

# How Common was the Common Law?

The Second Dodderidge Lecture, delivered on 6<sup>th</sup> June 2011,

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## *Some preliminary remarks*

It was a huge pleasure, and an honour, to be invited to deliver this lecture. When asked to provide a version for this site, however, I was faced with some problems. My original lecture was delivered, as is my normal practice, not from a written script but from a few notes and headings, incomprehensible to other readers and, indeed, often to me. To write it up in a fully polished form would take an amount of time which I do not have at the moment. My solution then is a compromise, in that it takes the form of an expanded set of notes. The reader, it is hoped, will be able to supply the elegant connected narrative which I can here pretend to have provided. References are minimal in nature and frequency. Unfortunately copyright reasons mean that pictures (legitimately!) displayed to illustrate the lecture cannot be reproduced in a more enduring form here, and in particular the lack of images of the autograph manuscript of Sir John Dodderidge's *The History of the Ancient and Moderne Estate of the Principality of Wales etc*, which I was delighted to come across in the National Library of Wales, is to be regretted. The lecture was intended to challenge too easy assumptions about the universality of the common law. It is, of course, overstated: having taught it for many years I do not believe the Common Law to be unimportant! The provocation, moreover is also, as a corrective to some of the more detailed work which has occupied me in recent years, presented within a survey of greater breadth than depth. Yet I am happy to stand by my call for balance and for nuance; for many (poor people, women, burgesses, the Welsh) at different periods and in certain respects the Common Law, despite its propaganda status, was not a system that was fully theirs. To ignore this fact is to run the risk of ignoring them.

I would appreciate it if you would acknowledge this work if it proves useful to you. You may e-mail me on [rwi@aber.ac.uk](mailto:rwi@aber.ac.uk) for further information.

## ***What was the Common Law?***

This isn't just a silly question. My students are good at telling me what it *isn't* (Equity, say, or Civil Law) or where it comes from (judge-made law) rather than what it was. But, of course, unless we know what it is, we can't say when it came into being, or how far it extended. I take it here then as meaning a body of law common to the whole of the jurisdiction (as opposed to variant local custom) and enforced through the royal courts

## ***When was the Common Law?***

Fortescue, writing in the fifteenth century, famously takes it back to the ancient Britons<sup>1</sup>. Blackstone in the eighteenth thought the customs and maxims of the Common Law "of higher antiquity than memory or history can reach", but stressed the role of Alfred via Edgar and

Edward the Confessor<sup>ii</sup>. On the other hand Maitland famously declared that “The Norman Conquest is a catastrophe which determines the whole future of English law<sup>iii</sup>” though his own account makes much of the reign of Henry II (1154-1189). So too does Van Caenegem, who urges that the reign of Henry II, although producing no new essential elements of the Common Law, was the time when all began to “work like a system”<sup>iv</sup>. John Hudson feels that the key elements were in place by 1135<sup>v</sup>. Other recent scholars too have pushed the search back a little, though not in the same spirit as Fortescue. Wormald, as an authority on Anglo-Saxon law, argued that: “English justice by Edgar’s time [ie the tenth century] was much more like that of Henry II’s than so far supposed...there was no ‘marvellous suddenness’ about the emergence of English Common Law”<sup>vi</sup>. Baker is his usual measured and authoritative self: “The common law emerged in the twelfth century from the efficient and rapid expansion of institutions which existed in an undeveloped form before 1066”<sup>vii</sup>.

Such differences may indicate a little more than simply shades of emphasis. Perhaps it is time to think about some issues which are rather more functional than narrowly chronological. Firstly it must be conceded that we have to accept that questions around the emergence of a system are those of evidence as much as fact: that we are sure that things are happening only when we have clear, generally documentary, evidence of their occurrence. Yet absence of evidence is not the same as evidence of absence. The profusion of records of a later period may dazzle us into thinking that what they record had no parallel at a time of predominantly oral transmission. This may not be the case. Yet as obvious and as important as that is, it provokes another important observation. For the technology of writing does in fact change the world, and it changes what law is and what lawyers do: when law is written down it becomes a matter for experts (see Paul Brand on this<sup>viii</sup>) rather than old men with long memories. Paradoxically, for those who argue that oral custom is inflexible, anthropological evidence suggests that in fact it may be more malleable than the process (albeit it reviewable one) of hardening norm into script. Whilst the main point of this lecture is to challenge the first word of the pairing “Common Law” it should be clear that the second term (though I do not think that a traditional jurisprudential answer by definitional *fiat* is helpful) is not without its problems. A similar functional difficulty of definition arises when we consider issues of proof. In a brilliant and influential argument Milsom urged that law cannot be separated from fact and neither can be properly expounded for as long as “irrational” proof (ie principally ordeal and battle-I had some lovely pictures here) prevails<sup>ix</sup>. There is important truth in this, though personally I think the dichotomy rather overstated-we know (eg from Glanvill) that there was argument and discussion before such proofs were resorted to, though their content was not recorded (so go back to the first point of this paragraph, then the second, again). How far can we separate a question of the emergence of a new form of law from a new judicial system, from a new set of procedures, a new system of proof, a new technology of capture. Which of these do we privilege? I don’t know (though I incline to bureaucratic reduction to writing) but I do think that it hints at problems in asking when the Common *Law* emerged.

Enough of this quasi-philosophical, quasi anthropological obfuscation! Let’s just agree that Common Law exists from, at latest, the end of the twelfth century.....

Does it? We have to move into even murkier waters-its extent *horizontally* across the country, and *vertically*, the distribution of its usage through society.

### *Horizontal Distribution*

Land is, axiomatically, crucial to the Common Law. So when Henry II gives external (ie to lordship), Common Law enforceability to inheritance rights we have a very important moment in our development. But who inherits? Primogeniture is the law. But not in Kent. Not in Wales (infra) and not in Exeter! Here's a case from the 1272 Exeter Court Roll, which records concerning the land of one Jordan "After whose death the right to the whole of the said tenement descended to one G and M his sister, wife of the said J the Barber as the son and daughter and sole heir of the said Jordan"- this is "Propartia" inheritance, and the singular "heir" is interesting, but not something I wish to pursue here<sup>x</sup>.

Boroughs, like Exeter, have their own customs; the Common Law is the product of a rural society, not an urban one. Let's leap ahead by a long way for a moment. By 1851 Britain (as the census of that year shows for the first time) isn't, rural any more. The borough anomaly has to be addressed when it is no longer an anomaly (and the attitude of the terribly polite but fiscally dubious authorities of Exeter forms a nice part of the preliminaries to the Municipal Corporations Act of 1835)<sup>xi</sup>. By then, of course, statute has taken over from the Common Law in many areas of regulation, a process of great importance, which I'm happy to leave hanging here, for you to think about. (I did a wholly unscientific survey of the numbers of volumes of statutes in the Aber Law Library, it goes 5 vols pre-1750, 25 vols 1750-1850, 43 vols 1850-1900).

Ah yes, but the Borough *was* anomalous, you cry. But Common Law (at different times and to different degrees) doesn't go to other places either, not simply fairs and markets, the palatinates or the monasteries, but its property rights don't go inside the matrimonial home to touch the married woman, or inside the manor to those either personally unfree (villeinage *de sank*) a status still not entirely obsolete in the sixteenth century, or holding their land by unfree tenure, which received Common Law protection at about the same time. For these latter class of people the custom of the realm was, to a great extent, less important than the custom of the manor. "Exceptions", mutters the Common Lawyer, "exceptions!", with all the certainty of the football "supporter" who thinks that the game is only played in the Premiership. I can't go into any of these "exceptional" areas in detail here. But it's another exception, the position of Wales I want to talk about mostly, because its legal history is still ignored by most people who talk and write about legal history - a failing which it's not just parochialism on my own part to point out. I suspect the majority of British Law students graduate without any knowledge at all of the legal history of their nearest neighbours<sup>xii</sup>.

Sir John Dodderidge certainly didn't ignore Wales. In his work he wrote of the medieval tradition of (let it be pointed out, *written*, law of the Welsh): "The Principality.... was gnyded, gouerned, and directed by their own municipall and homebred Lawes and the Customes of their Country. Most of which had their commencement from the Constitutions one of their ancient princes called Howell Dah"<sup>xiii</sup>, that is, *recte*, Hywel Dda, tenth century king with whose name our medieval Welsh legal manuscripts, though all our copies are later in date, are linked. Welsh Law was not English (see the picture of the judge in the beautiful NLW Peniarth 28, the very copy used by Edward I's Archbishop Pecham, who condemned Welsh Law for being contrary to Old and New Testament, on the National Library of Wales website). Welsh Law was very different

from Common Law. Its importance was not a short-lived, we'll see it being invoked as late as the nineteenth century

After the uprising of Llewelyn ap Gruffudd in the thirteenth century, Dodderidge wittily tells us that Edward I “made a finall and full conquest of Wales....Although the Welsh nation doe not willingly acknowledge such conquest, but referres it rather to composition”<sup>xiv</sup>. Edwards’s new legal regime was proclaimed in the 1284 Statute of Wales, or Statute of Rhuddlan. In fact the statute didn’t apply to all Wales nor does it apply exactly the same law as in England. The Marches (the various lordships not brought within the new regime), continued to employ a whole range of customs, including portions of the law of Hywel Dda, employed until all “sinister customs and usages of the Welsh” were abolished in 1536. So back to the Common Law then! Phew, we’ve got there!

Except..... If we are concerned with institutions rather than substantive law we ought to remember that separate courts continue to be used. The Council in the Principality of Wales and Marches exists (dropping jurisdiction over neighbouring English counties in 1604) until 1689, and the important civil and criminal forum of the Court of Great Sessions in Wales (not including Monmouthshire!) until 1830

OK Now we’re there! We’ve got a Common Law now, surely?

Except.....

### ***Vertical Distribution***

What I have in mind here is the degree to which the Common Law penetrates through the social structure (indeed, all “official law”. Actually I’m going to cheat a bit here, and move into a concentration on criminal law because it’s what I know best. I would be amazed, however, if it were impossible to find local arrangements concerning land, contracts and the like which operated outside the rules of Common Law). This is a massive topic, but I want you to at least think about it (although I can think of some legal historians who would be happy to exclude it from their analysis, leaving it perhaps to the lower ranks of “social historians”. I wouldn’t buy a used car from this sort of scholar –I’m not being rude, I mean it literally: they would be able to tell you everything in the handbook, but not know whether the car worked or not). Again I’m going to talk about Wales, but it’s not just in Wales that the law remains just one amongst many competing normative structures You think I’m going to talk about food-rioters or smugglers, but consider this case. In May 1833 the Chief Justice of Sierra Leone, Sir John Jeffcot, shot and killed Dr Hennis six miles outside Exeter. His three accomplices were tried (he had fled) and the judge clearly directed that they were liable for murder. They were acquitted. It was a duel. OK, it’s a late example, but not atypical of earlier standard practice<sup>xv</sup>.

In Wales the penetration of English Law is problematic. The differences of language, religion and local custom (some recalling, even explicitly invoking the laws of Hywel: use of the *ceffyl pren* was thought to be so justified as late as the nineteenth century) all resisted it. Crime was not reported to officials, leading to the Welsh boast of being the “gwlad y menyg gwinion”, the “land of white gloves”, after the traditional award to the (English) judge who presided over an Assize with no criminal business. Even in the face of murder local communities could, though they did

not condone the offence, unite against an outside force, as in the case of the slain Ruth Jones in Blaencwm in 1851, or that recalled by Parry-Jones, who describes the alternative sanctions, both fiscal and eschatological, visited upon a nineteenth-century homicide whose case never came before a court. And if they did come before the court the jury could, in Wales often did, routinely ignore the law and the evidence presented before them (John Harries was convicted in 1853 despite a direction that there was insufficient evidence, Esther Anthony, her alibi disproved and the clear evidence of two witnesses otherwise unchallenged, was acquitted in 1851, Ellen Donoghue was discharged by a Grand Jury without having to face trial, despite clear evidence plainly indicative of her guilt in 1861<sup>xvi</sup>). Admittedly rural Welsh juries (and defendants!) often did not understand the trial, because they spoke no English (how “common” can we expect law to be if it is in a language unintelligible to its subjects?), but I have argued, and still believe, that it was not only the necessity to form judgments on a basis other than that formally required, but also the existence of alternative norms of dispute settlement which might inform a verdict. The system of compensation (enshrined within the laws of Hywel, but of course not only a Welsh alternative to afflictive punishment, which subordinates the immediate interest of the victim to the manifestation of the power of the state) long survived the middle ages. We have mentioned the Parry-Jones reminiscence on this matter from the nineteenth century; let’s pick up a reference intermediate between the two. In a 1658 case subsequent to a rape Jane Gruffith said that defendant and his mother-in-law came to her to compromise, the latter affirming that Gruffith “should be contented for the wronge done her as neighbours should award”<sup>xvii</sup>. This is not an individual matter, but a communal one. So too was the *Ceffyl Pren* (the “wooden horse”, a communal ritualised extra-legal form of shaming punishment: Exeter readers may be more familiar with a related procedure, the “Devon Stag Hunt”<sup>xviii</sup>) still active in Wales throughout the nineteenth century (and indeed beyond, the practice of “whiteshirting” strikebreakers in early twentieth century industrial disputes is a horse of a not too different colour!). The case in 1851 of the legally acquitted “poisoner” Elizabeth Gibbs shows that invocation of popular penalty might be directly at odds with official versions<sup>xix</sup>. Remember, this is not individual, unstructured vigilante action. It is both communally (though by what proportion of a community is a moot point: neither am I suggesting it’s a wholesome exercise in social solidarity, it could be brutal and without safeguards for the “guilty”) structured and, as we have seen, might be supported by the (spurious in this case) invocation of a distinct legal tradition, the Law of Hywel.

### ***Conclusion***

As Fortescue knew, the invocation of the Common Law with its connotations of antiquity, reason and nationhood, has an important propaganda value. Our concentration on it, I have tried to argue, obscures the facts of geographical and customary variation, obscures - despite claims to flexibility - its limitations outside its favourite rural setting and better-off participants, ignores significant parts of a whole country’s legal tradition. That country, Wales, since the referendum of 2011, will now have primary law making powers. Its legal reality will no longer be able to be glossed over so glibly by the simple addition of the words “and Wales” to the name of its larger neighbour. It will again be constitutionally, as well as practically, a different legal system. We will be back to the question with which we started. When was the Common Law? I’ll let you know if we ever get one!

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<sup>i</sup> Fortescue *De Laudibus Legum Anglie* Ch xvii

<sup>ii</sup> Blackstone *Institutes*, 1.3

<sup>iii</sup> Pollock and Maitland *History of English Law* vol I, p.79

<sup>iv</sup> See Van Caenegem *The Birth of the English Common Law* Ch 1

<sup>v</sup> Hudson *Formation of the English Common Law* Ch 1

<sup>vi</sup> In Davies and Fouracre *The Settlement of Disputes in Early Medieval Europe* p.168, and see his other contributions.

<sup>vii</sup> *Introduction to English Legal History* p.12

<sup>viii</sup> Brand *The Origins of the English Legal Profession*, Chs 1 and 2

<sup>ix</sup> Milsom, in 17 *University of Toronto LJ* and subsequently in *Historical Foundations of the Common Law* Ch2

<sup>x</sup> Bateson *Borough Customs* vol 2, 21 *Selden Soc*, pp.132, 133.

<sup>xi</sup> See *Report of the Commissioners on Municipal Corporations*, 1835 p.498

<sup>xii</sup> There's no excuse now: See Watkin *The Legal History of Wales*

<sup>xiii</sup> *History...of Wales*. I have quoted from a 1630 printing. The manuscript, NLW MS100B, shows interesting differences from the printed version.

<sup>xiv</sup> *Ibid*

<sup>xv</sup> See Banks "A Polite Exchange of Bullets": *The Duel and the English Gentleman 1750-1850*

<sup>xvi</sup> Ireland in Watkin ed *Legal Wales: Its Past Its Future*, Parry-Jones *A Welsh Country Upbringing*

<sup>xvii</sup> Chapman *Criminal Proceedings in the Montgomeryshire Court of Great Sessions*, cases 412, 416

<sup>xviii</sup> On which Thompson *Customs in Common* Ch 8

<sup>xix</sup> Ireland "A Want of Order and Good Discipline" Ch 1 and in McMahon ed. *Crime, Law and Popular Culture in Europe 1500-1900*