period of state decline?<sup>6</sup>

### I. *THE EXCLUSIVITY OF STATE LAW*

Contemporary legal positivists, the theorists of national legal systems, treat state law as fact.<sup>7</sup> They argue that state law has

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5. See H. Patrick Glenn, *A Transnational Concept of Law*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* 839, 846-47 (Peter Cane & Mark Tushnet eds., 2003) [hereinafter Glenn, *Transnational Concept*].

6. See generally MARTIN L. VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* (1999) (observing that many existing states are combining into larger communities or disintegrating); see also PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 237, 241, 337 (2003) (noting the declining role of the state in matters of internal security and welfare, and characterizing the state as not withering away but undergoing historical change). The designation “state,” as applied to abstract political units, came into use in the first half of the seventeenth century. See *id.* at 95.

7. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 116 (1994) (delineating minimum conditions for “the existence of a legal system”).

been formally enacted, in structured and systemic form, and that it has engendered, in the argument of Herbert Hart, a social fact of obedience.<sup>8</sup> Hans Kelsen spoke of the necessary efficiency of the national legal system.<sup>9</sup> In itself, the national legal system would give rise to no obligation to obey the law.<sup>10</sup> It simply exists as fact, and facts cannot give rise to obligations. So long as the national legal system is factually efficient, however, people will tend to obey it, realizing that disobedience may attract sanctions for targeted behavior, even if one cannot speak of obligation. Moreover, the nature of a national legal system is one of exclusivity. Hart spoke of "a certain kind of *supremacy* within its territory and *independence* of other systems."<sup>11</sup> Kelsen spoke of the relations between "norm systems" as being either those of independence or subordination.<sup>12</sup> More recently, Joseph Raz has explained that "[a]ll legal systems . . . are potentially incompatible at least to a certain extent. Since all legal systems claim to be supreme with respect to their subject-community, none can acknowledge any claim to supremacy over the same community which may be made by another legal system."<sup>13</sup> All legal systems would thus be, in principle, exclusive and closed. The open legal system would be one which controlled its own boundaries and which would admit, exceptionally and according to its own criteria, the application of "foreign" law.

There are of course very profound reasons for the recalcitrance of legal systems before other potential sources of internal law, which are rooted in the positive or factual character of the legal system. If a national legal system is to apply law other than its own, in circumstances where its own law does not so provide, there must be reasons for doing so. What could these reasons be? They are reasons that suggest that the legal system should not be applicable in certain cases. They are reasons which go to the justification for legal systems, for the justification of their content, and for their exclusivity. Yet the theory of positive or

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8. *See id.* ("[R]ules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed . . .").

9. *See* HANS KELSEN, *PURE THEORY OF LAW* 115-16 (1967) (describing the notion of obligation as being "fundamentally" connected with that of sanction).

10. *See* JOSEPH RAZ, *The Obligation to Obey the Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 233 (1979) ("[T]here is no obligation to obey the law.").

11. HART, *supra* note 7, at 24 (emphasis in original).

12. *See* KELSEN, *supra* note 9, at 330, 332.

13. RAZ, *supra* note 10, at 119.

formal legal systems purports only to describe these systems as social facts, not to justify them. There can be no reasons for adherence or non-adherence to a legal system according to descriptive or analytical theory. Social facts do not give reasons for their own rejection or adoption. There is corresponding resistance to the idea that legal systems can exist as a matter of degree, since the existence of degrees would require explanation or justification.<sup>14</sup> The national legal system thus *exists*, as a kind of large, dumb animal which displaces all other legal animals within its territory, unless it leaves space for them because of their utility. The hippopotamus comes to mind.

The factual character of legal systems has today become, however, a very difficult proposition to accept, given the wide variety of states in the world, their relative efficacy, and widespread corruption in the administration of justice. We now know “failed” or “dysfunctional” states, and the expression “post-legal” has been used in describing some of these situations.<sup>15</sup> Such states do not produce social facts of obedience, but “paper law” and “paper rights.”<sup>16</sup> Even within long-standing states of unquestioned efficacy, new demands are being made for accommodation of different forms of (non-state) normativity.<sup>17</sup> So the factual explanation for national legal systems is now being factu-

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14. See, e.g., Klaus Füsser, *Farewell to “Legal Positivism”: The Separation Thesis Unraveling*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 119, 155 n.17 (Robert P. George ed., 1996) (listing references, for legal philosophers who “cling dogmatically to classificatory ideas,” and reject the analysis of legal systems as matters of degree). For the presumption of completeness of national legal systems, see HENRI BATIFFOL, *ASPECTS PHILOSOPHIQUES DU DROIT INTERNATIONAL PRIVÉ* 16, 24 (1956).

15. See Keith Culver, *Leaving the Hart-Dworkin Debate*, 51 U. TORONTO L.J. 367, 395 (2001) (“Some of the most exciting questions and sweeping empirical changes in life under law today are found in precisely these borderline cases.”); see also Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903, 913-23 (1997) (discussing failed and dysfunctional states); Nii Lante Wallace-Bruce, *Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law*, 47 NETH. INT’L L. REV. 53, 58-60 (2000) (highlighting the difference between a collapsed state and a failed state). There is also a phenomenon of legal systems failing within existing states. For an explanation of this phenomenon in Indonesia, see Adijaya Yusuf, *Integrating the Country Through Legal Reform: The Indonesian Experience*, in *LAW IN A CHANGING WORLD: ASIAN ALTERNATIVES* 110, 113 (Morigiwa Yasutomo ed., 1998) (“Although steps have been taken, law development has not yet been able to formulate a national legal system.”).

16. See WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 202 (2000).

17. See JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 1-29 (1995) (examining claims for recognition of aboriginal communities).

ally undermined, leading to a need for explanation and justification. Are there reasons to believe in states, if they are not simply facts? Are the reasons for their creation still valid? What *were* the reasons for their creation?

There are now close to 200 nation-states in the world, yet there was no supra-national legal authority dictating the creation of all of them.<sup>18</sup> It is true that some states were created by colonial powers, in a hierarchical kind of relationship, but no such hierarchical relationship explains the existence of the colonizing states themselves. States must therefore be grounded on an underlying, normative argument, common to all of them, that justified their creation and maintenance. A tradition of positivist thought had to develop prior to the development of positive law. In this way there would be underlying common law, or *ius publicum*, justifying the range of distinct states which emerged in Europe and the rest of the world.<sup>19</sup> This tradition of common law is not dumb; it speaks to the need and justification for legal systems, and is capable both of recognizing their weaknesses, their need for reinforcement, and degrees of effectiveness in their implementation. Western legal tradition is normative; it speaks to questions which legal systems, as purported facts, are unable to speak to. This is why Article 6 of the Treaty on European Union speaks of the “constitutional traditions common to the Member States,” since it is necessary to resort to such underlying common tradition as a means of critiquing and going beyond the national systems of Europe.<sup>20</sup> There is therefore law prior to the state, common to all states, which explains and justifies their existence. The state is the result, not the source, of common law. This common law is transnational in character, but the variety of

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18. See Douglas Hurd, *Diplomatic Answers*, WORLD TODAY, Mar. 1, 2005, at 16.

19. For an overview of the development of the public law argument, and historical references, see H. PATRICK GLENN, ON COMMON LAWS 51-53 (2005) [hereinafter GLENN, ON COMMON LAWS] (“[G]ood case that the only single *ius commune* that Europe has known is one of public law and not private law . . . a single, relational common law which argued for, and allowed, the emergence of exclusivist national states.”). See generally R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297, 300-01 (1999) (defining *ius commune* as “the amalgam of the Roman and canon laws that governed legal education in European universities and influenced legal practice in Europe from the twelfth century forward”).

20. Consolidated Version of the Treaty on European Union, art. 6, O.J. C. 325/5, at 11-12 (2002).

transnational law today requires further inquiry into the nature and role of common law in the world.

## II. TRANSNATIONAL COMMON LAWS

The expression “common law” is today thought to refer to the English, or Anglo-American, or Commonwealth case-law tradition.<sup>21</sup> Historically, however, the English notion of common law was a particular variant, with cases as its primary source, of a much more widespread phenomenon of common law in European legal history.<sup>22</sup> From the time of development of what we know as the modern civil and common law traditions from the twelfth century, the notion of common law was widely used as a means of reconciling the emergent civil and common laws with the particular local laws which they encountered in the course of their expansion.<sup>23</sup> English common law thus expanded out from Westminster, with its judges on horse or carriage, and was designated as the common law in order to distinguish it from the many other laws of England which were not common, but which were highly particular to the regions and even hamlets of England.<sup>24</sup> There was thus a centuries-long dialogue between common law and non-common law (which could be so-called “custom,” royal legislation, commercial law, or other).<sup>25</sup> The particular feature of common law was that it yielded to particular law, seen as more imperative in local circumstances, more commanding, or more specialized. Even today the common law in England will yield to custom, which meets the contemporary requirements of proof.<sup>26</sup> Common law was therefore not binding law, though it was clearly recognized as law. Its applicability, and content, varied according to the particular encounters it had with its particular interlocutors. Common law was therefore *relational* law, law which defined itself and its application in terms of its constant and ongoing relations with other laws applicable within the same territory. The notions of binding law and stare

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21. See GLENN, ON COMMON LAWS, *supra* note 19, at vii-viii.

22. See *id.* at 1-44.

23. See *id.* at 12-14.

24. See *id.* at 26, 29-30.

25. See H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 256 (2004) [hereinafter GLENN, LEGAL TRADITIONS].

26. See GLENN, ON COMMON LAWS, *supra* note 19, at 30-31.



decisis were creations of the mid-nineteenth century.<sup>27</sup>

The other well-known common law is the *ius commune*, of Roman legal origins, which was the object of major development in continental European law Faculties from the twelfth century.<sup>28</sup> This too was known as a common law, in spite of its doctrinal (non-decisional) sources and great differences from the common law, since it was common in comparison to the particular laws—the *iura propria*—which it encountered in the course of its expansion.<sup>29</sup> Like the English common law, it too (eventually) yielded to local law, and the great doctrinal authorities of the civil law came, modestly, to state their views “saving a better opinion.”<sup>30</sup> This common law, like that of England, did not purport to “bind,” but no one doubted its status as law nor its growing authority as such.

Less well known in legal history, largely because of the screen of national codifications, are the common laws of France, Spain, and Germany. In each case, a law considered as common expanded in influence, yet in each case yielded to local, more particular forms of normativity when it was clear that they were equal, and even more appropriate, for the task.<sup>31</sup> The Custom of Paris, and the doctrinal commentaries upon it, were seen as an “ideal” custom, supplementing all the many, and more minor, customs of France.<sup>32</sup> It was the basis of the French “*droit commun*,” which was the object of major treatises until the mid-eighteenth century.<sup>33</sup> Saxon customary law, in the form of the *Sachsenspiegel*, spread east, south, and even west, as a useful model for local laws which had not yet been developed into the same extensive and written form.<sup>34</sup> This was the German “*gemeine Recht*.” In Castille, Alfonso (“the Wise”) wrote a model text for laws in seven books (the “*Siete Partidas*”), which became a

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27. See Jim Evans, *Change in the Doctrine of Precedent During the Nineteenth Century*, in PRECEDENT IN LAW 35, 68 (Laurence Goldstein ed., 1987).

28. See, e.g., Helmholz, *supra* note 19, at 300 (noting the influence of the *ius commune* on European legal practice from the twelfth century).

29. See in particular FRANCESCO CALASSO, INTRODUZIONE AL DIRITTO COMUNE 67-69 (1970).

30. R. H. HELMHOLZ, THE IUS COMMUNE IN ENGLAND: FOUR STUDIES 243 (2001).

31. See H. Patrick Glenn, *The Common Laws of Europe and Louisiana*, 79 TUL. L. REV. 1041 (2005) (discussing the multiplicity of European common laws and their interaction in Louisiana).

32. See, e.g., JEAN GAUDEMET, LES NAISSANCES DU DROIT 176-77 (1997).

33. See *id.* (citing François Bourjon’s famous treatise, published in 1747).

34. See Glenn, *supra* note 31, at 1046-47.

constant source of reference and supplement to the local laws of what was eventually to become Spain.<sup>35</sup> It was widely referred to, in Castille and beyond, as a "*derecho común*." In all of these cases as well, the common law yielded to local particularity and local law, without in any case losing its co-equal status as law. No one doubted, or at least effectively challenged, the idea that there could be multiple sources of law, and multiple laws, applicable on the same territory.

This distant European legal history remains highly relevant to the contemporary debate on transnational law since these common laws, now perceived as internal to European states, became even more mobile with the expansion of European powers beyond Europe itself. It is important to identify the source or origin of this European expansion. It could not be said to be the European states which we know today as France, Germany or Spain, since these states achieved some form of legal cohesion only from the nineteenth century. England was identifiable earlier, but this was more due to geography than the unifying influence of the common law.

The common laws of Europe thus expanded overseas largely during the time when they were still in a process of expansion within Europe itself. They expanded outwards from major European centers—London, Paris, Madrid, and Amsterdam—and only stopped their expansion when they reached resistance (*uti possidetis juris*). French law, in the form of French custom, arrived in New France in 1534, almost three centuries before the French state became legally unified with the French Civil Code.<sup>36</sup> As a result, the common laws of Europe were common to territories beyond Europe as well as common to territories within Europe, and there were no clearly defined states to set territorial limits to them. The English common law expanded to Wales, Ireland, and Scotland, and this expansion was still occurring when expansion began to take place in North America.<sup>37</sup> It was possible to speak of "The Indian as Irishman" since the laws of both were being encountered and dealt with in

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35. *See id.* at 1059-60.

36. *See id.* at 1054.

37. *See* James Muldoon, *The Indian as Irishman*, *ESSEX INST. HIST. COLLECTIONS* 111 no. 4, 267, 267-68, *reprinted in* JAMES MULDOON, *CANON LAW, THE EXPANSION OF EUROPE, AND WORLD ORDER* (1998).

a comparable manner.<sup>38</sup> They were both inseparable elements of the same process of expansion outwards from European centers of authority and influence.

Almost from their inception, therefore, the common laws of Europe were common laws of the world, and everywhere demonstrated the same essential characteristic of a common law, that of yielding to local forms of normativity. Local laws beyond Europe were as difficult to displace as those of Europe, and nowhere in the world has it been possible for European common laws to displace, for example, the unwritten law of chthonic or indigenous peoples.<sup>39</sup> Nor was it possible for the common laws of Europe to displace the law created for and by the European settlers, who often rebelliously created their own "common law" in opposition to that advanced by European authority.<sup>40</sup> So in the colonized world (the whole world, with rare exceptions), there were multiple laws applicable within the same territory, just as there were multiple laws applicable within the same territory in Europe. At least one of these laws was a common law; the others were particular laws, particular to a people, a place, and a domain of law. The process of choice of law was vast and important, and enormous attention was given to the purported and necessary reach of both particular and common laws, in particular subjects and for particular people. There was no territorial uniformity, and this legal reality continued to prevail even through most of the period of legal nationalism of the last two centuries, in spite of the attention given by legal theory to the process of state construction and state uniformity. In very few jurisdictions of the world did national legislation bring about national legal uniformity.<sup>41</sup>

What effect did the measures of legal nationalization of the

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38. *Id.* at 267. Also, for a discussion of the continuity between the Spanish *Reconquista* and the Spanish conquest of the Americas, and of how "this tradition" forms "a unifying theme in Spanish history," see *id.*, and for the early development of a "frontier movement" within Europe, see DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* 132 (1981).

39. See GLENN, *LEGAL TRADITIONS*, *supra* note 25, at 80-84.

40. See PETER KARSTEN, *BETWEEN LAW AND CUSTOM* 4, 35, 186, 498, 529 (2002).

41. For a description of legal diversity within the civil law of France, even in the late twentieth century, as revealed by computer analysis of numerous court decisions in particular French judicial districts, see H. Patrick Glenn, *The Use of Computers: Quantitative Case Law Analysis in the Civil and Common Law*, 36 *INT'L & COMP. L.Q.* 362 (1987) (revealing regional forms of jurisprudence within France).

nineteenth century—such as codification and national concepts of *stare decisis*—have on the common laws of the world? It is an important question for the concept of transnational law. What is the reach of national law? It is everywhere recognized to be purely territorial, in the absence of express legislative intention otherwise and the means of giving judicial effect to that intention. So the jurisdictions of the world which gave rise to the common laws of the world were themselves unable to control, capture, or eliminate those common laws of the world by their own territorial legislation. The common laws of the world thus floated away from their original sources and, once liberated, became impossible to control in their entirety. This became obvious with all of the common laws known within Europe, and even with some of more recent vintage.<sup>42</sup> English common law is thus obviously today of transnational dimensions, and the transnational “judicial dialogue” in the so-called “common law world” is today intensifying after a certain decline in the middle to late twentieth century.<sup>43</sup> The transnational character of continental common laws continued to be evident in spite of the process of national codification. The French Civil Code became the national law of France, purporting to be uniform in character, but in much of the world (North and South America, Africa, Southern Europe, the Middle East, South-East Asia) became a source and ongoing model for local legislators and judges. The normative force of the French Civil Code, as a common law, was extraordinary, and all with no pretence of “binding” beyond French territory. The *Siete Partidas* is still being cited by judges in the South of the United States, to say nothing of Latin America, since it continues to be recognized as law, though again with no pretense of “binding.”<sup>44</sup>

There are even world common laws which developed their characteristics as such at the world level and not initially within Europe. This is the case for what may be designated as “Pandectist” common law, in the form of the enormous influence in the world of nineteenth- and twentieth-century German doctrine and legislation, which has been “received” in Japan, China,

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42. See GLENN, *ON COMMON LAWS*, *supra* note 19, at 53-56.

43. GLENN, *LEGAL TRADITIONS*, *supra* note 25, at 257-58.

44. See, e.g., *DeSambourg v. Board of Comm'rs*, 621 So. 2d 602, 606 (La. 1993) (citing *Las Siete Partidas* as shaping the First Civil Code adopted by the Territory of Orleans).

Greece, the Mexican state of Quintana Roo, and many other places.<sup>45</sup> Roman-Dutch law is also the product of world expansion of the law of the Dutch province of Holland, itself never a common law within Europe, but still today a major transnational common law.<sup>46</sup>

Under the influence of positivist and statist legal theory the actual operation of these common laws of the world has often been considered an extra-legal or sociological phenomenon.<sup>47</sup> It is rather the simple continuation of operation of laws which were never considered “binding” even at their inception, and which have continued their influence and dialogical relationship with particular laws, now including the “binding” laws of states, throughout their entire historical existence. All of the state law of the world thus nests within one or another of the common laws of the world, which provide language, concepts, persuasive authority, and models for judicial and legislative activity at the level of individual states.

Common laws thus constitute the law prior to states, and law which continues to nurture and support the legal endeavour within all contemporary states. There are also, of course, relations between the common laws themselves, though these are more difficult to trace and determine. They are relations of influence of non-binding laws, and the influence takes places across languages, religions, and geography. They are not what is often described today as “soft law,” but rather what has always been accepted as law, though it does not purport to bind.<sup>48</sup>

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45. See Rainer Grote, *Comparative Law and Teaching Law Through the Case Method in the Civil Law Tradition—A German Perspective*, 82 U. DET. MERCY L. REV. 163, 165 (2005) (noting that the Pandectist school's aim was the dogmatic and systematic study of Roman material).

46. See, e.g., MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE: PROPERTY AND OBLIGATIONS IN SCOTLAND AND SOUTH AFRICA (Reinhard Zimmermann, Daniel Visser & Kenneth Reid eds., 2004) (discussing how Roman-Dutch law, brought to South Africa by the Dutch East India Company, was infused with and remolded in part by the common law of England).

47. See, e.g., PIERRE LEGRAND, FRAGMENTS ON LAW-AS-CULTURE 85 (1999) (“[T]he decision to alter a local institutional framework at the level of formal rules, and to do so through borrowing, is first and foremost a function of a cultural engagement . . . .”); Heinz Klug, *Transnational Human Rights: Exploring the Persistence and Globalization of Human Rights*, 1 ANN. REV. OF L. & SOC. SCI. 85, 85 (2005) (describing a “socio-legal approach” to human rights).

48. See Orly Lobel, *Surreply: Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 506 (2004) (“Primarily international and European legal scholars have used the term ‘soft law’ to name the shift to governance as a whole.”); see also John

Transnational common laws thus contribute in a unique and important way to the laws of nation-states, and this dialogue is matched by the dialogue which takes place amongst the common laws themselves.

### III. THE DIALOGUE OF TRANSNATIONAL COMMON LAWS

How do common laws undertake a dialogue, however, with the large, dumb animals which national legal systems would be, according to positivist legal theory? How does one engage in normative debate with a large and apparently silent fact? It does involve a reconceptualization of state law, which can no longer be seen as an unchallenged, autonomous social reality. Rather, state law must be seen as an ongoing normative construction, drawing support from all possible sources.<sup>49</sup> It must be seen again as it is and always has been, a particular, variable and contingent instantiation of a common law, or even in some cases, of common laws. The state is thus an informational node within a larger body of normative information, or more precisely, legal tradition.<sup>50</sup> There is normative information within state law, as all lawyers know, and it is not limited to the precise content of particular rules. It also relates to the imperative or non-imperative force of such rules, and the reasons for their application. If such imperative force of state law can be found and justified, it will prevail against the common law which serves as its foundation and ongoing supplement. This is the teaching of all of the common laws, but they remain constantly available in the face of doubt as to the applicability, or adequacy, of particular (state) laws.

The existence of a large field of non-imperative state law is becoming clearer in the face of normative demands coming from within and without the state. It reveals itself as classic *ius*

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Packer, *Making International Law Matter in Preventing Ethnic Conflict: A Practitioner's Perspective*, 32 N.Y.U. J. INT'L L. & POL. 715, 718 (2000) (commenting that the "hard" and "soft" law distinction refers principally to the quality of the standards in terms of their sources).

49. For a description of law as an ongoing inquiry, see H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 288 (1987) [hereinafter Glenn, *Persuasive Authority*] ("There is never a closing of sources, never a declaration of satisfaction with existing knowledge, never a pure process of deduction from a single given, never an entire commitment to an exclusive paradigm of law.").

50. See WALTER C. OPELLO, JR. & STEPHEN J. ROSOW, *THE NATION-STATE AND GLOBAL ORDER: A HISTORICAL INTRODUCTION TO CONTEMPORARY POLITICS* 263 (2004).

*dispositivum*, at the disposition of the parties but not to be imposed upon them. So there is a recognizable phenomenon of “contractualization” of fields of law previously seen as fields of state regulation, which may or may not have gone too far.<sup>51</sup> What is essential is recognition of a field of law (whatever its boundaries at a particular time) where state law itself acknowledges its non-imperative, or even incomplete, character. Parties are thus free to create their own law, to invoke the law of other states (even in purely “internal” situations), or even to invoke non-state law, which parties now do in constructing so-called “islamic mortgages.”<sup>52</sup> state law does not exist as simple fact, silent on the terms and conditions of its application. It gives reasons for its application, or non-application, and the application of common laws will vary according to state claims of imperativity.<sup>53</sup> Legal systems, as products of normative common law traditions, thus share the normative character of those traditions. They may claim factual existence, but this itself is a normative claim, and in any event the boundaries and application of the system are always subject to normative debate.

The vigor of the common laws of the world will thus vary according to the claims of state law. This is part of the teaching of common laws, which are thus self-effacing to the point of apparent disappearance. Some states have entirely rejected the application of law other than their own.<sup>54</sup> All the law of such states would be imperative. Party choice of foreign law is then “impossible.” Communist states have thus been radically territorial in character, as were the “import substitution” states of Latin America.<sup>55</sup> There has also been great variation over time in openness to common laws of particular states. In the nineteenth

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51. See, e.g., Kenneth J. Vandavelde, *Ideology, Due Process and Civil Procedure*, 67 ST. JOHN'S L. REV. 265, 279 (1993) (discussing the contractualization of tort law); Jennifer Wiggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 299-300 (discussing the contractualization of family law).

52. GLENN, LEGAL TRADITIONS, *supra* note 25, at 184 (noting that islamic financing is increasingly present in the world). For an overview of islamic financing, see generally Gohar Bilal, *Islamic Finance: Alternatives to the Western Model*, Fletcher F. World Aff., Winter-Spring 1999, at 145.

53. See Glenn, *Transnational Concept*, *supra* note 5, at 850 (noting that statist theory is the result of a long Western tradition).

54. See *id.* at 859 (stating that where legal convergence is resisted, state law is often conflictual in character).

55. See H. Patrick Glenn, *Harmonization of Laws in the Americas*, 34 U. MIAMI INTER-AM. L. REV. 223, 229 (2003).

century, many European states enacted provisions precluding resort to foreign sources of law, and notably the doctrinal sources of the *ius commune* upon which they had extensively relied in the past.<sup>56</sup> The United States was extremely open to European common laws—of both English and continental origin—in the nineteenth century, went through a period of closure in the twentieth, and is now opening again, though the immediate outlook is not clear.<sup>57</sup> This is a controversial process, but it is the case that all parties to the debate rely on concepts which are rooted in transnational common laws, the concept of the ongoing availability of common law, and the concept of priority of particular or state law, to the extent of national invocation of it.

The variability of openness to common laws will also vary according to particular fields of law. In some areas of law the law of a particular state will be highly developed and there may well be a period of apparent self-sufficiency. This is usually not of long duration. Today, few if any states claim self-sufficiency and existing ultimate solutions in fields of human rights, biotechnology, industrial property, corporate governance, or even civil procedure.<sup>58</sup> This explains the “judicial dialogue” now taking place in these fields, and the ongoing attention to legislative re-formulations of existing law. Resort to “best practices” which are of transnational origin is of course facilitated by common language and common concepts, and this is what each transnational common law provides.<sup>59</sup> In public law, communication is thus facilitated by “a similar conception of constitutional values . . . certain institutional arrangements as well as a particular interpretive

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56. See GLENN, ON COMMON LAWS, *supra* note 19, at 46.

57. See generally Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 Wm. & Mary L. Rev. 743 (2005); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEORGETOWN L.J. 487 (2005); Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763 (2004); Donald E. Childress III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003); Glenn, *Persuasive Authority*, *supra* note 49, at 277; M. H. Hoeflich, *Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey*, 1984 U. ILL. L. REV. 719 (1984); Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403 (1966).

58. See Glenn, *Transnational Concept*, *supra* note 5, at 852 (stating that application of state law must be justified in the face of alternative persuasive authority).

59. See *id.* at 856.



methodology”<sup>60</sup> and all of this is inherent in the particular common law that is invoked, in case of need, by the actors of a particular state. They form part of a contemporary epistemic community, by virtue of their adherence to a particular transnational common law.

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60. Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 3, 4 (Vicki C. Jackson & Mark Tushnet eds., 2002).