

The Common Law Traditions

This afternoon we will talk of a belief in the importance of following the **law of the land-the law that has been created over a long period of time by your countrymen. The Common Law.** The common law is made up of the **documents and laws** that have been created over time in a particular country. Another way to think of this is that the common law is a combination of documents and judge made law. It is law that has withstood the test of time. It is the opposite of eternal and universal. It is historical and particular to a country. This is a **human construction.**

Common law principles in America were one of the mainstay's in public affairs. It was **part of the fabric of colonial life, written into colonial charters, and known to practically all who came from England.**

Antecedent Documents

The middle ages had governments that were authoritarianism but not totalitarianism. The kings were often restrained by the church. And even with the other royalty, (barons etc) the king was only the first among equals. The main source of the king's

power came from his **military might** and the military came from the members of the royalty who owed the king for land or privileges. The kings were often suspicious of the knights and barons, and the barons were often jealous of the king's wealth and power. All this kept Europe from becoming an absolute despotism found elsewhere in the world. Even with barons and knights who were obligated to serve him in wars, the kings still needed **money**.

In Thirteenth Century England, fortunately for us, the King was a very **grasping fellow, King John**. He was frequently engaged in wars and so frequently had to go to the Knights and Barons for manpower and **money**. Eventually they became resistant to his pleas for more money and King John tried to extract money by imprisoning the barons until they paid up.

John was forced to let the imprisoned royalty go and sign a document that he would act better in the future.

We call this document **The Magna Carta (1215)**. It is a pillar of our common law rights. It is considered the start of constitutional development in the West. The King had to grant rights to the British Aristocracy.

It was the start because it said that all-including the King-were under the law. It was the start because it divided political power (especially the power of the purse).

It established -the principle of the **supremacy of law** and the principle that if the king breaks the law, then he may be deprived of his powers. Another principle that came with this package was that of **representative government**. At first only royalty were representatives-but the principle, like topsy, grew and grew.

1. **Supremacy of Law**: All are bound by the rules in the charter

2. Special **taxes** could only be raised only with the consent of the barons-at the time the only representative body.

3. No free man could be **imprisoned** except by a judgment of his peers. Eventually this will lead to a fair trial and the demand that all should be tried by a jury of their peers.

We move to **1628** and the Petition of Rights.

PETITION OF RIGHTS

At about the same time that America was being settled by English people, England was engaged in religious and political wars that convulsed of Europe. In England the crown was fighting with the House of Commons.

The King of England James I, was, like King John, hungry for more money than parliament wanted to give. He finally resorted to taxation without Parliament's OK. He then went to martial law and imprisonment without a warrant (this was against a rule Magna Carta that said cases must be decided by law , not by personal whim of the King).

He still could not get enough **money**. So he decided to make **concessions to Parliament**. And in **1628** he signed another document - the **Petition of Rights** that became part of our common law and made Englishmen, including those who came to America, even more certain that they enjoyed the rights of Englishmen, and should fight for their rights.

He accepted something that was not a law but a petition. This document said that the king would stop taxing without the consent of Parliament, demanding

that private home be used to house soldiers, and imprisoning citizens illegally.

But Charles went back to his bad old ways and violated the agreement he had signed. This time Charles was beheaded (1649).

James fled and England eventually brought in a new set of rulers William & Mary.

Bill Of Rights 1689

This time Parliament acted with a new document The **Bill of Rights of 1689** firmly established **constitutional government** . The parliament felt that they were upholding the **traditional rights** of Englishmen against a monarch who was trying to usurp those rights. The new monarch was expected to swear their allegiance to this document. It established the **supremacy of Parliament** which was never again seriously challenged.

It demanded that Parliament was to be held frequently, that it was to stop: forcing citizens to **quarter soldiers** illegally, choosing unqualified **jurors**, requiring **excessive bail**, posing **excessive**

fines, decreeing **cruel and unusual punishments** of and---**levying money** without the consent of parliament.

Sovereignty had once and for all gone to parliament and representative government was firmly established.

The American colonies grew up after the acceptance of the Bill of rights of 1689. Those Englishmen in America took it for granted that this was part of their heritage.

There were also important philosophers who underscored these rights with their **philosophies**.

A few good men who supported the **Common Law Tradition**

18th century **David Hume**:

Hume was a philosopher and historian who emphasized the **role of experience** in setting up and maintaining government. He said that what we learn we learn through custom. We, in effect, perform long term experiments when we go through life. Society does the same. Individuals and society learn through experience, more so than through reason.

Looking at history we can learn the nature of man, and we should be guided accordingly. Going beyond this to set up and make important decisions regarding government is very dangerous. Pure reason is not to be trusted without the ballast of experience as learned in history. For example- should we set up a government that will create a perfect society? Let us look at history. **The 20th century contains many unhappy examples of people who just pictured or developed through reason the perfect society (communism) and proceeded to try and create such a world. The results are uniformly disastrous.** So we should learn from concrete experience and not try it.

His emphasis on experience, which is what the common law is, turned out to be just right for America. Common law means common experience.

Blackstone: The Used Law Book

Colonial America had no law schools in the 18th century. Very few of the lawyers in America had been trained in England.-so what was the main source of the knowledge of the law. In 1765 William Blackstone published a book called **Commentaries on the Laws of England.**

This became the law school and manual for American lawyers. It is from Blackstone that most Americans acquired their knowledge of the law: natural law, and the common law and the "chartered rights of Englishmen."

1. Blackstone starts by affirming **natural law**. Americans would use this to affirm their appeal to a justice that was higher than parliamentary laws. Blackstone said that "This law of nature being coeval with mankind and dictated by God himself is of course superior in obligation to any other. It is binding over all the globe, and all countries, and at all times; no human laws are of any validity if contrary to this; and such of them as are valid derive all their force, and all their authority, immediately from this original."

Blackstone was a champion of **ancient precedent and long-sanctioned usage**.

It was also **capable of growth** and adaptation since it was not confined to a written code.

This natural law declared "the absolute rights of man" and the natural liberty of mankind consisting of a. the

right of personal security" b. the right of personal liberty, and c. the right of private property."

Blackstone was conservative in the sense that he recognized limits and said the every man, when he entered into society," gives up a part of his natural liberty, as the price of so available a purchase... and obligates himself to conform to these laws which the community has thought proper to establish."

The colonists looked on the common law as the implementation of natural law, because it had grown out of the experiences and observations and successes of many generations ...John Marshall, who was to be the great first chief justice of the supreme court of the U.s. received a copy of Blackstone from his father when he was a child.

Edmund Burke

Edmund Burke was an 18th century English advocate of political prudence and compromise. Unfortunately the English government did not pay sufficient attention to what he had to say. After the Seven Years war (French and Indian) the English

government thought that the colonists should pay about one-third of the cost of maintaining troops in America. That seems to me to be reasonable. But the colonists thought otherwise. They didn't much like taxes and they really didn't like parliament telling them what to do- because they were not represented there. They wanted to be autonomous. They had gotten used to governing themselves and they liked it.

Burke wanted to work out a compromise which would leave the colonies alone.

Custom provided a firm ground for justice. Burke advised that England do what they had been doing and the colonists would remain friends and England would derive great economic benefits. Let the Americans retain the liberties they have always had and they will refrain from demanding independence, but push them and they will go for complete and absolute independence. The British government did not listen to him.

When he looked at the colonists he saw Englishmen asserting their "chartered rights of Englishmen. He saw no social revolution such as their was in France, no destroying of an old order that might have reformed peacefully... The French wanted to create a paradise on earth. The colonists, according

to Burke, just wanted to go on being left alone. The Americans, like the British, believed that society was a long term contract with the dead and the living. The American just wanted to go on keeping their "chartered rights" they had as Englishmen. They did this in the new country of the United States of America.

This country is the story of how a belief in the universal and eternal (natural law) combined with a belief in the particular history of a particular nation to create a country that has been, I think, a remarkable success in creating a country that has successfully created a world of freedom, democracy, and a fair amount of equality.