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論説

“Of the Absolute Rights of Individuals” Fukuzawa on Blackstone

Albert M. Craig
Cambridge, Massachusetts, November 2009

Fukuzawa Yukichi began the third volume of *Conditions in the West* (*Seiyō jijō nihen*) in 1870 with a translation of a chapter from Sir William Blackstone’s *Commentaries on the Laws of England*. The title of the chapter was “Of the Absolute Rights of Individuals.” He placed it at the beginning of the book because he felt it was supremely important. He referred to it as a *bikō*, by which he meant a supplementary text that would illuminate the whole of the West and not just a particular country.

That Fukuzawa should present material on natural rights is not surprising. In 1866, in the first volume of *Conditions*, he had translated the *Declaration of Independence*, the *U.S. Constitution*, and brief histories of the United States, the Netherlands and England, all three of which were constitutional states. In 1868, in the second volume, he had translated about half of John Hill Burton’s *Political Economy*, including a chapter on “Individual Rights and Duties.” In 1869, he had published *A Discussion of the British Parliament* (*Eikoku gijiindan*). Two years later, in 1872, he would publish the first volume of *An Invitation to Learning* (*Gakumon no susume*), which began with the famous sentence: “It is said that Heaven does not create one man above others and another below. As born from Heaven, all men are equal, without any distinction between noble and base, high and low...” Clearly, the years from 1866 to 1872 were the peak period of his acceptance of the ideas of natural law and the natural rights of freedom and equality.

When Fukuzawa translated Blackstone, he was working under pressure. In 1868, he had given up his job at the Gaikokugata --the foreign ministry of the bakufu. Subsequent to 1868, he also spurned several job offers from the new Meiji government and resolved to make a living as an independent translator and writer. During 1869 and 1870, he worked tirelessly. *Conditions in the West II* was one of many translations he completed during those years. He no doubt translated quickly.[1]

Blackstone and Kerr

William Blackstone (1723-1780) was an Englishman educated at a "public" school (Charterhouse) in London and at Oxford University (Pembroke College). While still a student at Oxford, he was apprenticed to a barrister (at the Middle Temple of the Inns of Court). In 1744 he became a fellow of All Souls at Oxford. In 1750, he became a Doctor of Civil Law and opened a practice; three years later, he began lecturing at Oxford on English common law. These were the first lectures on English law given at a university in England; until then, law had not been an academic field. In 1761, he was elected to Parliament. He left the university in 1766 and eventually was appointed a justice at the Court of Common Pleas. From 1765 to 1769, Blackstone published his four-volume *Commentaries on the Laws of England.*

In speaking of the legal systems of Europe, a distinction is often drawn between civil and common law. Civil law, which was influenced by Roman law, consists of statutes enacted by legislatures. The laws of France and Germany, both of which drew on Roman law, are examples of civil law. The Japanese Civil Code (*Minpōten*), which was based on the French, also belongs in this category. In contrast, common law is customary law as reshaped by the decisions of judges in the light of reason. It is seen as an evolving tradition that is not dependent on legislation. England and its former colonies are seen as possessing a common law tradition. The distinction between the two types of law, however, is not as clear as it may seem at first glance. In both England and France, elective bodies enacted laws, judges interpreted them, and other judges looked to precedents before rendering their verdicts. At best, the difference seems to be one of

emphasis.

In the era of English history immediately preceding Blackstone’s *Commentaries*, the emphasis was on decisions by judges. One writer has commented that Parliament enacted 3000 statutes but judges made 300,000 decisions. Blackstone’s great achievement was to select representative, or colorful, cases from the superabundance of precedents and to organize them in a framework that an aspiring lawyer could easily understand. The elegance of his writing, the clarity of his analysis, the breadth of his erudition, and, perhaps most important, the lack of any comparable work, made the *Commentaries* an immediate success. Almost overnight, it became the basic text for instruction in law in England and the United States. In some instances, it was the only text used by students in the United States. Scores of editions, revisions, and abridgments were published well into the twentieth century. (After Blackstone, an era of reform began in which the emphasis shifted toward statutes. Jeremy Bentham (1748-1832), was the leading representative of this new wave of reformism. He opposed Blackstone’s ideas.)

One of the many editions of the *Commentaries* was by Robert Malcolm Kerr (1821-1902). Kerr was born in Glasgow and became a student at Lincoln’s Inn (one of the Inns of Court) in 1842. He was called to the bar in 1848, became a judge at the City of London Court in 1859, and was admitted as a barrister of the Middle Temple in 1860. In addition to publishing a new edition of the *Commentaries* in 1857, he wrote two abridgments. The first, published in 1858, was of Blackstone’s first book and titled *The Student’s Blackstone: Selections from Commentaries on the Laws of England*. The second, published in 1865, dealt with all four books and was titled *The Student’s Blackstone: Commentaries on the Laws of England*. Such abridgments were sorely needed, for despite the original text’s excellence and the fact that it had been written for the use of students, it was encumbered with many digressions and lengthy footnotes in Greek, Latin, Italian, and French. In short, it exceeded the needs of most students of law. In abridging the work, Kerr made every effort to preserve the original language of the *Commentaries*. He did not interpret Blackstone so much as shorten Blackstone. Critical passages are often identical with the original.

Kerr published his second abridgment in 1865. Fukuzawa’s translation is

based on Chapter I of Kerr's second abridgment. Kerr's title page gives additional information: "Abridged and Adapted to the Present State of the Law." The date of publication is also given on the title page.[2] This date, I would conjecture, led Fukuzawa to think that the book was a contemporary work. Nowhere in the Preface or Introduction is there any mention of Blackstone's dates, or of the fact that the *Commentaries* had been written a century earlier. Had Fukuzawa been aware of this, he would not have purchased the abridged *Commentaries* or translated the chapter from it, since he had a keen sense of the speed at which knowledge was advancing. He probably bought the book at a New York bookstore during his 1867 visit to the United States.

Fukuzawa's Translation of Kerr's Blackstone

In his first chapter, "Of the Absolute Rights of Individuals," Blackstone laid out the definitions and distinctions which he would use throughout the four books of the work. Blackstone presented his analysis of law in numerical sequences, with two of this, four of that, and five of something else. It is as though he took the chapter directly from an outline of his lecture notes. The focus of the chapter is natural law.

Blackstone began by saying that (man-made) "municipal law is a rule of civil conduct, commanding what is right and prohibiting what is wrong."[3] Consequently, "the principal subjects of law are rights and wrongs." Fukuzawa handled these definitions skillfully: he understood that "what is right" (*seiri*) was different from "rights" (*tsūgi*). (In his Preface to the work containing the translation, Fukuzawa discussed the several meanings of "right" and "liberty" in the English language and the difficulty of translating these terms.)[4]

Blackstone next laid out the four broad categories that he would treat in his *Commentaries*: the Rights of Persons, the Rights of Things, Private Wrongs, and Public Wrongs. Each was the subject of one of the four books of the *Commentaries*. Fukuzawa translated "rights" as *tsūgi*, a translation-term he had already used in earlier translations, and then distinguished between the rights of persons (*isshin no*) and those of things (*mono no*). He translated "wrongs" as *aku*, the word for bad (as in *akunin* or bad man, *akushitsu* or bad quality, *akugyō* or evil

deeds), and then distinguished between private (*shi*) and public (*kō*) wrongs. In translating these and other terms, he used commonplace ideographs familiar to his readers, rather than using or creating a recondite legal vocabulary. (Blackstone also treated the legal distinction between natural persons and artificial persons, such as corporations. Fukuzawa felt this distinction was superfluous to his purp oses and omitted the paragraph containing it.)

The most important distinction in the chapter was between absolute and relative rights. Blackstone defined an absolute right as one that a person possesses wholly apart from his relations to other persons: "They are such as would belong to persons in a state of nature." Blackstone wrote "would belong," rather than "belong," because he was not sure whether such a state had ever existed. (More on this later.) Fukuzawa sidestepped the use of the subjunctive, and wrote that absolute rights (which he translated as *mukei no tsūgi*) are those in a person's nature, in his heaven-given nature (*hito no tenpu ni zokushitaru mono*), whereas relative rights (which he translated as *yūkei no tsūgi*) are those that arise from being in society (*sezoku ni ori*) and having relations with others (*sejin to maji-warite tagai ni kankei suru*).

Moving from the abstract to the concrete, Blackstone then gave a historical sketch tracing the gradual rise of English liberties. In the original edition of the *Commentaries*, Blackstone had written of "the Great Charter of Liberties, which was obtained, sword in hand, from King John." In his abridgment, Kerr omitted "sword in hand." Fukuzawa translated "Great Charter of Liberties" literally as "*jiyū no taihō*," added the date 1215, and in a page-note in smaller print, identified it as the Magna Carta. In doing so, he provided a cross-reference to his own account of English history in *Conditions in the West I*, in which he wrote that Magna Carta meant Great Law (*taihō*) and that it had been promulgated in 1215.[5] He added such dates for each historical advance noted by Blackstone.

In the same paragraph, Blackstone continued: "To these succeeded the Bill of Rights, or declaration delivered by the lords and commons to the Prince and Princess of Orange; and afterwards enacted in parliament when they became king and queen." Fukuzawa restated this as "In 1688, during the reign of William III, the Bill of Rights was established." The insertion of the date, the omission of the princess, and the identification of the prince as William III, were, again, consonant

with what he had written in *Conditions in the West I*. Fukuzawa usually followed the text closely, but he felt free to make changes that he thought would help his readers.

Blackstone then asked, how do the charters, bills, and acts, which advanced English liberties over the ages, fit the definitions he gave earlier? Do these advances rest on absolute or on relative rights? His answer was that English liberties are composed of two elements: that part of natural liberty that remains after the cuts required by society have been made, and the "civil privileges" established by society to replace the part of natural rights that has been lost.

Fukuzawa's translation of these difficult ideas was a model of clarity. He was able to translate accurately and quickly because by 1870 he was already familiar with many of the philosophical ideas contained in the *Commentaries*. The contrast in Western philosophy of what is natural and what is man-made, and the idea that the natural order contains ethical values, are concepts he had encountered in his earlier translations of 1866 and 1868. He had already worked out a way of presenting these ideas in the Sino-Japanese vocabulary of his day; he had already thought out cultural equivalences between ideas in the West and Japan.

Blackstone next analyzed at length the three principal rights that constitute the core of English liberties: personal security, personal liberty, and private property. His analysis of these rights was the heart of the chapter; it explained the ideas that Fukuzawa was most concerned to convey to his readers. Fukuzawa's translation was exemplary.[6]

Blackstone ended the chapter with a discussion of five "auxiliary subordinate rights" which "protect the three great and primary rights." They were: the powers and privileges of Parliament, the limitation of the royal prerogative, the right of appeal to the courts, the right to petition the sovereign or the houses of Parliament, and the right to bear arms. Fukuzawa translated this material with his usual verve. He completely omitted, however, the right to bear arms. We may conjecture that he had no wish to proclaim such a right in the unsettled conditions of Japan in 1870, a year before the abolition of the daimyo domains.

Translators and Texts

How a thinker relates to his own society and age is a perennial question. Proponents of natural law often have used it as an ideal system to criticize the institutions of their society. Voltaire and Rousseau used it as such. Locke, similarly, used it to justify the overthrow of a tyrannical system in the Glorious Revolution of 1688. Blackstone accepted most of Locke’s philosophy, and approved of the Glorious Revolution. Thus, in the terminology of his age, he was a Whig. But he saw that revolution as one segment of a centuries-long expansion of English freedoms. In his view, the edifice of man-made English law, the subject of his *Commentaries*, rested on the unyielding foundation of natural law, and was informed by it. Englishmen in his own day, he felt, enjoyed greater freedoms than any other people in the world. The *Commentaries* were a celebration of that fact; his purpose in writing the book was to acknowledge and conserve these laws. This essential conservatism led Jeremy Bentham and other reformers in the age that followed to view the *Commentaries* as the epitome of the old system they wished to change.

Fukuzawa’s position in Japan was very different. The great event of mid-nineteenth century Japan was the Meiji Restoration. Fukuzawa’s attitude toward it was complex, and changed as the Restoration itself changed. The Restoration had begun as a movement by a few domains seeking a larger voice in national affairs. It claimed legitimacy by championing the emperor and anti-foreignism; for some activists these were temporary goals, others took them to heart. By 1866 or 1867, however, the movement had turned into a rebellion against Tokugawa rule. As a student of the West, an employee of the bakufu and then a vassal of the Tokugawa shogun, Fukuzawa bitterly opposed the rebellion. Yet even before its culmination in 1868, the political rebellion had begun to turn into a cultural revolution. Fukuzawa was at the heart of this revolution. His *Conditions in the West* and other early writings helped launch it. In 1870, when he translated Blackstone, he was seeking to promote it. Blackstone’s concept of natural law, which in England was a bulwark of existing laws, became in Japan part of a radical agenda for change. For Japan to advance to a “civilized” state, human freedom

was a necessary component.

A second question for any thinker-translator is his understanding of the original text. A text is a node in a web of thought. For a translator, some areas in the text may be opaque; he may interpret others according to his prior knowledge of the web. An example of opaqueness may be seen in Fukuzawa's translation of the following sentence from *The Student's Blackstone*:

> Every man, when he enters into society, gives up a part of his natural liberty....[7]

Fukuzawa's translation is as follows:

> *Hito to shite sude ni sezoku ningen no kōsai ni kuwaruru toki wa, kono kōsaijō yori shite...tenpu no fuyo seru isshin no jiyū o mo isasaka wa kikyaku suru tokoro nakarubekarazu*.[8]

What does "when" (*toki*) refer to in this sentence? Is it that remote point in time when primitive man left the state of nature and by way of the social compact formed a civil society with rules and laws? Or is it the moment when "every man" in the contemporary world becomes a member of his own society and subject to its laws? Blackstone was almost certainly writing about the latter case. He was writing of what legal scholars of his age called the "doctrine of implied consent." That is to say, the idea that any person living in a society has by that fact opted for membership in it. (The doctrine prevents a criminal brought before judges at court from saying that he had never joined society and was, therefore, not subject to its laws.) Fukuzawa's literal translation is perfectly acceptable. But while doing it, he did not have these two alternatives in mind. He had not read Locke and knew about his ideas only as they were reflected in Blackstone, and it is unlikely that he had ever heard of the doctrine of implied consent.

Another example of how translation is affected by the larger web of thought can be seen in Fukuzawa's view of the condition of the least developed human beings. Blackstone, in his philosophical thinking, drew on both Locke and contemporary Scottish thinkers. The two schools, if we may call them that, agreed

on the importance of natural laws and agreed that the right of freedom was one of these. This right was an active principle in human nature and affected human behavior, even in its least developed state. They disagreed, however, on the question of whether early man was social or not. Locke held that he was pre-social and existed in a "state of nature," subject only to nature's laws. The Scots held that he was social and had rules or laws, however rudimentary. Blackstone attempted to straddle these two positions, with the consequence of considerable ambiguity in his early chapters. He wrote of the state of nature, but he also wrote that "man was formed for society."[9] Also, though he treated liberty as an active principle, Blackstone held that the "savage liberty" of early man was "infinitely less desirable" than the "legal obedience" of later societies.

The first time Fukuzawa encountered this issue was when Blackstone defined an absolute right as one that "would belong to persons in a state of nature." As we noted earlier, Fukuzawa translated this as "in a person's nature" (*hito no tenpu ni zokushitaru mono*). Blackstone meant this, but he also meant the condition of primitive man. A paragraph later, however, when Blackstone wrote of "savage liberty," Fukuzawa was forced to address the condition of the earliest humans. He must have felt that the juxtaposition of "savage" and "liberty" (his translation of the term was *ban'ya jinmin no jiyū*) would be perplexing to his readers, for he added the following explanatory page-note:

> What is savage freedom (*ban'ya jinmin no jiyū*) ? It describes peoples who have no permanent dwelling (*kyosho sadamarazu*), who have no regular food or sleep (*minshoku tsune naku*), who are satisfied to be ignorant and unlearned (*muchi mugaku*), who know nothing of social mores (*seken fūzoku no nanisama taru o shirazu*), and pass their lives in brutish vulgarity (*shunji to shite shōgai o okuru*). That is to say, it is a freedom that would not be permitted in a world where culture (*bunka*) flourishes. (This is the author's translation from the Japanese page note to English. Key terms in the original Japanese are indicated.)[10]

Why is Fukuzawa so negative in his view of primitive man? Fukuzawa was fully aware of the importance of freedom as a natural law; he saw it as an essential

component of human nature and the basis for legal reform in Japan. The answer, I would suggest, is that he differed from Locke and Blackstone and viewed the principle of freedom as quiescent in the savage state. It was there but had not yet developed. Only as society advanced would its force become manifest.

In addition, Fukuzawa's negative conception of primitive man was influenced by his prior translations. In 1868, for the second volume of *Conditions in the West* (*Seiyō jijō gaihen*), Fukuzawa had translated chapters from John Hill Burton's *Political Economy*. Burton had described early humans as possessing a freedom that was only "a freedom to starve, a freedom to tyrannise." In 1869, Fukuzawa had translated twice a passage from Samuel Augustus Mitchell's *New School Geography* that contained characterizations of savage man that were very close to those in the page-note. In translating these accounts, Fukuzawa wrote of "savage peoples" (*ban'ya no min*) who "lack fixed dwellings" (*kyosho o sadamezu*), and "were illiterate, ignorant of law, and had no concept of rules of behavior" (*moji o shirazu, hōritsu o shirazu, katsute reigi no nanimono taru o shirazu*.) The language is very similar to the page-note. Both 1869 translations also state that in the savage state humans were little removed from birds and animals, which is almost the same as "*shunji to shite shōgai o okuru*."[11] In short, Fukuzawa's translation of Blackstone was shaped at times by his prior exposure to other nodes in the web of Western thought.

A final point is that in translating Kerr's Blackstone Fukuzawa had to shift from one world view to another, and this influenced the content of the translation. For example, as we have seen, Blackstone called natural rights "absolute." His chapter title is "Of the Absolute Rights of Individuals;" in the text, as well, he wrote of "the absolute rights of man." But in translating these phrases, Fukuzawa omitted the "absolute," and spoke simply of *ningen no tsūgi* or *jinsei mukei no tsūgi*. Why did he diverge from his text? Certainly the idea of "absolute" was not beyond the resources of the Japanese language of that age.

The answer lies in the difference of their philosophical assumptions. Blackstone was a theist and as such was appealing to the authority of God. He believed that God had created nature, and that nature embodied God's will. For him, the Christian God was an absolute being, and the rights given by nature, therefore, partook of God's character. The following passage from Blackstone's Introduction

to the *Commentaries* illustrates his religious convictions. (Although Fukuzawa did not translate the Introduction, he probably read it before translating Chapter I.)

> Man, considered as a creature, must necessarily be subject to the laws of his Creator...As man depends absolutely on his Maker for everything, it is necessary that he should in all points conform to his Maker's will. This will of his Maker is called the *law of nature*. For God, when he created matter, and endued it with a principle of mobility, established certain laws for the perpetual direction of that motion; so, when he created man and endued him with free-will to conduct himself in all parts of life, he laid down certain rules, whereby that free-will is regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws. These rules are the eternal, immutable laws of good and evil....[12]

The authority to which Fukuzawa appealed was not God but *ten* (heaven). He translated "the natural liberty of mankind" as *jinsei tenpu no jiyū*, and as noted earlier, "natural liberty" as *ten no fuyo seru isshin no jiyū*, and "natural rights" as *hito no tenpu ni zokushitaru mono*. In these expressions, what did he mean by *ten* and *tenpu*? Should they be understood to mean "nature" and "given by nature?" Or do they have metaphysical connotations, and should they be understood as "heaven" and "heaven-given?" (Since *ten* is the source of human rights, it is clearly not "nature" in the modern sense of the term.) It is beyond the scope of this essay to explore the multiple meanings of *ten* in Japanese; even within Confucianism, the range is considerable. But however *ten* is defined, the stark Western dualism of nature and an absolute deity is missing in the translation. In short, it is the Japanese Confucian metaphysical setting that explains Fukuzawa's avoidance of Blackstone's term "absolute."

Notes

[1] I would like to call the reader's attention, at this point, to the pioneering research of Anzai Toshimitsu. In 1986, he wrote "Fukuzawa Yukichi to W. Burakkusuton [*Ingurando hoshakugi*] *Seiyō jijō* dainihen ni okeru dō'nyū ni matsuwaru jakkan no mondai." The

article appeared in Vol. 2 of *Kindai Nihon kenkyū*.

[2] An 1870 edition of Kerr's abridgment is identical to the 1865 edition (except for two unimportant supplements at the end of the book, which treat legislation passed in 1868 and 1869-1870.) But in this article, I have used the 1865 edition.

[3] In this paper, when I say Blackstone, I refer to Kerr's 1865 abridgement of Blackstone, except where I am comparing the abridgment and the original. For the most part, Kerr's abridgment used Blackstone's original prose but with cuts. Sometimes, however, he paraphrased or made changes in the original.

[4] Japanese scholars have analyzed extensively Fukuzawa's translations of these terms. The interpretations by Maruyama Masao in his articles on Fukuzawa and in his *Bunmeiron no gairyaku o yomu* are particularly brilliant.

[5] Sir William Blackstone, *Commentaries on the Laws of England* (*A New Edition Adapted to the Present State of the Law*) (London, 1857) 114; Kerr, 18; *Fukuzawa Yukichi zenshū* (hereafter FZS) 1:363.

[6] Fukuzawa's translation contains an error. Blackstone treated personal security under five headings, the first being the right to life itself. In explaining this, he stated that a fetus in many respects is treated in law as if it had actually been born, and that "in this point the civil law agrees with ours." By this, he meant that French law agrees with English law. Fukuzawa mistranslated it as follows: "On these points, civillaw (*sezoku no kokuhō*) does not in the least contradict the laws of nature (*jinsei tennen no jōhō*). Fukuzawa could not possibly have known that "civil law" referred to the French code: it was the only reference to a foreign legal system in the chapter, and Blackstone frequently used "civil liberties" and other terms with "civil" in connection with English law. Given the pitfalls that lie hidden even in ordinary prose, it is remarkable that Fukuzawa made so few errors.

[7] Kerr, 17.

[8] FZS I, 495.

[9] Kerr, 2.

[10] FZS I, 495.

[11] FZS II, 463-4, 663.

[12] Kerr, 1-2.

The Student's Blackstone, Chapter I, "Of the Absolute Rights of Individuals"

THE STUDENT'S BLACKSTONE.

COMMENTARIES

ON

THE LAWS OF ENGLAND.

In Four Books.

By SIR WILLIAM BLACKSTONE, KNT.,
ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS.

ABRIDGED

AND

ADAPTED TO THE PRESENT STATE OF THE LAW,

By ROBERT MALCOLM KERR, LL.D.
BARRISTER-AT-LAW.

LONDON:
JOHN MURRAY, ALBEMARLE STREET.
1865.

THE LAWS OF ENGLAND.

BOOK THE FIRST.

OF THE RIGHTS OF PERSONS.

CHAPTER I.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

The English liberties—Right of personal security—Right of personal liberty—Right of property—Securities for the enjoyment of these rights.

THE objects of the laws of England are so very numerous and extensive, that in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other; both of which are equally productive of confusion.

Now, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; it follows, that the primary and principal objects of the law are RIGHTS and WRONGS. In the prosecution therefore of these commentaries, I shall follow this very simple and obvious division; and shall in the first place consider the *rights* that are commanded, and secondly the *wrongs* that are forbidden by the laws of England.

Rights are, however, liable to another subdivision; being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum*, or the *rights of persons*; or they are, secondly, such as man may acquire over external objects or things unconnected with his person, which are styled *jura rerum*, or the *rights of things*. Wrongs also are divisible into, first, *private wrongs*, which, being an infringement merely of particulars rights, concern individuals merely, and are called civil injuries; and secondly, *public wrongs*, which being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors.

The object of the laws of England falling into this fourfold division, the present commentaries will therefore consist of the four following parts:—1. *The rights of persons;* with the means whereby such rights may be either acquired or lost. 2. *The rights of things;* with the means also of acquiring and losing them. 3. *Private wrongs*, or civil injuries; with the means of redressing them by law. 4. *Public wrongs*, or crimes and misdemeanors; with the means of prevention and punishment.

We are now, first, to consider the *rights of persons;* which are of two sorts; first, such as are due *from* every citizen, and are usually called civil *duties;* and, secondly, such as belong to him, which is the more popular acceptation of *rights* or *jura*. But both may be comprised in this latter division; for, as all social duties are of a relative nature, at the same time that they are due *from* one man, or set of men, they must also be due *to* another.

Persons also are divided by the law into either natural persons or artificial. Natural persons are such as nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

By the absolute *rights* of individuals, we mean such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties*, which man is bound to perform, considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them; for the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man, therefore, be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself (as drunkenness, or the like), they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. *Public* sobriety is a relative duty, and therefore enjoined by

our laws; *private* sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction. But with respect to *rights*, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

The absolute rights of man are usually summed up in one general appellation, and denominated the *natural liberty* of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature. But every man, when he enters into society, gives up a part of his natural liberty as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws which the community has thought proper to establish. And this species of legal obedience is infinitely more desirable than that savage liberty which is sacrificed to obtain it. For no man that considers a moment would wish to retain the uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or *civil liberty*, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public. Hence we may collect that the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every causeless restraint of the will of the subject, is a degree of tyranny: nay, that even laws themselves, if they constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty: whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance, by supporting that state of society, which alone can cure our independence. So that laws, when prudently framed, are by no means subversive, but rather introductive of liberty; for where there is no law there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws is alone calculated to maintain civil liberty which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

The absolute rights of every Englishman (which, in a political sense, are usually called their liberties), are coeval with our form of government. At some times we have seen them depressed by

tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

First, by the Great Charter of Liberties, which was obtained from King John, and afterwards, with some alterations, confirmed in parliament by Henry III., his son. Afterwards by the *Confirmatio Cartarum*, whereby the Great Charter is directed to be allowed as the common law; and all judgments contrary to it are declared void. Next, by a multitude of subsequent corroborating statutes, from the first Edward to Henry IV. Then, after a long interval, by the Petition of Right; a parliamentary declaration of the liberties of the people, assented to by King Charles I. in the beginning of his reign. Which was followed by the *Habeas Corpus* Act, passed under Charles II. To these succeeded the Bill of Rights, or declaration delivered by the lords and commons to the Prince and Princess of Orange; and afterwards enacted in parliament when they became king and queen. Lastly, these liberties were again asserted at the commencement of the last century, in the Act of Settlement, the statute declaring them to be "the birthright of "the people of England," according to the ancient doctrine of the common law.

Thus much for the *declaration* of our rights and privileges. The rights themselves consist in a number of private immunities; which are indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society has engaged to provide, in lieu of the natural liberties so given up by individuals. And these may be reduced to three principal or primary articles; the right of *personal security*, the right of *personal liberty*, and the right of *private property*: because, as there is no other known method of compulsion, or of abridging man's natural free-will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is a right inherent by nature in every individual; and it

begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, kills it in her womb; or, if any one beat her, whereby the child dies in her body, and she is delivered of a dead child; this is a heinous misdemeanor. An infant in *ventre sa mere* is also supposed in law to be born for many purposes. It is capable of having a legacy; it may have a guardian assigned to it; and an estate may be limited to its use, as if it were then actually born. And in this point the civil law agrees with ours.

2. A man's limbs enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural, inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty. And both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done by the highest necessity and compulsion. Therefore if a man through fear of death or personal injury, which is called in law *duress*, is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisitite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance. And the law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessaries of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, of which in their proper places.

These rights, of life and member, can only be determined by the death of the person; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was banished or abjured the realm, or entered into religion; that is, became a monk; in which cases he was absolutely dead in law, and his next heir should have his estate; for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's *natural* life. And this natural life cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority; but it may be forfeited for the breach of those laws of society which are enforced by the sanction of capital punishments, though the law of England now very seldom inflicts any punishment extending to life, unless upon the highest necessity.

3. Besides his limbs, the rest of his person is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding.

4. The preservation of a man's health from such practices as may prejudice or annoy it; and,

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles it will suffice to have barely mentioned among the rights of persons, referring the more minute discussion of their several branches to our third book, which treats of the infringement of these rights, under the head of personal wrongs.

II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws.

Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomsoever he or his officers thought proper, there would soon be an end of all other rights and immunities. The confinement of the person, in any wise, is in law an imprisonment. So that the keeping a man against his will in a private house, arresting or forcibly detaining him in the street, is an imprisonment. And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, until he seals a bond or the like, he may allege this duress, and avoid the extorted bond. To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus* (of which we shall treat in the third book of these commentaries). For if there be no cause expressed in the warrant, the gaoler is not even bound to detain the prisoner.

A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. For exile, or transportation, are punishments unknown to the common law; and whenever the latter is inflicted, it is by the express direction of some modern act of parliament.

And the law is in this respect so liberally construed for the benefit of the subject, that, though *within* the realm the sovereign may command the service of all his liegemen, yet he cannot send any man *out of* the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment implies an exception: he cannot even constitute a man lord lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might in reality be no more than an honourable exile.

III. The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land, which are extremely watchful in ascertaining and protecting this right. So great indeed is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner. All that the law does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature, or those to whom it commits this its exercise, ought to indulge with caution.

Nor is this the only instance in which the law of the land has postponed even public necessity to the rights of private property. For no subject of England can be constrained to pay any taxes, even for the defence of the realm, or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. This is enacted expressly by the *Confirmatio Cartarum*, and in numerous acts of parliament since passed, the last of these (1 W. & M. st. 2, c. 2), declaring that levying money for or to the use of the crown, by pretence of prerogative, without grant of parlialiament, or for longer time, or in other manner, than the same is or shall be granted, is illegal.

We have thus taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared by the dead letter of the laws, if the constitution had not established certain other auxiliary subordinate rights of the subject, which serve to protect the three great and primary rights of personal security, personal liberty, and private property. These are,

1. The constitution, powers, and privileges of parliament, of which I shall treat at large in the ensuing chapter.

2. The limitation of the royal prerogative, by bounds so certain and notorious, that it is impossible the sovereign should either

mistake or legally exceed them without the consent of the people. Of this also I shall treat in its proper place.

3. A third subordinate right is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein, according to the emphatic words of *Magna Charta*, spoken in the person of the king, who in judgment of law is ever present and repeating them in all his courts; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*: and therefore every subject, "for injury done to him, *in bonis, in terris, vel* "*persona*, by any other subject, be he ecclesiastical or temporal, "without any exception, may take his remedy by the course of the "law, and have justice and right for the injury done to him, freely "without sale, fully without any denial, and speedily without "delay."

4. If there should happen any uncommon injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the sovereign, or either house of parliament, for the redress of grievances. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult: for under these regulations it is declared by the statute 1 W. & M. st. 2, c. 2, that the subject has a right to petition; and that all commitments and prosecutions for such petitioning are illegal.

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, which is also declared by the same statute, and is indeed a public allowance of the natural right of resistance and self-preservation, when the laws are found insufficient to restrain the violence of oppression.

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen. So long as these remain inviolate, the subject is perfectly free; for every species of oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be supported in its full vigour; and limits, certainly known, be set to the royal prerogative. And lastly, to vindicate these rights, when attacked, the subjects of England are entitled, in the first place, to the regular administration of justice; next, to the right of petitioning the sovereign and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence.