

1972

## Common Mind and Common Law, as Basic Commonwealth

Harold H. Punke

---

### Recommended Citation

Harold H. Punke, *Common Mind and Common Law, as Basic Commonwealth*, 6 INT'L L. 635 (1972)  
<https://scholar.smu.edu/til/vol6/iss3/15>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## Common Mind and Common Law, as Basic Commonwealth

Commonwealth as government, ordinarily refers to a substantial group of people with a common body of goals and ideals who occupy a defined geographical area. While disputes over geographical boundaries occur, such boundaries may be the most concrete aspect of the idea of commonwealth. From a map persons can usually get a fairly clear idea of the geographical territory involved, but the content and scope of the common culture are more indefinite and may be more changeable.

The following discussion considers the general culture in terms of the common mind or central trend of group values and aspirations, and in terms of the common law as the regulatory framework which the group establishes to guide its future.

1. *Common mind*—It is important at the outset to differentiate the idea of group mind or common mind as a social concept, from the idea of brain and neuro-muscular system as a biological entity that is largely in control of a person's organic behavior. While it is fairly easy to think of common mind in terms of such elements as a common language, history, literature, tradition, religion, heroes and folklore, trade and travel, economic and monetary system, occupational opportunity, educational system, etc., complications arise when it is noted that several elements, which are often thought to constitute major aspects of a culture, vary substantially within a group that is ordinarily considered to be fairly homogeneous, while other elements are found to exist both within and outside that particular group.

For example, Switzerland has substantial language variation, as do Russia, India and Belgium, whereas several countries use the English language without using the English monetary system, accepting the English system of social class and education, or the English conception of national heroes and international relations. Several countries with significant cultural diversity are in varying degrees coordinated as to military, or some other

---

\* Emeritus Professor of Education, Auburn University, Auburn, Alabama. B.S. and M.S. Univ. of Illinois; Ph.D., Univ. of Chicago.

common interests through such arrangements as the North Atlantic Treaty Organization, the European Common Market, the Warsaw Pact Nations, Southeast Asia Treaty Organization, World Monetary Fund, Pan American Union, world wheat and coffee pools, international organizations to regulate traffic in narcotics, etc.

The foregoing illustrations indicate that "common mind" is a rather fluid and shifting abstraction, both as to content and to direction of movement. While fluidity is essential to growth, it can also be a prelude to disintegration. And when nationalism is a strong competing element among cultures, some strongly nationalistic groups are continuously on the look-out for ways to cause disintegration within neighboring cultures in the hope of their own expansion through adding loosened fragments. German minorities in parts of southeast Europe during Hitler's time afford one illustration.

More current illustrations may relate to "overseas Chinese" in Southeast Asia, the India-Pakistan struggle over religious differences and over East Bengal, the Irish Republic and the Irish Catholic struggle in North Ireland, or De Gaulle and gestures as to "Free Quebec" in Canada. Ambitions for expansion nurtured by the leaders of some cultures are thus posited on the disintegration of other cultures. The "divide and conquer" philosophy in international relations is not new, and recent action by countries such as India and Russia indicate that the practice is not entirely historical. To some extent the idea of splintering, perhaps in developing readiness for subsequent conquest, was promoted by the doctrine of ethnic self-determination associated with Woodrow Wilson and the outcome of World War I.

General expansion in knowledge and in technological developments, will probably stimulate further growth and integration in some cultures, and contribute to disintegration in others. When certain cultures of the world assume increasing leadership in scientific research and the associated application of knowledge, other cultures expand their ideational, economic, and other attachments to those cultural leaders. Perhaps at present the United States, Russia, West Germany, Japan and China, in varying degrees occupy leadership status. The location of tracking stations in various parts of the world, associated with space exploration, offers one illustration; as does the distribution of "moon soil" to research laboratories in several countries.

But within the so-called leadership cultures, it is important that the new knowledge and other technical developments become incorporated as a part of the general cultural background of the common people. This applies

to concepts of freedom and opportunity as well as to the more directly material aspects of a living standard. In America there is currently some anxiety about cleavages associated with race and social class, with consequent erosion of solidarity or neglect of the common mind element.

A significant point is that with growth in the number of facets or ramifications of a culture, there can be more fissures along which fragmentation or disintegration may occur, but also more strands which may be tied together in unifying and strengthening that culture. However, it is unrealistic to assume that the unifying needs will appear automatically. Such an assumption resembles a presently discarded view of *laissez-faire* economics—that if every individual engages in maximum pursuit of his own selfish interests, the total outcome will by some magic produce the greatest community well-being. Without substantial planning and coordination, disintegration of the fruits from past coordination is more likely than further coordination which includes the diverse new additions.

2. *Common law*—Two major connotations of the term “common law” seem to be in rather frequent use in the United States. One conceives of common law as essentially the same as case law, developed through an accumulation of court rulings which relate to fairly clear principles for regulating conduct. Some of the principles are presumed to be embodied in legislation, others are not. The other connotation relates to the general development and flow of custom and tradition, which has accumulated over a longer period of time than that represented by formal legislation, and which in a quite fundamental way constitutes the background out of which legislative debate and formal enactments arise. The case law then constitutes an effort to harmonize the legislative statement with the rather subconscious habit-value system embodied in custom and tradition. It is with the second of the two connotations that subsequent remarks are primarily concerned.

When a judge says that such-and-such has been the attitude and practice since “time out of mind” or so long that “the memory of man runneth not to the contrary” he is doing two things: stating what he thinks the custom is or requires, and stating that he does not know how or when the custom arose.

So it is with most customary values and practices. Few if any people actually know how those values and practices arose, and only a few students of anthropology and social philosophy attempt to figure out, or to speculate, on how they might have arisen out of environmental settings that previously existed. Through the common process of growing up, and associating with others of the culture who rather subconsciously live according

to the customs and practices of the culture involved, those customs and practices become the common property of everybody in the group.

Migration, an influx of persons from other cultures with different backgrounds, geographical changes in the environment, creative or rebellious imagination on the part of some members of the group, accident or chance, and probably other factors contribute to expanding and modifying the stream of custom and tradition as it flows from one generation or century to another. The flow and contouring are perhaps more like that of a glacier than like that of water.

In the foregoing sense, the body of common law, under which we now live in the United States, includes elements which emerged in the Indus Valley, Persia, Egypt, etc., before the days of literacy. The contributions of the Greeks and Hebrews were not confined to reflections which appear in such items as Plato's "Laws" or in the Old and New Testaments, but the practice of writing made it possible to state the content and the intent of customs more explicitly, and brought them to the east end of the Mediterranean, from which they could more readily spread westward through Phoenician and Roman influence.

Spanish and English colonists were the most prominent representatives of Western Europe in bringing customary practices of the Old World to the New World, and in shaping them to the new environment. Other coastal areas of Western Europe made early contributions, as did the subsequent millions of immigrants—especially from Germany and other parts of Central Europe. But the colonists and early immigrants incorporated much from the American Indians, as did successive generations of persons with European ancestry, as white settlement and control moved westward across the continent.

Custom-shaping and transforming contributions from the foregoing sources, as well as from Negroes of African origin, varied considerably among different parts of the country. Regional differences in geographical conditions, as well as in cultural background of settlers, led to substantial variation in customs and traditions in the different regions. However, expanding facilities for communication—of people, ideas, merchandise, etc., are continuously decreasing the regional differences within this nation. But at the same time, communication and other developments which are sometimes referred to collectively as cultural enrichment, continuously increases the areas to which custom and tradition typically relate.

Among other things, the foregoing developments mean a continuous expansion of the common mind or common body of information, competencies, and expectations of the American people, as well as expansion

in the body of customary practices and values, and a growing similarity among regions as to the content and scope of the common mind and the body of common law. These developments also mean that the formal legislative crystallizations, that emerge from the expansions noted, become more nearly alike over the country. One change in pattern of crystallization is that more of the regulatory flow originates at the central fountain of the federal system, and less at the local spigots around the country.

A major note in the present connection is that the various items of mind and custom which have been noted in foregoing comments, are elements in broadening the commonwealth of the American people—both with regard to concrete or material elements, and with regard to common ideals and common aspirations.

3. *Worldwide commonwealth*—It requires only a reasonable further expansion of knowledge, material production, and communication or distribution, and a very moderate expansion of imagination, to project the foregoing comments on American commonwealth into a conception of worldwide commonwealth.

Research and experimentation are rapidly expanding the rate at which knowledge grows, and satellite communication rapidly expands the rate at which new knowledge becomes a common possession in all parts of the world. Moreover, industry is continuously augmenting its worldwide facilities for producing goods and services, and for extending its productive facilities into the lesser developed countries; whereas trade, monetary, and loan arrangements broaden the areas of distribution. In addition, facilities for air and other travel, for education and advanced study on an international basis, for conferences held by technical and learned societies and for the circulation of their research and other publications, broaden world desire to participate in the development and use of knowledge. Other influences could be noted, which contribute to developing the common mind on a worldwide basis.

To a considerable extent common bases of thought and association generate common values, as well as common ideas about the kinds of regulations that will help to translate value aspirations into functioning realities. The continuous process of translating, preserving and revising of such regulations, is essentially the process of developing and expanding the common law. Common ideas about regulating individuals, domestically and internationally, could be a great influence in shaping the regulatory framework of worldwide commonwealth. Thus the three areas of growth emphasized in the present discussion are mutually supporting and mutually promoting: common mind, common law, and commonwealth.

While the foregoing comments have included numerous references to change and development, the quest for certainty is a deep-seated trait in human personality. This can be noted if one observes the tendency of our predecessors to think in terms of absolutes, eternal, rock of ages, fountains and recipes for unending life, etc. Such phrases as absolute truth, absolute justice, absolute power, absolute monarchs, absolute religions, absolute purity (minerals, water, morals, etc.), absolute accuracy, eternal verities, etc., illustrate the point. In addition to an immature mind being unable to think in terms of relative or shifting criteria of evaluation, absolute terms such as noted indicate amateur tools for measuring or evaluating human and other relationships. They suggest inability to make refined differentiations.

Consideration of absolutes, along with earlier comment on movement toward a worldwide common law or commonwealth, may justify a question as to whether there is any such thing as an absolute common law—worldwide in scope, and permanent in applicability. Several thinkers in the field of human regulation have found comfort in the idea of final and absolute statements in this area: Cicero referred to eternal justice. Hammurabi, Moses, Justinian and other formulators of “codes,” seemed hospitable to the idea that they were doing a comprehensive and permanent job. Perhaps some modern dictators have nursed similar provincial illusions as to their constituting the final stage in man’s struggle upward from ignorance and the cave. By contrast, the compilations which present-day American state or federal legislators may refer to as “codes” are intended to be “dates summaries,” to be expanded and revised in the light of further experience.

Some diluted versions of absolute law have appeared during recent centuries under such captions as natural law, higher law, God-given insight, holy writ, divine law, eternal king, etc. It may be helpful at this point to think of such terms as reflections by the persons who use them, of efforts to make their pronouncements seem as important and commanding as possible. Hence, the appeal to enlist the support of the greatest power which the culture of the time has been able to conceive. This comment is not to disparage the efforts of our predecessors, in view of their rather limited historical background and often limited contact with the contemporary cultures which differed from their own, but to view such terms as labels for milestones along an endless road of development. If our successors do not develop more adequate concepts and more discriminating tools than we now use, their prospects for growth will be limited.

Perhaps the most stable factor in any consideration of a permanent

worldwide common law or commonwealth, is man's fairly stable biological organism. Biologically, humans seem to be about the same now as they were 10,000–20,000 years ago. But statements of this kind involve a large concession to ignorance. In the first place our knowledge concerning human biology as of 10,000 years ago is quite meager and vague. Moreover our knowledge of the organism today, including individual differences, is far from approaching completeness—especially with regard to the structure and potential of the brain and central nervous system. The relative future prominence of different genetic strains among humans, or the areas of unexplored genetic and other biological potential which may develop, are essentially in the world of dreams and fantasy speculations.

Thus, as man learns more about his own organism and about developing its potential, and more about the content and possible uses of his physical environment, the common mind and commonwealth of mankind may move in directions that cannot now be surmised. So, although there may be no remaining isolated geographical or cultural regions in the world to be drawn into the general stream of group-mind development, uncertainties because of a growing wealth of diverse possibilities will probably become of increasing importance.

But in spite of the fact that man's future promises little pay dirt for persons who would nurture hopes of absolute stability and permanence regarding such concepts as common mind, common law and commonwealth, it is possible for such concepts to become much more inclusive and meaningful than they are now—through expanding the areas included, along with including the idea of infinite possibility and infinite hazard as to future growth and development. The declaration of human rights by the United Nations may embody one clue.