'Common Rights' - What are they?

An investigation into rights of passage and rights of land use (or rights of common)

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Abstract

There is a level of confusion relating to the expression 'common' when describing 'common rights'.

What is 'common'? Common is a word which describes sharing or 'that affecting all alike'. Our 'common humanity' may be a term used to describe people in general. When we refer to something 'common' we are often saying, or implying, it is 'ordinary' or as normal. Mankind, in its earliest civilisation formed societies, usually of a family tribe, that expanded. Society is principled on community.

What are 'rights'? Rights are generally agreed practices. Most often they are considered ethically, to be moral, just, correct and true. They may even be perceived, in some cases, to include duty. The evolution of mankind and society has its origins in the land. Generally speaking common rights have come from land-lore (the use of land).

Conflicts have evolved between customs and the statutory rights of common people (the people of the commons). This has been influenced by Church (Canonical) law, from Roman formation, statutory enclosures of land and the corporation of local government. Privilege, has allowed 'freemen', by various customs, certain advantages over the general populace, or 'common people'. Unfortunately, the term no longer describes a relationship of such people with the land, but to their nationhood.

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'Common Rights' - What are they?: an investigation into rights of passage and rights of land use (or rights of common)

The expression common right may be assumed to be a 'right' held equally by more than one[1]. It does not mean a right held by all. In the case of land use 'the commonalty' is a tract of open land, used in common by inhabitants of a town, parish, etc. Commonable is that held in common and the general body of people holding 'rights' (or common people) are referred to as the commonalty[2]. Common land is land over which there are rights of common. Such land is freehold but differs in respect from other freehold land in that its use is owned in severalty.

A 'right' to something may be gained, in customary law[3] after having, traditionally, practiced a certain action for at least twenty years. Normally a right by custom will have precedence dating from 'time immemorial'. Rights to land use are usually held in 'gross' by grant or prescription[4]. They may not necessarily be attached to any particular land. Such rights of use, tend to descend to an heir as an incorporeal hereditament.

The accepted 'right' to practice many activities today, originate in very early pre-recorded history. In many instances they are a form of tribal tradition. Such rights have come from the 'freedom'[5] to practice. In a sense, they are the privileges given to lawful people of good intent and 'free' birth. From the very earliest of times, throughout the world, people were born into slavery or servitude. Alternatively they were born, or became free[6] by purchase or grant, under the governance of a leader, lord, monarch or emperor.

A distinction between the free and unfree originated with the Phoenicians. Rome had its citizenship. In the Bible, St Paul recognised there were bond and free. References to this are made clear in Acts xxii, 28:

> "And the chief captain answered, With a great sum obtained I this freedom. And Paul said, But I was free born".[7]

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[1] *Chambers's Twentieth Century Dictionary* (1964) London: W & R Chambers.
[2] Ibid.
[3] Customary law - in accordance with custom (preempting English common law)
[4] Application of rights are described on pages 5 & 6.
[5] Ibid Freedom - by licence or by entitlement, without restraint.
[6] Freeman - one who enjoys the freedom of a borough [or parish] re *Hutchinson's Compact Encyclopaedia* (1990) London: Random Century
[7] Description of freedom used by Berry, A.W. (1987) *Sudbury's Freemen* Colchester: A.W.Berry p.1.

The Angles and Saxons were operating the principles of freedom and 'rights of use and passage' long before the arrival of Norman administration in England and Wales. Early nomadic Germanic tribes are considered by George Unwin[8], the authority on London guild history, to have introduced these customs. The germs from which have formed the borough constitution and subsequent local government systems of today.

Free men were independent only to a limited extent, normally they would owe services or pay rent to a feudal lord. They would be liable to serve in court (the Soke). Free men in turn, were under the valuable 'protection' of a lord. Cottagers, villeins and slaves were tied to labour, where free men could engage in trade outside of the manor. They were not bound to the land and had freedom of passage and in some cases of toll. The Domesday Book, produced as an inventory for taxation purposes, recorded the numbers of free men *(liberi homines)* who contributed to the geld. In towns and large villages, the burgesses *(burgenses)* are assumed to be the free men. In documents of 500 years later, burgenses was still used as the Latin expression for 'Freeman'.[9]

Freemen, or burgesses, shared in many of the privileges, including the use of manor lands, waste, woodlands, produce from hedgerows and mineral extraction from the ground. Burgesses, in many instances owned rights in severalty[10], fields for agriculture and meadows for grazing. Each burgess having an equal right to graze or use freemen's land. NB. These are notable today with such titles as 'portmanscroft' or Huntingdon's Port Holme Meadow and the Port Meadow at Oxford. The Old English word 'port' signified a market town, (on coast or inland) and a portman was a burgess. Such a meadow or field may be privileged to the senior (usually 12 or 24) freemen who were responsible for the town's administration. Many such meadows have had a tradition of continued grazing (after hay-cutting) for some centuries and in the case at Oxford, for more than 1000 years.

The children, born of freemen, normally inherit the right to privileges according to custom. These rights are usually available at maturity. In most cases, in the past, they were limited to sons, who would be required to swear an oath of loyalty to the rules of the locality and to the State. In some cases they were required to submit a fire-bucket or other article of importance to the community. NB. Freedom could be purchased to allow certain rights but this would often exclude rights to common.

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[8] Unwin, G. (1963) *The Gilds and Companies of London* London: Frank Cass, (p.xxii)
[9] Berry, A.W. (1987) *Sudbury's Freemen* (booklet) Colchester: A.W.Berry, p.2.
[10] *Chambers' Dictionary:* Severalty - is an expression of ownership.

In early times, the ancient towns were a considerable source of trade and revenue for their over-lord, be they King, lord or ecclesiastical establishment. Under such circumstances, the over-lord could issue a charter (for a price) to licence 'free' and regular markets. Other charters were awarded to the burgesses giving access to land or freedom of passage and tolls. These were usually rewards for actions taken on behalf of the lord. They may even be sold, in the form of a licence at times when the lord was in need of funds.

Elder burgesses (Aldermen) were grouped to form a 'corporation'. The senior burgesses, de facto governors of the town, were free of feudal territorial obligations. As 'freemen' they jealously guarded their privileges. Only the free burgesses subsequently had the right to vote, an exclusive privilege until the 19th century. An apprentice to a freeman, if recommended on completion of seven years, could request admission to the freedom of the town, but would probably be excluded from right of commons. Non freemen would be unable to trade or do any form of business in the town or district.

The majority of freemen, with rights of common today, tend not to depasture any beasts, but choose to exercise their rights to shared 'common money' coming from the leasing of pasture (herbage). Letting is carried out by trustees of freemen bodies who normally employ rangers to maintain the lands. The beasts (limited to so many per acre) are 'turned on' and 'turned off' the commons at times according to the traditions of that land.

The common lands were areas where free commoners had sole rights, to fish, hawk, shoot and hunt in other ways. Community fairs and assemblies were occasionally arranged by the aldermen. Informal recreation was not allowed on the common lands and accepted paths (rights of way) were not to be deviated from. Contrary to the belief of many today, cottagers with property adjacent to common lands were usually refused any attempt to create access and any unofficial path was immediately prevented.

Freemen of royal boroughs would not be required to pay the normal market tolls required elsewhere in the country, this even included those at Smithfield. Nor was he required to pay towards the repair of town walls or bridges (taxes on passage). The cost of acorns for his pigs would have been nil and he was exempt from other tolls if and when they occurred.

The term 'common land' applies to some 1.5 million acres of England and Wales. It suggests public ownership but it means nothing of the kind. Until now, the right to

roam over these lands stretched to only one fifth of the common lands. Freehold[9] is a tenurial status for property which was not subject to manorial customs, as were copyhold or leasehold. A freehold was originally held either in knight service or in socage[10]. Copyhold tenure is a form of customary tenure by which a tenant held a copy of the entry in the rolls of the manorial court baron which recorded their possession of a holding on agreed terms. In the early Middle Ages, the tenant performed services to the lord. Copyhold was eventually replaced by leasehold agreements. Copyhold was abolished in 1922.[11]

There are many examples of infighting between freemen and newly formed councils and subsequent local authorities. An authority would attempt to use land or to let for non-entitled purposes. Freemen, in some areas have continued, even quite recently, to acquire land. Such land may be purchased to replace 'shackage' rights or 'half-year' land and for way-leaves taken up by service industries. Although freemen, on admission, swear allegiances to mayor, council and JP's, they will not stand-by when 'rights' are affected. The lands are treated as private freehold but with permission to the wider local community to enjoy recreation in an orderly fashion. The future of these lands is essentially as ESA's and with nature reservations. Key to the sustaining of the grassland landscape is continuous grazing and trampling, preferably with cattle. Such areas provide an excellent example of our past cultural landscape[12]. They provide informal recreation for a wide variety of users and include an educational source of wildlife and countryside subjects for adults and children of all ages.

Rights of Common

A right of common is a persons heritable right, from a grant or award, or acquired by prescription or custom, to take from land, of which he is not the owner, part of one of the land's natural products.

The preferred legal description is that given in Halsbury's Laws of England, 3rd Edition, Vol. 5 page 298:

> "a right, which one or more persons may have, to take or use some portion of that which another man's soil naturally produces"[13].

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[9] Hey, D. (ed) (1997) *The Oxford Dictionary of Local and Family History* Oxford: University Press

[10] Ibid - Socage is a form of feudal tenure in which land was held not by service but by a money rent.

[11] Freehold in England & Wales is ownership of land which is for an indefinite period. It is contrasted with leasehold which is always for a fixed period. In practical affect, a freehold is absolute ownership: *Hutchinson's Compact Encyclopaedia* (1990) London: Random Century

[12] Hedgerows with pollards, wooded corners of coppice, old drainage ditches with sluices, etc.

[13] Campbell, I. & Clayden, P. (1980) *The Law of Commons and Village Greens* Henley-on-Thames: Commons, Open spaces and Footpaths preservation Society p.6.

Section 22 of the Commons Registration Act 1965 extends this by providing that rights of common shall include cattlegates, beastgates and rights of sole or several vesture, herbage or pasture. These are not as other rights of common in that 'the person enjoying them is entitled to take the product in question to the exclusion of the owner of the soil'[14].

All common land has a freehold owner, though in practice often hard to trace. The commoner in some instances, may be deemed to 'own' part of the land, as is the case with many freemen's lands, over which he may exercise certain 'rights' of common. A right of common is similar to a licence and may be mistaken for such. Some rights of common require a payment to be made. It is normal practice for each beast to be charged for pasture, usually a nominal sum limited to the entitled numbers to be put out on the commons.

The rights exercised over commonable land may vary from one locality to another. Sometimes they are exerciseable (as pasture rights) for six months of each year ('half-year lands'). Others are for two years in every three. There are other lesser known periods. Rights of common may only be exercised during an open season. During the remaining period the land is 'close season' for hay making or for winter (wet season) rest.

Under the *Commons Registration Act,* 1965, common land means land subject to rights of common, whether those rights are exerciseable at all times or only during limited periods. It also means waste land of a manor not subject to rights of common; and it excludes a village green or any land forming part of a highway[15].

For the purposes of the Act, rights of common include rights of sole or several vesture (of herbage or of sole or several pasture). The generally accepted rights are those over: pasture, estovers, turbary, piscary, pannage and common in the soil.[16] There are rights as follows:

- Rights appendant - ancient rights of freehold tenants to depasture on a manor's arable waste.
- Rights appurtenent - a right of common appertaining to certain land. (unrestricted)

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[14] Ibid (p.6.)

[15] Harris, B. & Ryan, G. (1967) *The Law Relating to Common Land* London: Sweet & Maxwell Definition 1-10 (p.7.)

[16] Pasture = herbage; Estovers = underwood & furze; Piscary = fishing; Pannage = acorns & beech-mast for pigs; In soil = mineral extraction.

- Rights in gross - common in gross are not connected with ownership of any tenement - merely personal rights.
- Rights by reason of vicinage - are restricted to rights of pasture - intercommoning between two or more common lands.

Other examples of commonable land rights are those exercised over shack land. These are rights over land owned in severalty. The shack fields are used for arable during the summer. After harvest and until sowing the commoners are able to put their beasts 'at shack' (or at large) during autumn and winter. In the majority of cases these rights have been sold or exchanged for more permanent land. Lammas land or half year land is land usually opened from Lammas Day (Aug 12) until Lady Day (March 25). Generally the land is owned in severalty and the ownership of the soil is uncertain. Such land is called known land, it may be of arable or can be a Lammas meadow.

Woods and wood pasture

Oliver Rackham suggests that most Domesday wood pasture (of which there was much) was communal, by 1300 wood-pasture commons had greatly diminished. In some cases the grazing had turned them to heath or grassland. Others became encoppiced or inclosed into private wood, forest or parks. A minority remained wood-pasture commons. These are only a small part of a much larger subject. The lord of the manor would normally be the landowner and the rights to use belonged to the commoners. Mainly those who occupied particular properties. The grazing would belong to the commoners and the soil to the lord. Timber to the lord and pollards or underwood to the commoners *(firebote & hedgebote).* Timber of sufficient size for building and equipment was allowed from the hedgerow trees *(housebote, cartbote,* etc.). By the Middle Ages, such rights were already dated from time immemorial[17].

Freemen's Lands

Freemen were unhappy about the Commons Registrations Act 1965. Parliamentary draftsmen and civil servants did not appear to appreciate the traditions of freemen, who received their rights after admittance, usually at aged twenty one.

The Act followed the recommendations of the Royal Commission on Common Land 1955-8 which stressed 'Common land is private land'. Common land has not been public property for one thousand years. Section 193 of the Law of Property Act 1925 gives the public the right to air and exercise over all 'commons' within a borough or urban district. This right has been maintained by the local Government Act 1972.

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[17] Rackham, O. (1997) *The History of the Countryside* London: Phoenix (p.121).

In 1688 a quarter of all land (England and Wales) was common land. In 1963, despite encroachments and the Enclosure Acts, one and a half million acres was existing amounting to 4% of all land. Since the Registration Act, the freemen have complained that the Government had claimed they were preserving the rights of ownership. They consider that in many cases rights were taken away. Commoners and freemen had neither ability nor money to fight for their rights[18].

The 1835 Municipal Corporation Act initially stripped freemen of their former (privileged) power. Before that time, freemen collectively had property of various kinds. Lands were often granted to a borough, usually for pasturing stock. Such land would be granted to "The Mayor, Aldermen and Burgesses" and therefore to the freemen. Non freemen were excluded from the benefit of it. In 1835, the functions of local government were transferred to the new statutory Borough Council. The freemen had lost their functions, but they retained their status in being freemen. Section 2 of the Act states, at great length, that freemen's rights, property and personal rights remain entirely as they were before 1835. It also says the lands and property shall continue to exist exactly as in 1835.[19]

The individual rights of freemen were, and are, their 'real property' in perpetuity. Their rights over commonable pasture (where practised) were secure in customary and statutory law. In terms of the pasture, freemen as a body corporate, have effective ownership of the relevant lands. These landed rights, belong to individuals and not any form of public property or public trust. Some freemens' land has been derived from enclosure and some from gift or grant. The commons belonging to freemen should have been registered in 1965 as 'freemens' lands'.

Problems occurred at the time of the Local Government Act 1972, even though the legal position regarding ownership had not changed. Rights, as under the 1835 Act remained frozen and in principle remain today. Confusion, however, remains with the new incumbents of local councils who see themselves as the owners of the 'freehold' of these lands. Unfortunately they do not understand the 'real property' attached to the persisting 'rights' over the land. The actions of the Bill for the Local Government Act, 1972 led to the foundation of the Association of Freemen of England and Wales.

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[18] Ward, H. (1975) *Freemen in England* Epsom: Ward

[19] Notes taken (Grimsby, 1982) from a talk by Charles Sparrow Q.C. to the Association of Freemen of England & Wales.

NOTES on Rights of Common

Rights of common are about the use of land, considered today as 'common lands'.[20] The common lands are extremely important as they bring together a facility that can be enjoyed by communal society. They provide informal recreation and exploration where the alternative parks and open spaces are restrictive or clinical landscapes. Common lands are examples of our cultural heritage and provide a link with the past while offering an integrating facility for modern society today.

The continuity of many common lands has been dependant on the commoners who maintain them by grazing their animals and practising 'common rights'. Before entering the deeper discussion of commonable rights let us firstly consider the meaning of 'rights' in English common law.

All rights may be distinguished as being either absolute or qualified. In law an absolute right, is one the violation of which is actionable, *per se;* a qualified right is one the violation of which gives rise in itself to no action, but is actionable only as being in the actual result of an instrument of mischief. Rights, as they apply to the law of torts are defined as follows - the right not to be libelled is absolute, while the right not to be slandered is merely qualified[21].

The general definition of a right is 'that which is right is correct' and rightness is fair treatment, equity, truth, justice and therefore a just or legal claim. Having a rightful and just claim is according to justice and belonging by right.[22] Commonable rights have evolved from customs[23] practised in very early English history and as is suggested by the term 'common' they result from community regulations. Common rights are inextricably attached to the early systems of communal land husbandry. Certain lands provided those 'privileged' with additional rights to the 'fruits' of the soil and fish from the waters.

Privilege[24] is defined as an advantage, granted to, or enjoyed by an individual or a few. It carries with it 'freedom' from burdens borne by others and considers 'prerogative' as a right coming from one's rank or position, e.g. the right to vote. Freedom, in general, considers the unrestricted ability to act. It is an expression of civic liberty, absence of slave status and of having the power of self determination.

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[20] See page 12 for simplified definition of 'common land'.
[21] Salmond, J. (1924) *The Law of Torts* London: Sweet & Maxwell p.11.
[22] Chambers Dictionary
[23] Customary law - in accordance with custom

Now let us examine the origins of commonable rights, passed down through the ages.

Distribution of Land

The system of land tenure[25] obtaining to this country at the present day permits land to being practically the subject of absolute property. The owner may dispose of it unrestrictedly during life or by will after death. The system established before and retained after the Norman conquest recognised no absolute proprietorship. All land was vested in the king as representing the State. Some land was retained for the monarch's own use and much was distributed amongst the principle leaders throughout the Country, generally in return for military services. Land held for the life of the holder was known as a *feudum* or fee. It then reverted to the sovereign unless an heir capable of performing military service was granted succession.

In the process of time the heir became entitled to succeed to an ancestor's estate. It was common practice, on receipt of a hereditary fee, to grant parts of the land to the vassals of the estate who held them in return for the performance of services. This was called subinfeudation. Eventually the estate of such vassals would descend to their issue after death. Ultimate ownership, however, still remained with the over lord and his successors.

Each lord's estate was a manor and these were divided in two parts. The lord's demesne of cultivated land and forest with some marsh land, was known as the lord's waste. The waste was regarded as common grazing for himself, his vassals and his dependants. The other part was distributed into the fees of his vassals. Each tenure of fealty and homage recognised that services rendered were free and performed by a 'freeman'. The tenure or socage, although modified to fit with the feudal system[26], retained many marks of its Saxon origin.[27]

Every tenant, by socage, was bound to fealty (loyalty) and an obligation of military service. Homage was required to acknowledge the vassal's position. Public

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[24] Chambers Dictionary

[25] Tenure - a condition or form of right or title under which property is held. It may be the holding of an office. Hawkins, J.M. & Allen, R. (eds) (1991) *Oxford Encyclopedic English Dictionary* Oxford: Clarendon Press.

[26] Feudal System: Feud is a piece of land held in fee (a fief). It is a medieval European politico-economic system. Nobility held lands from the Crown in exchange for military support. Peasantry lived on a lord's land, providing labour or share of produce in exchange for protection. The system broke down in England in the 13th and 14th centuries although feudal tenures were not actually abolished by statute until 1666: *Oxford Encyclopedic English Dictionary* (1991) Oxford.

[27] *Real Property Law* (p,5.)

ceremonies of homage and fealty were a recognised method of presenting land to a tenant. This was the origin of livery (delivery) of the seisin. The vassal would be deemed to be in full possession of his feud and to be 'enfeoffed'.

We have established that the ancient feudal systems required 'food rent' and military service to the lord of the manor. In return the lord not only protected the community but also allowed a certain amount of self governance among the freemen in the grazing of pastures and the practices of customs and traditions. These customary privileges were inherited by their heirs. Royal charters were a common source of privilege and form the substance of many rights legally claimed today. The term *bocland* 'bookland' was applied to an estate secured to its holder by a royal charter. Derived from Roman documents, such charters were a simple conveyance of land. Rights were expressed in vague words. Such charters were providing liberties that could be inherited by later inhabitants. However, it is not the manor, but the community of free peasants, which is recognised as forming the starting-point of English social history.[28] The basis of early society was the free peasant land-holder who had no claims to nobility and was not subject to a lord below the sovereign. An independent person with many rights.

What was the early origin of English Society

Sir Paul Vinogradoff in his seminal work 'The Growth of the Manor' puts a case for its establishment in Celtic times. The Celtic tribes had formed distinctive arrangements of society. Customs and institutions appear to have been derived from one stem. These relate to Germanic facts of tribal custom. The principles of which was the union of persons descended from the same ancestor through males. In Scotland, the 'clan' means children or descendants, and is recognised as being from males. Welsh manors were held continuously by related communities of joint tenants called weles (gwelys) meaning 'beds'. They were recorded as agnates descended from the same ancestor. The predominance of agnatic relationships must have entailed the 'rightlessness' of women and therefore excluded 'rights' proceeding through females.

The house or position of the tribal king or chieftain, that of the *ulchelwr* surrounded by his dependants. By joint occupation and clustered hamlets *(trevs)* they were distributed in 'beds' according to their kindred status. The Celtic tribes lived chiefly on produce of their herds. They also kept sheep, pigs and goats, but the tariffs of compositions were fixed in cows. It is not known when the cultivation of soil arose, beyond the notion that cultivation by British Celts were mentioned in Caesar's time. Farming was predominantly grazing husbandry and there was no concern for parcelling land. It is

[28] Stenton, *Anglo Saxon England*

recognised that the tribes, clans, septs or kindred's would intercommon their herds within certain boundaries and to customary rules.

The Open-field System

The formation of hides and their sub-divisions grew up in connection with the agricultural practices of rights and duties. This involved a complex intermixture of claims and co-operation between neighbours. In turn this gave rise to the measure of rights in dwelling and close, to pasture, wood, water, and in arable or meadow. This was a system of communal shareholding and was associated with claims by the government and political duties being apportioned accordingly. The freeman had the commons and undivided use of wasteland. However, the use could be limited and controlled by the community. Everybody was required to conform to the agrarian rules of rotational cropping, after which the open field was put in 'common' use. Land owned by a community of ceorls is mentioned in an old English legal enactment and applies primarily to the duties of parceners (co-heirs) in keeping up hedges for the protection of a meadow. Share-land is also mentioned, where arable strips required protection of corn by hedges. Such hedges, necessary as protection from freely commoning cattle, may have been raised as temporary enclosures.

Regulations of a community are at two levels. Firstly, represented by the by-laws, framed by the manorial court and secondly by those managed by special meetings of the householders. The second method was settled by appeal to custom and to immemorial or ancient usage. In cases of dispute, sworn experts were chosen from within the community to declare the correct usage. Political duties were performed by the shareholder who participated in the common husbandry of a township. They would be participant in the burdens on it by the powers that be, or suffer loss of privileges. A free burgess would be considered in scot and lot[29] with the township.

Land Ownership

The lord's ownership of a manor may be considered as dependant tenure, by grant of the sovereign. Freeholders of the manor are his tenants and their possession of land resolves into a hereditary feoffment. Unfree tenants have no rights in law, but may have certain limited privileges resulting from the proprietary rights of the lord. Non compliance with certain duties may result in confiscation of property.

With regard to the use of commons and the open-field system of cultivation, this continued by influence of custom. Plots, cultivated in severalty, made their appearance

[29] Being in *scot and lot* is a requirement to contribute one's share (rate) to municipal expenses.

by the side of the open-field slots, furlongs and commons. Free socmen were customary freeholders who obtained their position by tradition of free stock and possession without any, expressed as beginning by grant and feoffment. Of socage tenure was Burgage (or borough) tenure, where houses or lands were formerly held by a lord. These boroughs often had their own customs with regard to hereditary rights and distribution of estates upon death. Some of these customs arose from pre-existing Saxon tenure.

'By the time of Edward the Sixth, nearly all villeins had become freemen and their tenure less burdensome'.[30] They had acquired long continued enjoyment and had

> "a right to hold their lands without reference to their lord's will, so long as they performed their accustomed services".[31]

The tenant was to hold such grants, not only at the will of the lord, but 'according to the custom of the manor'.[32] This was then capable of restricting the lord's privileges.

> "By the laws of England, every invasion of private property, be it ever so minute, is a trespass".[33]

Rights of Usage

> "There seems to be hardly anything more certain in the domain of archaic law than the theory that the soil was originally owned by groups and not by individuals".[34]

Where land was reserved for crops, the apportionment of the soil lends itself to frequent readjustment in the interest of the community. This required an appropriate management system from its members out of a common land fund. It was apportioned according to certain rules to component households by lot. Does this therefore, lead us to the conclusion that Celtic society was democratic in its governance? The land was considered primarily to be the 'common' property of the clan. There were, however, marked ranks and privileges built upon this foundation and there were special forms of land ownership.

The armed free 'warrior' tribesman was endowed with a rough average of rights. There were dependant classes consisting of slaves *(caeths)* villains *(taeogs, aillts, etc.)*

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[30] *Real Property Law* p.10.
[31] Ibid p.10
[32] Ibid p.10
[33] Salmond, . (1924) *Law of Torts* (6th Ed.) London: Sweet & Maxwell p.11.

and there were strangers *(alltuds)* with no rights. The taeogs were native serfs, settled on the land performing certain duties and paying rents. Some of these belonged to private persons and had very little freedom. The Celtic conquerors formed the upper layer of society and the created a 'freemen' and 'subordinated' hierarchy. The employment of slaves and of serfs was regarded as a burden and it was more natural to leave the employment of servile labour to the kings and chieftains. Pasturing of herds, ploughing and agricultural operations were mainly performed by members of the free households with assistance from the domestic servants and strangers.

The purpose of this discussion has been to draw attention to the importance of male inheritance and to the class arrangements of those free to practice 'of common right' by custom and tradition. Roman influences, no doubt, were absorbed into the Celtic culture. The big plough, that transformed the landscape has no known origin. It was not Roman nor Teutonic in origin. The plough comprised a large iron ploughshare and was mostly drawn by four oxen or more. As to the social order, this may have been influenced by the proximity of Roman cities which were typically comprised of resident burgesses who administered the country around them. The rights of Roman citizenship were bestowed on those in the position for municipal organisation. Dwellers in the open country and not living closely still had many interests in common. They were drawn together for civil purposes into a form of civil parish centred on temples or churches. The *pagus* or City under cover of a lord and magistrates that administered municipal government also controlled the affairs of the *vicus* (or rural) community. The village was, however, able to retain an amount of self government.

Of the English Conquest

The Angles, Jutes, Frisions and Saxons, settled in Britain and modified its history. Changes of the Roman estates and of the common language to a mixture of teutonic rather than Celtic speech. Migration into England was such that Bede mentions that the home of the Angles, on the Continent, was virtually empty in consequence.

In Kent was an Anglo-Saxon society and a Kentish customary law. It was a mixed population of Jutes and Saxons, with a division of people into *eorls, ceorls* and *loets,* besides the slaves. There were three orders, *ethelingi, frilingi* and *lazzi.* The Alemannic and Lombard codes divide the free tribesmen into several subdivisions, as best, medium and minor men. The eorls are the nobility or leaders of the community.

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[34] Vinogradoff (p.18.)

A typical freeman of the Kentish laws is the ceorl. He would be of the middle (main) rank and has no specific distinction. The ceorls and eorls are considered in general as the free and the noble.

The rural system of Old England consisted of an organic relationship to the composite unity of the *tun.* This organisation was not so much composed of people than the diverse proprietary rights and economic pursuits. The population of the tun was commonly arranged by shares of hides and there were proportional adjustments of rights and duties. Hides are not measures even though they are expressed as measures. They may often vary in size any where between 120 and 180 acres, unlike a virgate or the furlong. The reckoning of rights to a hide, carucate and sulong, had rather elastic qualities. In field practice, generally the hide and the carucate divide into four virgates or into eight bovates and the sulung into four yokes.

The Common Rights of the Free Peasantry

Common rights became restricted to a particular class of inhabitant, the 'free tenant' within a community or manor. The concept of a 'stint' was introduced for every right. This was a quota agreed within the community. The rule was that of *couchant and levant* that limited the numbers of beasts to the size of the available pasture. Common land today is private property. Originally such lands were common property. There had been no need to appropriate the wild wastes on the boundaries of a community, the moors, fens, heaths, marshes and woodlands. The customary practises of grazing, taking wood or turf, or fishing and taking the fruits of nature. These rights developed where there was plenty to be shared by all.

However, many lords continued, through the ages, to make claims and these were jealously resisted by commoners who protested their 'rights'. Disputes between lords and commoners at times became acrimonious. In 1236 an Act (now referred to as the Commons Act) controlled the demands of manorial lords. This statute permitted inclosure or the approval of wastes and commons providing enough land was left to allow sufficient common pasture for the 'free tenants'. This event marked the end of plenty-for-everyone, and boundaries were drawn before the end of the thirteenth century.

Rights to common are, in general, of immemorial antiquity. The common lands of England and Wales can be considered the most ancient institutions we now possess, 'older even than the manor within whose organisation and control they subsequently

fill'.[35] Common meadows and pastures are mentioned in the Laws of Ine (688 - 726)[36] and open-field systems are known to precede the Danish invasions of the ninth century.[37] The open-field system[38] was predominantly arable and existed alongside the large wet marshland pastures held in severalty.

Kent has evidence in many early charters that indicate common pastures in woodland and marsh. These were employed by villagers even at great distance. Andred's Weald (woodlands) is thought to have been 'common' to the whole of Kent[39]. Such woodlands had many clearings or *denns* of pasture. Common rights of certain villagers would be linked with specific denns. Rights would include pannage for swine and access to wood for fuel and building. Many of these lands were subsequently appropriated by Anglo-Saxon and then by Norman kings for hunting grounds. Even so, the old rights were recognised where they did not interfere with the new forest laws.

Customary practices are recognised to have predated the early settlements by Germanic tribes in the Kentish countryside (fifth century). The example given for Kent is considered to have been widespread and representative. 'Common' pasture and grazing in common on Dartmoor existed before the formations of Totnes or Barnstaple.[40] Dartmoor was common to all who could reach it. Similarly, Sherwood in the Midlands, derived its name from shirewood, indicating it was common to its local inhabitants. The fens and marshlands were similarly regarded as the woodland pastures and inter-commoning would be practised 'of right' over very large areas of different lands.

In early times' groups of villages would manage wastes as 'common fen'. Subsequent appropriations by manorial lords partitioned the lands. The villagers continued to claim their right to inter-common in the fen that had 'existed from time out of mind'[41]. Inter-commoning between two or three parishes persisted until the parliamentary inclosures in the times of George III. At a much reduced scale, the rights of intercommoning continue even today.

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[35] Hoskins
[36] Stenton
[37] Hoskins
[19] Unenclosed fields without fences.
[39] Neilson, *Cartulary and Survey of Bilsington, Kent* P.4-5.
[40] Stamp & Hoskins p.7.
[41] Hoskins

Summary and Conclusion

Common rights are customs that date back in history to pre-recorded times[42]. Customs developed from a communal society that practised in equitable ways. Not entirely democratic as there were privileges that were gained, retained and inherited by heirs. Rights came about from the activities of land husbandry that had developed through the integration of customs introduced by early tribal settlers and the later Norman influence. Privileges have descended through the male lines and originate from family settlements and their relationship with particular areas of land. It is important that one recognises that there are differences that occur between localities and that customs may change from place to place.

The countryside was influenced by the imposition of the feudal manorial system that specifically identified the lands of communal occupation. The freedom of the English peasant, particularly after the release of subjugation to a lord, was considerable. However, it would be limited to economic restraints. The community operated its own regulations and laws. These were, in general, protective of 'rights' and supportive of the needs of all in the community. Dependants were not left to go hungry and systems were in place to ensure that every family had their quota of produce, sufficient to size of household. Possession of individual ownership or concepts of profiteering did not occur until 'inclosure' began to rear its head. Freedom of passage would allow unrestricted local access but travel abroad would require some insurance. It is the author's opinion that a form of pass token or warrant would have been necessary in medieval times, to allow unrestricted passage through 'foreign' territory. It is unlikely that people would 'roam' abroad without following a defined (safe) route, mainly consisting of recognised paths and cartways. Drovers' routes are among the most ancient remaining marks, inflicted by man, on the English landscape.

In conclusion, English society and the landscape has been formulated through practices, mainly communal, that show themselves in the laws and customs remaining today. Commonable rights are an interesting and protectable feature of our distant past. It is reasonable to say, that had the commoners' rights not continued to be recognised through the centuries, we would not be inheriting these unspoiled landscapes today. The commoners have at times fought hard to maintain their rights and it is to everybody's benefit that many of these lands have not been developed during the industrial revolution or by subsequent housing developments.

[42] Of immemorial antiquity.

GLOSSARY OF TERMS[43]

Appendant	Common law right of a freeholder to use certain specific land.
Approvement	Right of an owner to inclose manorial waste superfluous to the requirements of the commoners.
Appurtenant	Right created by grant of the owner of the soil (of a particular holding).
Award	Final binding document of statutory inclosure.
Balk	Piece of unploughed land in an open field used for grazing and for access to ploughed portions (grass covered 'occupation roads' (balks between strips).
Beastgate	Or cattlegate is the sole or exclusive rights acquired by grant. Right to graze a number of beasts on a piece of land held in common with possessors of other gates.
Copyhold	Form of land tenure abolished in 1926.
Couchant	See levant
Custom	Local law arising from long usage, distinguished from common law. Law of a locality or manor which has existed from time immemorial.
Demesne	Part of a manor retained by the lord for his own occupation and use.
Estovers	Norman - (to furnish) Common right, appurtenant or in gross, of cutting and taking tree loppings or gorse, furze, bushes, or underwood, heather or fern, off a common for fuel or to repair buildings, hedges, fences or farm implements. In early English was referred as 'bote'.
Gross	Right of common held by grant or prescription - not attached to any particular land. It descends to an heir as an incorporeal hereditament.
Inclosure	Process by which common rights are extinguished and land turned into ordinary 'freehold'.
Inclosure in Severalty	Parcelling of commonable land amongst persons with legal common interests.

[43] Glossary mainly extracted from HMSO (1958) *Royal Commission on Common Land 1955 - 1958*

Inter-commoning	Pasturing stock of two or more communities on common lands.
Lammas and Half-year land	Arable or meadow held in severalty during half the year - after cropping. Usually 1 August (Lammas Day) or 12 August (Old Lammas Day).
Levancy and Couchancy	Literally - 'rising and 'sleeping'. Rule limiting the numbers of commonable animals of which the holder has a right appendant or appurtenant.
Lot Meadow	Form of Lammas land marked off in portions for which owners draw lots each year.
Pannage	Right to turn out swine, usually for a limited period, to feed in woodland on beech-mast and acorns.
Piscary	Right of fishing with other persons, in water owned by another.
Pur Cause de Vicinage	Inter-commoning
Severalty	Denoting individual tenure of land in contra-distinction to open field and common. Also used to describe the exclusive occupation of pieces and particularly strips of commonable land.
Shack land	'Shack' - grain shaken or fallen for feeding stock after harvest, Occupied in severalty during part of year until the crop is removed then made commonable to all parties with severalty rights.
Soil	Right to dig for sand, stone or other minerals.
Sole Vesture and Sole Pasture	Exclusive right to take produce of the soil or of the pasture. They exclude participation by the owner of the soil.
Stint	Denotes the number and kinds of animal a commoner has right to put on a common.
Turbary	Right to dig turf or peat in another man's ground (for use in the commoner's house).

London: HMSO pp 272-276.

Common Law

Common law is derived from custom and judicial precedent rather than by statutes.

'Common land is any land over which there are 'rights of common'.[44] The rights exist with holders who may not own the soil. This distinguishes 'common' land. All common land has a freehold owner even though they may be hard to trace. The greater part of surviving common land was originally manorial waste. Other land has gained rights of common through grants and prescription.

Customary law is in accordance with custom, and 'custom' is long established practice considered as 'unwritten law'. In order that a practice might be considered as a valid custom it should have been exercised from 'time immemorial'(q.v.); have been exercised continuously; have been observed as of right; be reasonable; be contrary neither to statute nor common law; be not inconsistent with other accepted customs. Existence of a custom may be proved: by direct evidence by a witness of his personal knowledge of its existence; by a witness testifying to its exercise; by evidence of a comparable custom in a similar trade or locality.[45]

Feudal System - Feud is a piece of land held in fee (a fief). It is a Medieval European politico-economic system. Nobility held lands from the Crown in exchange for military support. Peasantry lived on the lord's land - providing labour or share of produce in exchange for protection. The system broke down in England in the 13th and 14th centuries, although feudal tenures were not actually abolished by statute until 1666.[46]

Tenure is a condition or form of right or title under which property is held. It may also be the holding of an office.[47]
Farm or ferme or firma is a fixed payment. Firmus (Firm) is applied only to leased land. It may also refer to a tract of land (originally one leased or rented) used for cultivation along with a house and other necessary buildings.[48]

Freehold is a tenure of land or property in fee simple (for ever) or fee tail, for life. Land or property or an office held by such tenure (freeholder).[49]

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[44] Harris, B. & Ryan, G. (1967) *The Law Relating to common Land* London: Sweet & Maxwell p.
[45] Curzon, L.B. (ed.) (1989) *Dictionary of Law* 3rd Ed. London: Pitman
[46] Hawkins, J.M. & Allen, R. (eds) (1991) *Oxford Encyclopedic English Dictionary* Oxford: Clarendon
[47] Ibid
[48] Ibid
[49] Ibid

Freedom is the condition of being free or unrestricted, personal or civic liberty, absence of slave status. Having the power of self-determination. A full or honorary participation in the privileges of membership of a society or community.[50]

Copyhold is a tenure based on manorial records (Copyholder).[51]

Fee - (Law) An inherited estate, unlimited (fee simple) or limited (fee tail) as to the category of an heir. Historically a fief is a feudal benefice (feudum).[52]

Burgage is a tenure of land in a town on a yearly rent.[53]

Burgess (a freeman) is an inhabitant of a town or borough (usually with full municipal rights) and is similar to a burgher, citizen/ freeman of a Continental town.[54]

LAND LAW AND COMMON LAW[55]

This relates to private property, to ownership and to usage responsibilities.
Land reverts to the Crown: Freehold is 'Ownership'. Land is owned - 'Usque ad Coelium" (air above land). Water is not 'owned' but held by Riparian Rights, from the bank of the river to the centre (half way). The holder has right to fish and right of navigation, also a right to receive water from upstream without loss of quality.

Land is also owned below surface: it includes minerals in it or attached to it (but coal, oil and natural gas revert to state). 'Incorporeal hereditaments' are 'rights of way' and 'Profits a Prendre'. The Common Law of England is focused on 'Rights to enjoy Property' and there is no 'protection' of the environment in general. A plaintiff must have suffered damage to himself or property and have an 'interest' in that property. Traditionally this is dealt with through the liability 'in Tort'(wrongs or injuries).
The Torts are of 'Nuisance', of 'Negligence', and of 'Strict Liability'.

Nuisance: Interference with another's 'Use & Enjoyment' of land.
Civil offence (Nuisance contravening EPA 1990 - criminal offence).
Nuisance must be a continuous or repetitious situation (e.g. emission of fumes, discharge of effluent).

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[50] Ibid
[51] Ibid
[52] Ibid
[53] Ibid
[54] Ibid
[55] Cowell, M. (1999) Lecture notes: LC401 (unpublished) Cheltenham & Gloucester College of H.E.

Must interfere with 'beneficial use' or cause actual physical damage.
It must have been reasonably 'foreseeable'.

What constitutes 'nuisance' is not fixed and hard to define on occasions.

Damage is much easier to substantiate.

Compensation is awarded in relation to loss of property value.

Recourse to Tort cannot be used to effect 'general' environmental protection.

Negligence — 'Duty of Care' in principle. Negligence has to be 'established' it is not universal, no-one is 'generally' liable.
The negligence must have been 'Reasonably Foreseeable'.
A 'link 'has to be established between act and harm caused.

Strict Liability — Seeks to define 'duty of care' of landowners 'in Negligence'
Rylance v Fletcher - 1867 (Polden & Jackson p.59).
The 'escape' of 'something' that causes damage or 'mischief'.
'Something' brought to land - not 'Natural' use of land.

'Neighbour'
Test: - Is the activity complained of a reasonable use of land?
Is the complaint one a reasonable neighbour would make?

NOTES: Has been limited in its application by recourse to other Statute Law.
Has been hard to establish the 'Foreseeability' question in light of 'lay' knowledge of environmental 'effects' of acts - this may change.

APPENDICES English Law and the Use of Land

The origins of English law begin with the Roman conquest. Behind the Roman system were other more ancient - Greek, Semitic, Assyrian and Egyptian.[56] With the decline of Rome came the growth of Christianity. The 'Hellenistic' religion had been regarded an official department.[57] This became displaced as the 'new' religion, and the Church, grew increasingly effective through the study of theology and the practice of canon law.

After long years of minor warfare in England, following the departure of Roman administration, the petty tribes were replaced by larger 'kingdoms' who generally ruled by European methods. It had been the Roman method of taxation consisting of the division of land into 'hides' that formed the basis of land regulation.[58] Church law brought with it a moral dimension to the customary practices.

A Brief History of Land Formation

The vill, a community constituting a hamlet, village, township, ecclesiastical 'parish' or the economic unit of a manor. Typically, this would be a group of houses, in a cluster or ranged along an ancient road. Close-by the settlement would be the parish church and in most cases the hall or mansion of the lord of the manor. In some instances a manor may comprise several vills, or a vill may contain several manors. Surrounding this, there would be two or more (usually three) large fields. Each of these would be divided into long narrow strips. The strips, each of approximately half an acre, were distributed among the households of the vill. Each household may hold a varying number of strips, scattered through the fields. It has been widely considered that this method was imported by Scandanavian (Anglo-Saxon) settlers.

Prehistoric fields were of an irregular shape and size, while the Celtic fields that generally replaced them were oblong, and of regular proportions, due to their method of ploughing. The Celtic settlements tended to favour higher ground and their fields are generally to be found on elevated levels. Saxon settlements are mainly found on lower ground, in valleys, and here they ploughed with larger teams of oxen, creating longer furrows of narrower strips. The communal system provided the means to perform many of the functions from team ploughing to communal harvesting.

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[56] Plunkett, T.F.T. (1956) *A Concise History of the Common Law* (5th Ed.) London: Butterworth p.3.
[57] Ibid, p.4.
[58] A 'Hide' would be considered the normal holding of land necessary to sustain a family: Stenton, F.M. *Anglo-Saxon England* pp. 276 & 638.

Such communities were regulated, in everyday terms, by the 'moot'('halimotes'). This form of medieval rural community was gradually dissolved during the sixteenth to eighteenth centuries as a result of the inclosure movement. (More of that later).

Feudalism

It may be confidently accepted that the principal features of feudalism had been well established before the Norman Conquest.[59] This was a system of dependent land tenure, subject to rent, services and sometimes including military service. Following the Conquest, a body of administrators regulated the system in accordance with methods applied on the Continent. However, the older English customs also continued to be recognised. Anglo-Saxon law of the land comprised the three terms 'bookland', 'folkland' and 'laenland'.

Bookland, or charter agreements were written with precise Roman terminology but were also in vague references. It was not always clear as to whether land was in question of ownership or of the rights and privileges over the land. Immunities were also included that may exempt certain public burdens. Rights over freemen were numerous and these included forest and hunting rights. Litigation concerning bookland took place before the king and the witan. The folk courts of the hundred and the shire had no jurisdiction over it. A holder or claimant 'by book' was in a very privileged position as it was unquestionable.

Folkland, in Anglo-Saxon legal terms, was public property of the State. Vinogradoff has established its meaning to be that land according to custom by folk right, contrasting with stated bookland.

The Qualities of Medieval Rural Society

The problems that eventually led to the needs for parish poor relief and the poor/ workhouses came about as a result of 'inclosure' and the adoptions of a culture of land 'ownership'. This cultivated a change of communal activity and support. In time it promoted migration from the manor towards employment for wages elsewhere. It introduced a new 'middle class' land owning society that led to the exchange and distribution of land (and with it of some land rights).

It is clear that there were many factors that commend themselves to the systems of medieval organisation. With the exception of subjugation to military service, most families and individuals were self sufficient. Admittedly there was serfdom but there

[59] Maitland *Domesday Book and Beyond*

are no indications that they were treated badly within society. In fact many were able, in time, to earn their freedom. The system of land management proved to be efficient and contained a high degree of communal support. It was the communal management that provided security and well being that may be considered lacking in today's society. This was a culture of responsibility, where people were educated to understand the importance of living off and 'with' nature and understanding the useful purpose of its association. Cropping the right materials to live by and husbandry that ensured future growth was a natural conclusion of their ideals.

Land Law

Land law comprises the body or law that regulates proprietary issues concerning that which is classified as 'land'. Land is defined by Section 205 (1) (ix) of the Law of Property Act 1925, which provides:

> "'Land' includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments; and an easement, right privilege, or benefit in, over or derived from land ..."[60]

Corporeal hereditaments are the physical features of land and incorporeal hereditaments are the intangible rights existing in the land as a physical entity. Ownership of land carries with it rights above and below the surface. An 'easement' is a right over another's land (not ones own) freedom of use or right of way.

Land law has developed by a process of evolution. Historically all land was 'owned' by the king and his subjects were permitted to make use of it. Those holding land directly from the monarch were tenants *'in capite'*. Sub-tenants were then known as tenants *'in demene'*. Tenants enjoyed the right under tenure. This normally required the tenant to perform services for the over-lord. There were two types of tenants, those that enjoyed tenure in their own (free) right and those who were tied by unfree tenure or villeinage. Later this became known as 'copyhold tenure'. Free tenure could be transferred to others.

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[60] Stevens, J. & Pearce, R. (1998) *Land Law,* London: Sweet & Maxwell p.9.

Common Law and Equity

The Common Law system of justice, administered by the Royal Courts, emerged after the Norman Conquest. 'By 1234 the origins of the two common law courts, the Court of Common Pleas and the King's Bench had emerged'.[61]

Equity law was developed to remedy the defects of the Common Law system.[62] It dealt with appeals from aggrieved parties. The Court of Chancery developed as a court of 'conscience'.[63] An important creation of equity is the 'trust', by which property may be held by one person for the benefit of another. The other party has the 'equitable' benefit of ownership. The concept of the trust began with development of 'use' in mediaeval times. A legal owner or *feoffee* was able to pass the advantages of land use to commoners or to the clergy who were otherwise prevented from 'owning' property. The Chancellor could act against feoffees who did not observe rights or privileges over land.

Common Right

The term 'common right' gained its meaning from the defences of commoners against inclosure. Particularly bad was the approval of Parliament for inclosures without compensation in land. Disappointment was high among the agrarian community who felt they were being usurped of their land rights. At that time, a democratic party of 'Levellers' (ultra-republican) was formed to claim the rights the common people. They found wide support in the English Revolution but were later crushed by Cromwell. Several versions of a popular poem were well used in those days:

> *The fault is great in man or woman*
> *Who steals a goose from off a common*
> *But what can plead that man's excuse*
> *Who steals a common from a goose?*[64]

Half-year Land

In many areas, land was taken out of arable and put down to grass. This was done to increase available grazing. In some cases' commoners would agree to inclosure of common-field land to become permanent pasture. This was conditional that it be commonable after hay harvesting. Similar agreements were made over arable that provided commoners' animals to graze after harvesting and before re-seeding. During the seventeenth century much of the arable land was put to pasture. Things changed

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[61] Stevens & Pearce, 1998, p.25.
[62] Ibid p.25.
[63] Ibid p.25.

and by the end of the eighteenth century there was relatively little uncultivated wasteland in common-field.

Common Rights were Economic Rights

The loss of commons, among the poor, was disastrous. Their subsistence relied upon the fuel and products of the common lands and even including as a source of supplementary food source. Some employment was gained from the commons by way of rush matt and basket weaving, seasonal collection of flowers, berries and fruits. Fishing was a highly prized right of the commoner. Community equity is well illustrated, as are the changes brought about by inclosure, in the following poem by John Clare:

That good old flame the farmers earned of yore
That made as equals not as slaves the poor
That good old flame did in two sparks expire
A shooting coxcomb and a hunting Squire
And their old mansions that was dignified
With things for better than the pomp of pride ...
Where master son and serving man and clown
Without distinction daily sat them down ...
These have all vanished like a dream of good ...

Common pastures were of fundamental necessity to the old peasant economy of Britain.[65] They are not synonymous with uncultivated wilderness and waste, far from it. Common lands are far more complex and conditions associated with them differ throughout the country. The origins of common land are covered to some degree in previous chapters. 'Rights' of land use have existed 'from time immemorial'. Our earliest records recognise that rights were in existence. See also, previous chapter on early origins in the Kent countryside.

Common lands existed in the primeval woodlands of Anglo-Saxon England, on the high moors, in the lowland marshes and on the fens of the coastal fringes. Intercommoning was practised between several villages and towns and social life was based on a culture of sharing. 'Common rights' were not considered of special importance until after the seventh century. There were great customary grazing grounds and customary practices had existed from pre-recorded times.

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[64] *Oxford University Press Dictionary of Quotations* (1985) Mitchell, B. (ed.) p.10.
[65] Stamp, L.D. & Hoskins, W.G. (1963) *The Common Lands of England & Wales* London: Collins p.xv.

Open Countryside

Pressures on common lands came from the eleventh century onwards. The thirteenth and early fourteenth centuries contain records of bitter disputes between the peasantry with the lords of manors over respective rights of commons. It was in the twelfth and thirteenth centuries that several new towns came into existence. These were frequently built over ancient commons.[66]

Common land was of fundamental importance to peasant economy up until the end of the eighteenth century. It has remained of considerable social importance even until the present day. The old peasant economy was relatively self sufficient. A considerable bond cemented the communities of village or town. The common lands had been much reduced in area by the time of the 'Black Death' in the fourteenth century.[67] Arable land then became idle and was left to waste or rough pasture until the sixteenth century when pressure on the common lands resumed.

The quality of common land can vary considerably. Some commons, at the edge of the parish may be on the poorest land. They could also be close to, or within, a village or town and be upon good grazing land. Some reduction of common land occurred through the erection of cottages on the edge of commons and inclosed small gardens. In some places a cottager could establish a 'squatter's right', if a house could be erected in one night and smoke be seen rising from the chimney at sun rise. In Wales these were known as *'ty-un-nos'* (house of a night).

Threat on the Commons

As much as one quarter of the total area of England and Wales was still waste in 1688, useful only as rough grazing.[68] Foodstuff was expensive and that brought about the revolutionary movement of the 'Diggers'. It was an attempt to gather an action of communal cultivation - particularly of the common lands. The revolution was quickly crushed and one of its leaders hanged. A more powerful attack occurred in the late eighteenth century from landlords and big farmers.

By the end of the eighteenth century the picture of the commons looked particularly black. The land had seriously deteriorated and many of the ancient manors had been dismembered. Old manor courts ceased to exist and the regulation of the commons was seriously affected.

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[66] Ibid
[67] Ibid P.45.
[68] Ibid p.53.

Common Land Inclosed in the 18th and 19th Centuries

1700 - 1760	56 Acts	74,518 acres
1761 - 1801	521 Acts	752,150 acres
1802 - 1844	808 Acts	939,043 acres
1845 & after	508 Acts	334,906 acres

In total there were 1893 parliamentary acts and awards relating to waste alone which dealt with the enclosure of 2,100,617 acres. During this same period 2911 acts dealt with the inclosure of more than four and a half million acres of unknown proportions of common pasture within open-field parishes.[69]

Protection of the Commons

In 1782 there were steps toward mitigating the effect of inclosures. The General Inclosure Act, 1801, provided for grazing in common (by reducing fencing). State intervention was considered necessary by the 1830's. The population of the country had nearly doubled in a hundred years and the greater proportion now lived in towns. Protection was particularly concerned with the urban commons. The General Inclosure Act, 1845, provided for all local inhabitants as well as the lord and commoners.

Parliament retained control over most common land with the exception of certain ancient arable and common meadows. The Act provided for the health, comfort and convenience of the local inhabitants. Metropolitan Commons Acts of 1866 and 1878 regulated commons by various schemes. The Commons Act, 1876, reinforced the idea that commons might be regulated rather than be inclosed, although this never proved very effective. The Metropolitan Commons Act of 1896 excluded from inclosure, lands within the Metropolitan Police District.[70]

The Commons Act of 1876 enabled the inclosure commissioners to regulate inclosure in accordance to the levels of representation. In 1899, the Commons Act also applied mainly to regulation and "the benefit of the neighbourhood".[71] The Law of Property Act 1925 (Section 193) greatly extended the legal right of access in three classes of common. This section forbade the erection of any building or fence.[72]

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[69] Ibid
[70] Ibid
[71] Ibid, p.82
[72] Ibid

By the end of the nineteenth century the laws and rules had made it virtually impossible to remove any piece of common without applying for a special act of parliament. In many cases the acts have extinguished ancient rights of commoners. In 1955 a Royal Commission was appointed to consider changes, if necessary, in the law relating to common land. It called for a registration of all commons and common rights. This then resulted in the Commons Registration Act, 1965 and subsequent proposed amendment.

Summary

There is 1.5 million acres of common land remaining in England and Wales today. Inclosures came about through land owners claiming their land. For many years the landowners had been restricted in their actions over land which obtained 'rights' held by cottagers. The cottagers rights, properly represented, are recognised by courts. The lord of the manor could not enclose land without parliamentary authority. Reference to obligations from the Statute of Merton 1235.

There were more than four thousand individual inclosure acts prior to the general Act passed in 1845. This provided for an agreement whereby the lord and commoners each received freehold land (in compensation). A remaining amount was reserved for communal use, and this may include some land to contain a poor-house.[73] Major legislation, introduced for the protection of commons, was that of the Metropolitan Commons Act 1866 and the Commons Act of 1876. A subsequent Royal Commission was charged with a thorough investigation of common lands in 1958 and it proposed the registration of all common land. It was recommended that registration should include wider access and schemes for managing the land.

The Commons Registration Act 1965 was intended to ascertain the present facts about common land and rights. There was a prescribed period within which all commons were to be registered. Common land not registered ceased to be recognised as land with any pertaining rights. A provisional second registration in 1972 allowed the correction of disputed omissions from the register.

[73] Clayden, P. (1985)

Disputed claims to rights of common[74]

Rights may be proved accordingly:

- prescription, by enjoyment of the right of common as of right and without interruption for a period of at least 30 years;
- reference in a manorial roll;
- express deed;
- Act of Parliament;
- other documentary sources.

A claim for prescription must be:

- certain and reasonable;
- 'as of right';
- without interruption.

Removal of common rights[75]

Common rights may be cancelled in the following ways:

- union of the ownership of the common and the commoner's property;
- release by deed;
- exhaustion of the product;
- inclosure;
- abandonment;
- severance;
- failure to register.

The rights of private persons

An owner of land may grant other individuals' easements over a common. Rights may then be acquired by long use (Common Law) or by prescription in accordance with the Prescription Act 1832.

Rights of way - A vehicle may not be driven more than fifteen yards onto common land without lawful authority. The public have no right to wander over common land.

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[74] Clayden, P. (1985) p.18.
[75] Ibid, p.21.

However, there certain common lands where, by statute, local and general public have rights of access 'for air and exercise'.

Customary Rights - Village Greens

Rights of common exist over greens. Customary rights of recreation may attach to certain common lands where inhabitants of a locality have been regularly practising sport, dancing or traditional games. Common law requires that customs have been regularly practiced for more than 20 years

WHAT ARE THE LAWS OVER LAND USE?

Common Law

'Common land is any land over which there are rights of common'.[76] The rights exist with holders who may not own the soil. This distinguishes 'common land'. All common land has a freehold owner even though they may be hard to trace. The greater part of surviving common land was originally manorial waste. Other land has gained rights of common through grants and prescription.

Rights of Common

These are gained from the following processes:

- Privilege by manorial right and under common law;
- By grant, prescription, custom and statute.

Custom

Rights of common may be claimed on the basis of custom. This may only be claimed if the land is appurtenant, formerly copyhold. Tenants of copyhold tenements cannot prescribe for rights of common. The right must be shown to have been exercised for a long period as of right and without interruption. Custom can be claimed by a body of persons, the inhabitants of a locality. Custom is in fact local law.

Statutory Law Affecting Common Land Use

A brief summary of extracts from Acts of Parliament:

PRESCRIPTION ACT 1832

1. No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of the Sovereign, Duchy of Lancaster or Cornwall, ecclesiastical or body corporate except where specially provided for and except tithes, rent and services, where such right, profit or benefit shall have been enjoyed without interruption for the full period of thirty years - such rights can be defeated by a benefit enjoyed for the full period of sixty years when such a right will be deemed absolute and indefeasible, ... Text from p.18.

[76] Origin?

INCLOSURE ACT 1845

147. It shall be lawful for the Secretary of State, upon the application in writing of persons interested in lands not subject to be inclosed under this Act, or in lands subject to be inclosed under this Act, or in lands subject to be inclosed under this Act as to which no proceedings for an inclosure shall be pending, and who shall desire to effect an exchange of lands in which they shall be so interested, to direct inquiries whether such proposed exchange would be beneficial to the owners of such respective lands; and in case the Secretary of State shall be of opinion that such exchange would be beneficial, and that the terms of the proposed exchange are just and reasonable, they shall, unless notice of dissent ... shall be given, ... an order of exchange, with map or plan annexed showing the lands given and taken in exchange.

INCLOSURE ACT 1857

12. And whereas it is expedient to provide summary means of preventing nuisances in town and village greens, and on land allotted and awarded upon any inclosure under the said Acts as a place for exercise and recreation: If any person wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes, or rubbish or any other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, such person shall for every such offence, upon a summary conviction thereof before two justices, upon the information of any church-warden or overseer of the parish in which such green or land may be vested, forfeit and pay, in any of the cases of aforesaid, and for each such offence, over and above the damages occasioned thereby, any sum not exceeding £25. An expense will also be incurred for the removal of any materials laid illegally on the land - and this may be recovered in a manner provided by the Magistrates Court Act, 1980. Text extracted[77] from Act pp.69-70.

COMMONS ACT 1876

7. In any provisional order in relation to a common, the Secretary of State shall, in considering the expediency of the application take into consideration the question whether such application will be for the benefit of the neighbourhood, and shall, with a view to such benefit, insert in any such order such of the following terms and

[77] Ibid

conditions (in this Act referred to as statutory provisions for the benefit of the neighbourhood) as applicable to the case; that is to say,

1) That free access is to be secured to any particular points of view; and

2) That particular trees or objects of historical interest are to be preserved; and

3) That there is to be reserved, where a recreation ground is not set out, a privilege of playing games or of enjoying other species of recreation at such times and in such manner and on such parts of the common as may be thought suitable, care being taken to cause the least possible injury to the persons interested in the common; and

4) That carriage roads, bridle paths, and footpaths over such common are to be set out in such directions as may appear most commodious; and

5) That any other specified thing is to be done which may be thought equitable and expedient, regard being had to the benefit of the neighbourhood. Text from pp.34 & 56.

LAW OF COMMONS AMENDMENT ACT 1893

1. This Act may be cited for all purposes as the Law of Commons Amendment Act, 1893.

2. An inclosure or approvement of any part of a common purporting to be made under the Statute of Merton, and the Statute of Westminster the second, or either of such statutes, shall not be valid unless it is made with the consent of the Secretary of State.

3. In giving or withholding his consent under this Act, the Secretary of State shall have regard to the same considerations, and shall if necessary, hold the same inquiries as are directed by the Commons Act 1876, to be taken into consideration and held by the Secretary of State before forming an opinion whether an application under the Inclosure act shall be acceded to or not.

4. Nothing in this Act shall preclude Her Majesty Her heirs and successors, or any person whatsoever whose rights or interests are affected by any inclosure or approvement, from taking any proceedings by way of information, action or otherwise, for the abatement of such inclosure or approvement and the protection of such rights and interests. Text from p.22.

LOCAL GOVERNMENT ACT 1894

26. 2) A district council may with the consent of the county council for the county within which any common land is situate aid persons in maintaining rights of common where, in the opinion of the council, the extinction of such rights would be prejudicial to the inhabitants of the district; and may with the like consent exercise in relation to any common within their district all such powers as may, under s.8 of the Commons Act 1876, be exercised by an urban sanitary authority in relation to any common referred to in that section; and notice of any application to the Secretary of State in relation to any common within their district shall be served upon the district council.

3) A district council may, for the purpose of carrying into effect this section, institute or defend any legal proceedings, and generally take such steps as they deem expedient.

[Note: Section 8 of the Commons act 1876 was repealed by s.34 of the Local Government, Planning and Land Act 1980] Text from p.18.

COMMONS ACT 1899

1. 1) The Council of a district may make a scheme for the regulation and management of any common within their district with a view to the expenditure of money on the drainage, levelling, and improvement of the common, and to the making of bylaws and regulations for the prevention of nuisances and the preservation of order on the common.

2) The scheme may contain any of the statutory provisions for the benefit of the neighbourhood mentioned in section 7 of the Commons Act 1876.

3) The scheme shall be in the prescribed form, and shall identify by reference to a plan the common to be thereby regulated, and for this purpose an ordnance survey map shall, if possible, be used.

2. 1) Not less than three months before the making of a scheme under this Part of this Act the council shall give the prescribed notice of their intention to make it, and shall state thereby where copies of the draft of the scheme may be obtained, and where the plan therein referred to may be inspected.

2) During the three months aforesaid any person may obtain copies of the draft on payment of a sum, not exceeding $2^1/2$p per copy, and may make in writing to the council any objective or suggestion with respect to the scheme or plan.

3) After the expiration of the said three months the council shall take into consideration any objections or suggestions so make, and for that purpose may, if they think fit, direct that inquiry be held by an officer of the council.

4) The council may by order approve of the scheme, subject to such modifications, if any, as they may think desirable, and thereupon the scheme shall have full effect. Provided that if, at any time before the council have approved of the scheme, they receive a written notice of dissent either -

(a) from the person entitled as lord of the manor or otherwise to the soil of the common; or

(b) from persons representing at least one third in value of such interests in the common as are affected by the scheme,

and such notice is not subsequently withdrawn, the council shall not proceed further in the matter.

3. The management of any common regulated by a scheme made by a district council under this Part of this Act shall be vested in the district council.

5. A parish council may agree to contribute the whole or any portion of the expenses of and incidental to the preparation and execution of a scheme for the regulation and management of any common within their parish (including any compensation paid under this Act). Text, pp 42-43.

First Schedule: Enactment's relating to Inclosures subject to restriction under the Act.

Session and Chapter		Title or Short Title
43. Eliz.	c.2.	The Poor Relief Act 1601
51. Geo.3.	c.115.	The Gifts for Churches Act 1811
58. Geo.3.	c.45.	The Church Building Act 1818
1 & 2 Will.4.	c.42.	The Poor Relief Act 1831
1 & 2 Will.4.	c.59.	The Crown Lands Allotments Act 1831
5 & 6 Will.4	c.69.	The Union and Parish Property Act 1835
4 & 5 Vict.	c.38.	The School Sites Act 1841
8 & 9 Vict.	c.18.	The Lands Clauses Consolidation Act 1845
17 & 18 Vict.	c.112.	The Literary and Scientific Institutions Act 1854
1965	c.56.	Part 1 of the Compulsory Purchase Act 1965

(Text, pp 22, 51, 61, 68)

OPEN SPACES ACT 1906

9. A local authority may, subject to the provisions of this Act -

(a) acquire by agreement and for valuable or nominal consideration by way of payment in gross, or of rent, or otherwise, or without any consideration, the freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over, any open space or burial ground, whether situate within the district of the local authority or not; and

(b) undertake the entire or partial care, management, and control of any such open space or burial ground, whether any interest in the said is transferred to the local authority or not; and

(c) for the purposes aforesaid, make any agreement with any person authorised by this Act or otherwise to convey or to agree with reference to any open space or burial ground, or with any other persons interested therein.

10. A local authority who have acquired any estate or interest in or control over any open space or burial ground under the Act shall, subject to any conditions under which the estate, interest, or control was so acquired -

(a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose; and

(b) maintain and keep the open space or burial ground in a good and decent state,

and may inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats and otherwise improve it, and do all such work and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them.

14. A county council may ... support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever. Text, p.39.

NATIONAL TRUST ACT 1907

29. By virtue of this Act there shall be imposed upon the National Trust with respect of any of the Trust property which consists of common or commonable land the following duties and the National Trust shall (subject to the provisions of this Act) have with respect to the same property the following powers (namely):

(A) Except as in this Act otherwise provided they shall at all times keep such property unenclosed and unbuilt on as open spaces for the recreation and enjoyment of the public;

(B) They may plant drain level and otherwise improve and alter any part or parts of such property so far as they may deem necessary or desirable and they may make temporary enclosures for the purposes of this subsection and for the purpose of protecting or renovating turf and for protecting trees and plantations:

(C) They may make and maintain roads footpaths and ways over such property and may make and maintain ornamental ponds and waters on such property:

(D) They may on such property erect sheds for tools and materials and may maintain and repair such sheds:

(E) They shall by all lawful means prevent resist and abate all enclosures and encroachments upon and all attempts to enclose or encroach upon such property or any part thereof or to appropriate or use the same or the soil timber or roads thereof or any part thereof for any purpose inconsistent with this Act:

(F) They may set apart from time to time parts of such property upon which persons may play games or hold meetings or gatherings for athletic sports. (Text, pp 39, 46)

COMMONS ACT 1908

1. (1) The persons for the time being entitled to turn out animals on a common at a meeting convened in manner provided by this Act may, by a resolution passed by a majority in value of interest of the persons present by themselves or by their proxy or attorney -

(a) Make, alter, or revoke regulations for determining the times, if any, at which and the conditions under which entire animals or entire animals of any class or description or age specified in the regulation may be upon the common, and for authorising the removal by an officer appointed to enforce the regulations of any animal found upon the common in contravention of the regulations, and the detention and disposal of any animal so removed, and for raising such sums as may be necessary for defraying expenses incurred in making, publishing, or enforcing the regulations, either by annual contributions payable by the person for the time being entitled to turn out animals on the common, or by way of an annual payment in respect of each animal turned out on the common, and for prescribing the person to receive or sue for payments;

(b) Appoint and remove, or provide for the appointment and removal of, officers to enforce any such regulations;

(c) Constitute and regulate the constitution of a committee consisting of persons entitled to turn out animals on the common, and delegate to the committee such of the powers exercisable by resolution under this Act as may be specified in the resolution;

but no such regulations and no alteration or revocation thereof shall take effect unless and until they have been confirmed by the Secretary of State, and the Secretary of State may confirm them either without modification or subject to such modifications as the Secretary of Sate, after considering any objections by persons appearing to the Secretary of State to be interested, considers desirable.

(2) The owner of any animal which is found on any commoning contravention of a regulation made under this Act, and any person who obstructs any officer appointed under this Act in the execution or enforcement of a regulation, shall be liable on summary conviction to a fine not exceeding £25, or in the case of a continuing offence not exceeding ten shillings for every day during which the offence continues; and where a fine is recovered on the information of an officer appointed under this Act, the court may direct the whole or any part of the penalty to be paid to such officer, to be applied by him towards the expenses of enforcing the regulations made under this Act.

(3) A meeting for the purposes of this Act may be convened in respect of any common by the Secretary of State upon the application of any three persons claiming to be entitled to turn out animals upon the common or of the council of the county in which any part of the common is situate. (Text, p.48)

LAW OF PROPERTY ACT 1925

193. (1) Members of the public shall, subject as hereinafter provided, have rights of access for air and exercise to any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts, 1866 to 1898, or manorial waste, or a common which is wholly or partly situated within an area which immediately before 1st April 1974 was a borough or urban district, and to any land which at the commencement of this Act is subject to rights of common and to which this section may from time to time be applied in manner hereinafter provided:

Provided that -

(a) such rights of access shall be subject to any Act, scheme, or provisional order for the regulation of the land, and to any bylaw, regulation or order made thereunder or under any other statutory authority; and

(b) the Secretary of State shall, on the application of any person entitled as lord of the manor or otherwise to the soil of the land, or entitled to any commonable rights affecting the land, impose such limitations on and conditions as to the exercise of the rights of access or as to the extent of

the land to be affected as, in the opinion of the Secretary of State, are necessary or desirable for preventing any estate, right or interest of a profitable or beneficial nature in, or affecting the land from being injuriously affected, or for protecting any object of historical interest and, where any such limitations or conditions are so imposed, the rights of access shall be subject thereto; and

(c) such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon; and

(d) the rights of access shall cease to apply (I) to any land over which the commonable rights are extinguished under any statutory provision; (ii) to any land over which the commonable rights are otherwise extinguished if the council of the county in which the land is situated by resolution assent to its exclusion from the operation of this section, and the resolution is approved by the Secretary of State.
(Text, p.51)

Other Statutory Legislation Affecting Common Lands

- Caravan Sites and Control of Development Act 1960: (Section 23)
- Compulsory Purchase Act 1965: (Schedule 4 Common Land)
- Commons Registration Act 1965: (Sections 1 to 25)
- Countryside Act 1968: (Section 9)
- National Trust Act 1971: (Section 23)
- Town and Country Planning Act 1971: (Sections 121 and 290)
- Road Traffic Act 1972: (Section 36)
- Local Government Act 1972: (Sections 122, 126, 189 & 270)
- Acquisition of Land Act 1981: (Section 19)

CUSTOMARY LAW

Laws are imposed by authority such as a reigning monarch or by the legislature of Parliament or supreme Court. Alternatively, law can develop from the 'ground' by the customs and practices of the 'ordinary' people. Imposed law is authoritarian by nature and typically requires the support of a powerful minority. Customary Law, developed from the bottom up, requires widespread acceptance.

Most actions, in law, require people to conform to expectations. This is compared with the actions of other parties who have reasonably corresponded to the practices on which the everyday conduct of the members of the group was based. Customs give rise to expectations which guide peoples actions.

Customary law is recognised for the benefit of that behaviour which is in accordance to an individual's expectations. It prevents the coercive impositions of minority groups. The recognition of 'duty' to obey the law and of law enforcement is couched in the system of customary law. There is a mutual recognition that the observance of certain rules will be of benefit to all. The source of recognition of customary law is reciprocity. Recognition of private property and the rights of individuals constitute its primary rules of conduct.

Under customary law, offences are treated as torts (see also section on law of Torts) Resolutions of disputes are a major source of legal (updating) change. An adjudicator may improve a definition in law and even introduce new rules of regulation. If the relevant group accept the new ruling, then it becomes part of customary law. Good rules eventually supersede those that are less effective. Another process of making changes under customary law is by individual representation. Where an individual observes a wrong doing and or, can provide precedence of a better method, this may be presented for correction in customary law.

No downward pressure, as exists in parliamentary politics, can coerce the customary system. An aggrieved party must pursue prosecution. It is the reciprocal incentives that cause individuals to form mutual support groups. This is reflected in families, tribal, religion, geographic proximity, functional similarity or by contractual arrangements. Group members become obligated to aid one another in a valid dispute. Group actions provide strength and security, they provide a threat of force with which to negotiate. Penalties in customary law tend to be of an economic punishment and ostracism by their community is an ultimate form of punishment for wrong doing.

Of Lost Ancient Rights: 'The Lament of Swordy Well' by John Clare c.1822

In swordy well a piece of land
Thats fell upon the town
Who worked me till I couldn't stand
And crush me now I'm down

There was a time my bit of ground
Made freeman of the slave
The ass no pindard dare to pound
When I his supper gave

The gipseys camp was not affraid
I made his dwelling free
Till vile inclosure came & made
A parish slave of me

Alas dependance thou'rt a brute
Want only understands
His feelings wither branch & root
That falls in parish hands

Common-field peasants had shared a common culture, mutual aid and a sense of political solidarity. Pasture rights existed where land and herbage allowed. Similarly the pasture of pigs or geese would be dependant on the existing land. The economy of a cottager whose property adjoined common land may be sufficient to provide most of their sustenance. Sheep, that require less grazing than cattle may be the traditional 'stint' of the locality. Tenements with rights attached would be considerably more valuable than those without. Cottages, with rights tend to form a mutual association with their fellow commoners.

The culture revolves around ancient traditions and practices. These customs result from before the inclosures. Functions occurred on certain saints' days and there would be meetings of commoners including such events as the 'beating of bounds'. Glebe tax and the ten per cent tithe taxes were remainders of the influences of the church canon and ecclesiastical laws. Landless cottagers - following inclosure, many tenants were faced with land taxes. Cottagers who were able to prove a prior right of common were in some cases compensated with small plots of land.

Bookland is held by book, by royal and ecclesiastical privilegium. Folkland, held by unwritten title, by folk law.[78] Laen Land is similar to the Continental precaria. The Church is required by the monarch to grant laen land to royal nominees (loaned land). The loan would be up to three lives with each inheritor paying relief.

Inheritance

Ancient Germanic communities in Britain in the days of Caesar and as late as the seventeenth century, peasants practised communism in the land. Small, compact and highly socialistic, this has been coined the 'mark' system, (Stubbs, *Constsitutional History,* 1875, I,49) Co-operation was believed to exist between neighbouring villagers would combine their resources.

Land, in early times was owned by families rather than by individuals. The land was certainly not a commodity of commerce. However, the Church would take every precaution in order to secure its title. Freemen certainly 'held' land and this may have held a right to pass on a parcel of land but it did not necessarily constitute ownership. Anglo-Saxon laws are essentially customary as are the communal courts that operate 'immemorial custom'. A feature of this system was its flexibility and adaptability. Customs could be categorised as 'long', when introduced within ten or twenty years, 'very long' if dating from thirty years and 'ancient' for as much as forty years.[79] The feudal system rearranged society onto a military rather than a capitalist relationship. The flexibility of custom enabled this to be done relatively smoothly when compared with the statutory legislation likely to apply in today's system of regulation.

Summary

We all, in England and Wales, are privileged with certain rights and these are tested in English Common Law. It is recognised that the land was initially 'owned' by communities. Our systems of government stem from tribal customs that originated in time immemorial. Regulation was greatly influenced by the operations of land use and the protective security necessary in society.

The politico-economic conditions of the twentieth century have led us into a self sustaining environment that while providing greater self determination, has lost many of the benefits of communal reliance. The general freedom and liberty that we enjoy today is founded in antiquity and this is entwined in customs of early shared land use. Privileges arose from trading rules and the increasing enclosure of the communal open-

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[78] Maitland, *Domesday Book and Beyond* p.257.
[79] *Concice History of Common Law* P.308.

field system. Statutory laws have tended to exploit benefits to the few and in many ways to limit the freedom that existed in earlier (free-peasant) times.

Declaration of Rights

In 1812 Percy Bysshe Shelley, described by Paul Foot[80] as straddling 'the gap between the levellers before him and the socialists after him," spoke up for the people of the post-enclosure countryside.

> The rights of man are liberty, and an equal participation of the commonage of nature ...
> The rights of man in the present state of society, are only to be secured by some degree of coercion to be exercised on their violator.
> The sufferer has a right that the degree of coercion employed be as slight as possible ...
> No man has the right to disturb the public peace, by personally resisting the execution of a law however bad. He ought to aquiesce, using at the same time the utmost powers of his reason, to promote its repeal ...
> No man has a right to do an evil thing that good may come ...
> Expediency is inadmissible in morals. Politics are only sound when conducted on principles of morality ...

This *Declaration of Rights* [81] by Shelley was published without authority.

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[80] Foot, P (1980) *Red Shelley* London: Sidgwick & Jackson p.98.
[81] Tomalin, C. (1980) *Shelley and his World*

APPENDIX

Human Rights

In English history, human rights were long established in pre-Norman times under traditional 'customary' law. The Magna Carta in AD 1215 founded (in written form) the statutory principles of human rights that form the basis of rights held by the English speaking nations.

Feudal in form and character, of feudal law and custom, the Magna Carta divides into 63 parts or 61 clauses. A number of these dealt specifically with abuses ()at the time) of the feudal incidents of relief, wardship and marriage. Others refer to the payments of debts, then at the mercy of the royal bailiffs or the Jews, while others laid down rules governing the rights of heritage.

The opening chapter concerning the liberties of the Church, including the recently granted 'right of free election', are guaranteed. In a general clause (13) the liberties and free customs of all cities, boroughs, towns and ports were confirmed. For the advantage of trade the Charter granted all merchants the right to come and go freely except in time of war (41-2) and in the interest of the consumer it established standard weights and measures (35). Abuses of power by local administrators are limited and particularly to restrain oppression by the officers of the forests (44,47,48). A separate 'Charter of the Forest' later expanded on administrative control of forest lands.

Embodied within the Charter was the concession already made, that no freeman should be proceeded against except by due process of the law. The Charter was a practical assertion of existing law and custom and it imposed limitation on the arbitrary power of the Crown.

From the view of the free commoner over land, the next most important charter specifically over rights of common, was the Statute of Merton (Commons Act 1285 c46, 13 Edward I).

Charity - described in Chambers Dictionary = a non profit-making foundation, institution or cause, caring for those in need of help.

Free - is described as not bound; at liberty, not under arbitrary government, not strict, or bound by rules.

Freedom - is described as liberty; Freeman is free or enjoys liberty, a person who holds a particular franchise or privilege.

'The Rights of Man' 1791-92

Thomas Paine (1737-1809) *Common Sense, Rights of Man* and *The Age of Reason* are among the greatest publications on freedom. The American Constitution is based upon these works.

Percy Bysshe Shelley supported the views of Tom Paine in hating kings and courtiers, he argued that the only government worth obeying was one that took its power from the people. Paine attacked the snobbery of Edmund Burke by publishing his *Rights of Man* which became a best-seller. A famous sentence in the book (against Burke) "He pities the plumage, but forgets the dying bird". Shelley quoted this sentence in his reference to the death of Princess Charlotte (1817).

Shelley revered Tom Paine throughout his life. In 1812 he wrote of 'government' in his *Proposals for an Association* 'can have no rights, it is a delegation for the purpose of securing them to others . . . . The strength of government is in the happiness of the governed'. He argued in *A Philosophical View of Reform* (1820) that "any government that was not representative had no right to a day in power".

'Freedom' and 'liberty' took on, for Shelley, a different meaning to that given by most reformers and free-thinkers. Tom Paine hated arbitrary power, but did not believe that ownership of property had anything to do with it. This view had been shared by most radicals and republicans of Shelley's time. Freedom had meant to them, freedom of expression, of thought and the ability to choose their government.

To Shelley, property was the key to freedom, as it was to tyranny. People should be free to obtain food, warmth and shelter and a right to speak and hold meetings. Shelley had a name for the 'new aristocracy' he called them 'capitalists'.

In defence of equality Shelley did not believe that society should be founded on equality for everyone - forced to share everything. Some property was right and proper - to be supported by society; other property was unjust. Property from trade, agriculture, art and profession. Where the rich had stolen money they were not entitled to accumulate more - his plan was one of a 'Social society' where benefits could be enjoyed by the multitude (common ownership). These ideas were later followed up by Karl Marx.

Chancery - is a division of the High Court of Justice (under the Lord Chancellor) it is a court of public record. In chancery (of an estate etc.) in litigation. Ancient rules, regulations, Royal Charters dating back to pre-Conquest times.

Freedom – by right, influence or law

Liberty under Roman law was a privilege given rule and regulations. Under Scandinavian law, liberty was a birth right by a tradition of entitlement.

People of Scandinavia have always been able to move freely throughout their nations without fear of prosecution for trespass.

England inherited the rules, initially set by the Roman law and this has been complimented by much of the freedoms recreated by the Anglo-Saxon and subsequent Dane law.

The 'English' of Britain became a democracy before the introduction of the Feudal government imposed under the Norman domination. Even so, the fusion of the various 'customs' gave freedom with inherent privileges to many as a 'birth right'.

Town Freemen (Freedom of Anglo-Saxon origins)

The emancipation of rights held in common by inhabitants of a town. Free inhabitant6s formed gilds (guilds) or companies. They exercised power by 'Borough laws' (locally) now known as 'By-laws'. Possession of 'common' houses, pastures, forestlands, market stalls, mills etc, purchased for the common use and benefit of the whole body.

Large towns would be divided into 'wards', each containing their own possessions, companies, property and customs.

This same system of 'common' application was transferred to the American colonies.

Alan Shelley

English Bill of Rights
1689

An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown

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Whereas the Lords Spiritual and Temporal and Commons assembled at Westminster, lawfully, fully and freely representing all the estates of the people of this realm, did upon the thirteenth day of February in the year of our Lord one thousand six hundred eighty-eight [old style date] present unto their Majesties, then called and known by the names and style of William and Mary, prince and princess of Orange, being present in their proper persons, a certain declaration in writing made by the said Lords and Commons in the words following, viz.:

Whereas the late King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom;

By assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament;

By committing and prosecuting divers worthy prelates for humbly petitioning to be excused from concurring to the said assumed power;

By issuing and causing to be executed a commission under the great seal for erecting a court called the Court of Commissioners for Ecclesiastical Causes;

By levying money for and to the use of the Crown by pretence of prerogative for other time and in other manner than the same was granted by Parliament;

By raising and keeping a standing army within this kingdom in time of peace without consent of Parliament, and quartering soldiers contrary to law;

By causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law;

By violating the freedom of election of members to serve in Parliament;

By prosecutions in the Court of King's Bench for matters and causes cognizable only in Parliament, and by divers other arbitrary and illegal courses;

And whereas of late years partial corrupt and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason which were not freeholders;

And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects;

And excessive fines have been imposed;

And illegal and cruel punishments inflicted;

And several grants and promises made of fines and forfeitures before any conviction or judgment against the persons upon whom the same were to be levied;

All which are utterly and directly contrary to the known laws and statutes and freedom of this realm;

And whereas the said late King James the Second having abdicated the government and the throne being thereby vacant, his Highness the prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did (by the advice of the Lords Spiritual and Temporal and divers principal persons of the Commons) cause letters to be written to the Lords Spiritual and Temporal being Protestants, and other letters to the several counties, cities, universities, boroughs and cinque ports, for the choosing of such persons to represent them as were of right to be sent to Parliament, to meet and sit at Westminster upon the two and twentieth day of January in this year one thousand six hundred eighty and eight, in order to such an establishment as that their religion, laws and liberties might not again be in danger of being subverted, upon which letters elections having been accordingly made;

And thereupon the said Lords Spiritual and Temporal and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties declare:

- That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal;
- That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal;
- That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious;
- That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;
- That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal;
- That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law;
- That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law;
- That election of members of Parliament ought to be free;
- That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament;
- That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;
- That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders;
- That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void;
- And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliaments ought to be held frequently.

And they do claim, demand and insist upon all and singular the premises as their undoubted rights and liberties, and that no declarations, judgments, doings or proceedings to the prejudice of the people in any of the said premises ought in any wise to be drawn hereafter into consequence or example; to which demand of their rights they are particularly encouraged by the declaration of his Highness the prince of Orange as being the only means for obtaining a full redress and remedy therein.

Having therefore an entire confidence that his said Highness the prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights which they have here asserted, and from all other attempts upon their religion, rights and liberties, the said Lords Spiritual and Temporal and Commons assembled at Westminster do resolve that William and Mary, prince and princess of Orange, be and be declared king and queen of England, France and Ireland and the dominions thereunto belonging, to hold the crown and royal dignity of the said kingdoms and dominions to them, the said prince and princess, during their lives and the life of the survivor to them, and that the sole and full exercise of the regal power be only in and executed by the said prince of Orange in the names of the said prince and princess during their joint lives, and after their deceases the said crown and royal dignity of the same kingdoms and dominions to be to the heirs of the body of the said princess, and for default of such issue to the Princess Anne of Denmark and the heirs of her body, and for default of such issue to the heirs of the body of the said prince of Orange. And

the Lords Spiritual and Temporal and Commons do pray the said prince and princess to accept the same accordingly.

And that the oaths hereafter mentioned be taken by all persons of whom the oaths have allegiance and supremacy might be required by law, instead of them; and that the said oaths of allegiance and supremacy be abrogated.

I, A.B., do sincerely promise and swear that I will be faithful and bear true allegiance to their Majesties King William and Queen Mary. So help me God.

I, A.B., do swear that I do from my heart abhor, detest and abjure as impious and heretical this damnable doctrine and position, that princes excommunicated or deprived by the Pope or any authority of the see of Rome may be deposed or murdered by their subjects or any other whatsoever. And I do declare that no foreign prince, person, prelate, state or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence or authority, ecclesiastical or spiritual, within this realm. So help me God.

Upon which their said Majesties did accept the crown and royal dignity of the kingdoms of England, France and Ireland, and the dominions thereunto belonging, according to the resolution and desire of the said Lords and Commons contained in the said declaration. And thereupon their Majesties were pleased that the said Lords Spiritual and Temporal and Commons, being the two Houses of Parliament, should continue to sit, and with their Majesties' royal concurrence make effectual provision for the settlement of the religion, laws and liberties of this kingdom, so that the same for the future might not be in danger again of being subverted, to which the said Lords Spiritual and Temporal and Commons did agree, and proceed to act accordingly.

Now in pursuance of the premises the said Lords Spiritual and Temporal and Commons in Parliament assembled, for the ratifying, confirming and establishing the said declaration and the articles, clauses, matters and things therein contained by the force of law made in due form by authority of Parliament, do pray that it may be declared and enacted that all and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed and taken to be; and that all and every the particulars aforesaid shall be firmly and strictly holden and observed as they are expressed in the said declaration, and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all time to come.

And the said Lords Spiritual and Temporal and Commons, seriously considering how it hath pleased Almighty God in his marvellous providence and merciful goodness to this nation to provide and preserve their said Majesties' royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto him from the bottom of their hearts their humblest thanks and praises, do truly, firmly, assuredly and in the sincerity of their hearts think, and do hereby recognize, acknowledge and declare, that King James the Second having abdicated the government, and their Majesties having accepted the crown and royal dignity as aforesaid, their said Majesties did become, were, are and of right ought to be by the laws of this realm our sovereign liege lord and lady, king and queen of England, France and Ireland and the dominions thereunto belonging, in and to whose princely persons the royal state, crown and dignity of the said realms with all honours, styles, titles, regalities, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining are most fully, rightfully and entirely invested and incorporated, united and annexed.

And for preventing all questions and divisions in this realm by reason of any pretended titles to the crown, and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquility and safety of this nation doth under God wholly consist and depend, the said Lords Spiritual and Temporal and Commons do beseech their Majesties that it may be enacted, established and declared, that the crown and regal government of the said kingdoms and dominions, with all and singular the premises thereunto belonging and appertaining, shall be and continue to their said Majesties and the survivor of them during their lives and the life of the survivor of them, and that the entire, perfect and full exercise of the regal power and government be only in and executed by his Majesty in the names of both their Majesties during their joint lives; and after their deceases the said crown and premises shall be and remain to the heirs of the body of her Majesty, and for default of such issue to her Royal Highness the Princess Anne of Denmark and the heirs of the body of his said Majesty; and thereunto the said Lords Spiritual and Temporal and Commons do in the name of all the people aforesaid most humbly and faithfully submit themselves, their heirs and posterities for ever, and do faithfully promise that they will stand to, maintain and defend their said Majesties, and also the limitation and succession of the crown herein specified

and contained, to the utmost of their powers with their lives and estates against all persons whatsoever that shall attempt anything to the contrary.

And whereas it hath been found by experience that it is inconsistent with the safety and welfare of this Protestant kingdom to be governed by a popish prince, or by any king or queen marrying a papist, the said Lords Spiritual and Temporal and Commons do further pray that it may be enacted, that all and every person and persons that is, are or shall be reconciled to or shall hold communion with the see or Church of Rome, or shall profess the popish religion, or shall marry a papist, shall be excluded and be for ever incapable to inherit, possess or enjoy the crown and government of this realm and Ireland and the dominions thereunto belonging or any part of the same, or to have, use or exercise any regal power, authority or jurisdiction within the same; and in all and every such case or cases the people of these realms shall be and are hereby absolved of their allegiance; and the said crown and government shall from time to time descend to and be enjoyed by such person or persons being Protestants as should have inherited and enjoyed the same in case the said person or persons so reconciled, holding communion or professing or marrying as aforesaid were naturally dead; and that every king and queen of this realm who at any time hereafter shall come to and succeed in the imperial crown of this kingdom shall on the first day of the meeting of the first Parliament next after his or her coming to the crown, sitting in his or her throne in the House of Peers in the presence of the Lords and Commons therein assembled, or at his or her coronation before such person or persons who shall administer the coronation oath to him or her at the time of his or her taking the said oath (which shall first happen), make, subscribe and audibly repeat the declaration mentioned in the statute made in the thirtieth year of the reign of King Charles the Second entitled, "An Act for the more effectual preserving the king's person and government by disabling papists from sitting in either House of Parliament."

But if it shall happen that such king or queen upon his or her succession to the crown of this realm shall be under the age of twelve years, then every such king or queen shall make, subscribe and audibly repeat the same declaration at his or her coronation or the first day of the meeting of the first Parliament as aforesaid which shall first happen after such king or queen shall have attained the said age of twelve years. All which their Majesties are contented and pleased shall be declared, enacted and established by authority of this present Parliament, and shall stand, remain and be the law of this realm for ever; and the same are by their said Majesties, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in Parliament assembled and by the authority of the same, declared, enacted and established accordingly.

II. And be it further declared and enacted by the authority aforesaid, that from and after this present session of Parliament no dispensation by "non obstante" of or to any statute or any part thereof shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of Parliament.

III. Provided that no charter or grant or pardon granted before the three and twentieth day of October in the year of our Lord one thousand six hundred eighty-nine shall be any ways impeached or invalidated by this Act, but that the same shall be and remain of the same force and effect in law and no other than as if this Act had never been made.

Statute of Artificers, 1563

The Statute of Artificers, often referred to as the 'Statute of Apprentices', was finally passed in 1563 and remained on the Statute Book until 1819. It was associated with the eventual Poor Law Act of 1601.

The Statute of Artificers was actually a group of English laws between 1558 and 1563 that regulated the supply and conduct of labour. In particular it set wages and regulated the quality of people entering certain professions by laying down rules for apprenticeships.

The Statute established the machinery to determine wage rates at the local level, to control the conditions of employment for many workers including apprentices, and to restrict the mobility of labour. It was abolished in 1814 when reforms challenged the existence of 'privilege'.

Elizabethan in origin, it brought together several aspects even dating back to the aftermath of the 'Black Death', providing a more general direction and to plan for national development.

The importance of this Act was that 'No one may take up a trade or craft practised in England without serving at least seven years' apprenticeship'. It intended "to banish idleness, advance husbandry and yield unto the hired person a convenient proportion of wages".

Employment after an apprenticeship was to be no less than a year at a time in any of the sciences, crafts, mysteries or arts of clothiers, woollen cloth weavers, tuckers, fullers, cloth-workers, sheermen, dyers, hosiers, tailors, shoemakers, tanners, pewterers, bakers, brewers, glovers, cutlers, smiths, farriers, curriers, saddlers, spurriers, turners, sappers, hatmakers, feltmakers, bowyers, fletchers, arrowhead-makers, butchers, cooks or millers.

Having retained a servant or employee for a year's term, you could not let them go at the end of that term without a quarter's notice. Unless it could be proved (with 2 witnesses) that there was reasonable and sufficient cause. Fine: 40s.

During an apprenticeship, an apprentice cannot marry or start a household. Between the age of 12 and 20 the youth cannot refuse apprenticeship if demanded – unless already apprenticed elsewhere. Agricultural labourers were prevented by economic regulation from streaming into the cities to curb any social climbing.

NB. By the 1580s, most London craftsmen and tradesmen could both read and write. Those employed in the outdoor trades were less likely to be as literate by having less need of writing skills.

Alan Shelley

'The Agreement of the People' (1649)

Originally drafted in 1647 when 'agitators' of Cromwell's New Model Army and civilian 'Levellers' collaborated to propose a new constitution in the aftermath of the First Civil War.

Sovereign power should reside in the people of England rather than a sovereign King.

Parliaments to be proportionally elected from the population with biennial elections – to sit from April to September. A single House with supreme authority – with powers to make or repeal laws, appoint officials and conduct domestic and foreign policy.

After the King's defeat in the Second Civil War, an extended version of the 'Agreement' was promoted by John Lilburne (who was looking for a middle way).

Final 'Agreement of the People' dated May 1649:

- The right to vote for all men over the age of 21 (excepting servants, beggars and Royalists)
- No army officer, treasurer or lawyer could be an MP (to prevent conflicts of interest)
- Annual elections to Parliament with MP's serving one term only
- Equality of all persons before the law
- Trials should be heard before 12 jurymen, freely chosen by their community
- No-one could be punished for refusing to testify against themselves in criminal cases
- The law should proceed in English and cases should not extend longer than six months
- The death penalty to be applied only in cases of murder
- Abolition of imprisonment for debt
- Tithes should be abolished and parishioners have the right to choose their ministers
- Taxation in proportion to real or personal property
- Abolition of military conscription, monopolies and excise taxes.

This version was published after the Leveller leaders Lilburne, Overton, Walwyn and Prince had been imprisoned by order of the Council of State and a few weeks before the suppression of the Army Levellers at Burford, the leaders executed, and after which the Leveller movement was effectively finished.

Alan Shelley

The Power of the Citizenry

At various moments during the history of our nation there have been occasions when the citizens rise up in protest. We appear to be arriving at one of those momentous times. The global situation with its slowed economy and rapidly expanding population does not bode well. Earthquakes, floods, drought and famine have naturally encouraged migration from the Southern hemisphere into Europe and the northern countries. Our growing population in Britain has now reached 62 million and an increase of 47% over the last three years is put down to immigration.

In order to cope with this fast increasing and diverse new society, the Government has introduced 'sustainability' as key to all forms of development policy. Britain now faces demanding reforms in legislation that could well change the traditions and the landscape that we have recognised as typically England or Wales.

It is not immediately conceivable that such measures will automatically lead to trouble but we may reflect on some of those historical moments when the citizens responded to the events? Perhaps the earliest notable example was the 'Peasants Revolt' of 1381. The rebellion led by Wat Tyler has been considered the most extreme and widespread insurrection in English history. It arose most particularly from the excessive taxation on an already downcast and overstretched citizenry. The evil taxation by Richard II, that came to be known as the Poll Tax.

Alongside Wat Tyler was John Ball, the Lollard (excommunicated) priest who is famous for the sermon he gave to the crowds gathered on Blackheath in London:

> *"When Adam delved and Eve span, Who then was the gentleman" – All men being created alike, bondage or servitude came in by the unjust oppression of naughty men.*

An interesting conjecture finds some similarity with the events leading to the 'Enclosures' of the 16th and late 18th centuries. The Tudor 'Inclosures Riots' between 1539 and 1549 presented some of the most violent reactions that took place over the enclosing of the common lands. Perhaps, what is now known as the Ket's Rebellion in 1549 could be regarded as the most bloody and resulted in multiple hangings to provide an example against any further uprisings by the citizenry, particularly in East Anglia.

At Norwich, malcontents had 'layed open' the Town Close, ancient common long enclosed and grazed by the freemen of the city. The brothers Robert and William Ket were well-to-do tradesmen who were unhappy with the discreditable circumstances in which, after the Dissolution, church property was passed into lay hands and the highhanded way in which land grabbing was taking place. They could see the unfair practices in which people were losing their rights over the common lands.

For six weeks Robert Ket who had gathered a great following, maintained a large camp on Mousehold Heath north of the city of Norwich. While the city authorities officially showed a hostile front, there were many influential leading citizens, including the mayor who assisted in the deliberations. People from all over East Anglia joined the uprising, swelling into thousands. The rebellion was eventually subdued by a Royal army, which included 1,200 German mercenaries. What had begun as a local riot had developed a great popular demonstration and ended in the violence and bloodshed of rebellion. A contemporary report suggests that around 300 were summarily executed by way of example.

Quite possibly the rebellion had been, at least to some degree, influenced by the German Peasant Rising of 1525 where not only had the serfdom been a leading issue, but the appeal of the New Testament, expounded by Luther. The Ket movement's famous demand: –

> *"We pray that all bond men may be made free, for God made all free with his precious blood shedding"*

The motives for Enclosure in Tudor times were not so very unlike the situation we are currently finding with the motives of the proposed 'National Planning Policy Framework' today.
Back then, in the Tudor period, the ultimate stimulus for Enclosure was a rising population, compelling individuals or whole communities to devise more economical ways of using their land. Landowners converted their arable, removed smallholdings, and put their fields to pasture in order to reduce their labour costs. All the subsidiary motives for enclosure have to be considered but the overwhelming compulsion of population increase together with accompanying price rises can explain why enclosure made such swift progress and was such a burning issue in the separate periods of history, the sixteenth and early nineteenth centuries.

Subjects require continuous review – nothing is truly immune from change. As we look back at historical events, depending on our current circumstances, we can see a differing side to those events. The fundamental elements of good rulings must be 'agreement by understanding' and hopefully justice over rights. Fairness may not always be democratically possible.

Between 1517, when Wolsey's commission investigated the progress of enclosure in Norfolk, and the debacle of 1549, the tale is one of perpetual disputes, riots and lawsuits, some between rival landlords or rival villagers, but mainly between landlords and tenants. In 1539 Sir Henry Parker was charged with encroaching upon Hingham Common; in 1540 it was Middleton Common and in 1544 it was Great Dunham. Fence-levelling almost attained the status of a rural pastime by the time it had reached Attleborough and the fateful outcome of 1549.

A Commission appointed in 1548 had been directed to enquire into engrossing as well as enclosing and imparking, but it did not complete its work and the only returns to have survived relate to Warwickshire and Cambridgeshire. Disturbances continued throughout the country and a Midland Revolt in 1607 caused the enclosure commissioners then to centre their attention upon that area. When Edwin Gay examined the enclosure evidence collected by the commissions of enquiry in the early Stuart period, he suggested that the complaints against depopulating enclosure were somewhat exaggerated. Enclosures, in a somewhat ruthless manner were known to have occurred before the beginning of the reign of Henry VII. Enclosure has first to be recognised as a social economic problem concentrated particularly in East Anglia and the Midlands.

In the current circumstances, nationwide, we are faced with legislation that may allow agricultural land, previously protected (by rights) to be developed by profiteers. The citizenry, represented by august bodies such as the National Trust, the Open Spaces Society, the Countryside Alliance and the Campaign for the Protection of Rural England are opposed to the Government introducing such a relaxation of planning regulations.

The Government's edict that there must be "a presumption in favour of sustainable development" will no longer protect, forests and Areas of Outstanding Beauty. The changes in law may lead to unrestrained building in rural areas. Our Government sees new sustainable developments as vital to the economy and in housing a rapidly increasing population. With such plans ahead are we on the brink of another historical moment when the citizenry, in an attempt to prevent change, rise up in opposition?

Alan Shelley, 29 October 2011.

Footnotes: -
Heartbreak of Change The analogy can be made to the human response of such permanent changes as occurred with the 'Enclosures'. The poet John Clare adequately recorded the sad losses forever of the common lands, the dingley dell, the forest glade and of the ancient wild-flowered meadows

Citizenship carries with it rights and responsibilities primarily, political participation in the life of a community, a right to vote and a right to receive certain protection from the community as well as obligations. There are attendant duties, rights and privileges.