Law's Evolution: Why Private Law Thrives in Western Europe and Japan

John O. Haley
Wiley B. Rutledge Professor of Law
Washington University in St. Louis

Utrecht, The Netherlands
September 20, 2007

This paper is based on two chapters of a book-in-progress tentatively entitled Law's Evolution*. The project is intended to build on ideas first articulated in* Authority without Power: Law and the Japanese Paradox[*]. *As in* Authority without Power, *the focus of the project is the means or manner of law enforcement rather than legal rules or norms of law. The argument is essentially that law enforcement matters most. Law is defined in terms of two separate but inter-related elements and processes—the rule (norms) and sanctions (remedies) as articulated and applied by those who exercise political authority (for law making) and power (for law enforcement). A critical proposition is that legal systems evolve in tandem with the institutions of governance, in other words, the capacity of rulers within various stages of political development to command and maintain order, especially to control resources and compel compliance with its commands.*

I argue that the emphasis on private law in Western Europe was determined by the limits of power of the political regimes that emerged after the collapse of the Western Roman Empire in the Fourth century of the Common Era through the establishment of feudalism. Constraints on the control of rulers over resources and their resulting capacity to coerce precluded the evolution to the sort of advanced public law system achieved by the rulers of Imperial China by the Third Century before the Common Era. The limits of power of the political regimes in Western Europe instead produced a reliance on adjudication of disputes to buttress authority and means of maintaining order. Contemporaneous Japanese experience suggests that Western European was not exceptional in terms of this basic evolutionary trajectory but was quite exceptional with respect to two fundamental conceptual schemes--private law and natural law--that developed in mature form in the High Middle Ages. Japan, I argue, replicated the fundamental conditions evident in Western Europe that resulted in a reliance on adjudication as the primary means of law enforcement. As a result in Japan as in Western Europe Europe adjudicatory institutions and nearly all of the basic features of a well-developed private law system became a well-developed means of law enforcement. The difference was that Japan unlike Europe did not have a conceptual system to enable the recognition of substantive legal rules and principles of private law analogous to those in the Corpus Juris Civilis, which spread

[*] John Owen Haley, *Authority without Power: Law and the Japanese Paradox* (Oxford and New York Oxford University Press, 1991).

through reception to become the formative feature of the European ius commune. Nor did any shared belief in universal values or moral system take root in Japan despite the introduction and spread of both Buddhism and Confucian precepts. The shared beliefs and values that mattered in the village and beyond remained particularistic. This tendency precluded any notion of universally valid set of moral much less legal principles to cabin either the conduct or rules of those who ruled. Particularistic values requiring deference to collectivist concerns and some degree of local autonomy also contributed to moral restraints on the exercise of power. In combination they helped to define the legitimacy that elites—nobles and warriors alike—came to regard as essential for legitimate governance. Nevertheless, in term of formal mechanisms for law enforcement, a well-developed system of adjudication of private claims operated within what otherwise appears ostensibly as a sinofied administrative order. Thus the foundations were well established for the successful reception of European private law at the end of the 19th century.

1. Introduction

By the turn of the 20th century Western law had become globally paramount. Western legal conceptions and processes were accepted universally. Western law had indeed become an essential attribute of all "civilized" nations. Hand in glove with prevailing conceptions of statehood, the definition of law as predominantly a system of private law, also uniquely Western in origin was evidenced in the centrality of civil codes and common law.

The processes of legal transplantation varied but colonization by West European states and their imposition of Western law was the overwhelmingly most common. Extending throughout the Americas and the Philippine islands, the Sixteenth century Spanish colonial empire represented the first and territorially most expansive and enduring extension. English common law institutions similarly spread with colonization Beginning with the United Stets and Latin America with independence, virtually all of the new post colonial states retained colonial legal institutions and orientations—a pattern that continued through the 20th century. By the end of the 19th century with the exception of the lands under Ottoman or Russian rule, only a handful of countries, most notably in East Asia, remained independent states. All, however, ultimately succumbed to Western institutional dominance and within a generation had reformed traditional political and legal institutions and structures along West European patterns. Of these states Japan stands out as having accomplished the first and most successful transplantation of 19th century Western law.

The aim of this paper is to offer an explanation of the unique development and primacy of private law in Western Europe and Japan's success in replicating the European experience. The argument rests on a set of simple and generally well-accepted premises related to the evolution of political systems that hopefully need only to be restated. First, political have evolved historically along a trajectory beginning with the most primitive forms of kinship based social organizations, through extended clans and

tribes with the concomitant emergence of chieftainships and ruling elites. The trajectory ends --at least to the present--with centralized bureaucratic systems administered by officials who function in theory as the agents for those who hold the authority to rule. A second premise is rulers require resources to rule. The development of political systems along the posited trajectory depends on the capacity of rulers from chiefs to emperors to control human and material resources and to coerce. The capacity to do both is a prerequisite to do either. Hence the evolution of political systems as Marx accurately observed begins with a dynamic process of power and subordination. My third and final premise is that the nature of wealth-generating resources thus defines the requirements for effective rule and the features of the political systems that emerge in this process. The most advanced early bureaucratic systems had two basic characteristics. They were agricultural societies with slave labor. Effective control over land and cultivation—in other words, agricultural labor—enabled those who ruled to create both a dependent military and civil bureaucracy that in turn perpetuated, at least internally—their capacity to govern. Without slavery the rulers of these ancient empires would have had to depend on less dependent sources of agricultural labor in effect negotiating for resources in return for security and protection. Similarly as commerce became an increasing source of wealth rulers in all ages have been forced to find mechanisms of indirect control. Licensing comes quickly to mind.

What then of law and law enforcement? To state the argument simply, patterns of law and law enforcement tend to evolve along the same trajectory in tandem with political systems. In primitive societies those with the authority (legitimacy) to rule tend not to have either control or the capacity to coerce. They exhibit a communitarian bias with custom and consensus the common sources of law and rulers as mediators often with community participation. As those who govern increase control over resources and the capacity to coerce they are able also to introduce new legal rules and to use more coercive means to enforce them. Thus legal rules that advance the interests of those who govern and the most coercive means of enforcement subject, of course to the control of those who rule characterize the most advanced political systems and legal orders.

Adjudication

What place then do adjudication and private law have in this scheme? Adjudication is both a law-making and law-enforcing process initiated and essentially controlled by claimants whose claims are recognized or denied as factually and legally valid. Unlike mediation in which the outcome requires at least nominal consent by all parties, in adjudication the third party adjudicator determines the outcome. Adjudication is a law-making process in that the adjudicator articulates and applies specific legal rules in the particular factual context of each case. Legal rules are thereby in effect created or recreated in each case as the adjudicator articulates the applicable rule and thus restates or refines preexisting rules or even formulates new rules. Adjudication thus enables those who rule to make new rules on a case by case basis. The consequent entitlement of vindicated claimants to legally approved remedies is its law-enforcing function. The adjudicator's decision may be coercively enforced either by those who govern or by allowing claimant to exercise some form of self-help. Because claimants initiate the

process no policing is necessary. To the extent that some form of self-help is permitted, no significant means of coercive enforcement becomes necessary. Because claimants initiate the process, no policing is necessary. Because the claimants maybe entitled to some form of self-help, no significant means of coercive enforcement is necessary. It is also more flexible, less direct, and less costly than other means for rulers to make and to enforce legal rules that they ultimately control. However, because adjudication requires someone to initiate the process, the rules that will inexorably be enforced most effectively are those that benefit the claimants not the adjudicator or those who rule. Thus given a choice rulers are unlikely to use adjudication as either to make or to enforce legal rules designed to serve their primary interests. In other words, the use of adjudication as a principal means of maintaining order, making and enforcing legal rules, is in itself an exceptional phenomenon that can best be explained by the constraints of power and authority that somehow have prevented the evolution of a political system toward a more advanced stage in which a more effective public legal order can prevail.

2. The Limits of Power and Private Law: The West European Experience

Three distinct factors defined the institutional borders and political orders of Western Europe. The first is geography. Ready access to the sea, with all but one transcontinental river—the Danube--flowing northward and none directly into the Mediterranean, a coastal plain stretching from the Pyrenees to the Urals, an interior terrain marked by mountains, hills and valleys, and a temperate climate facilitated southward tribal migrations and coastal invasion, small cohesive settlements in interior regions, and local agriculture and husbandry. The Rhine, the Elbe and the Oder facilitated transport and communication from interior regions to the North Sea and the Baltic with the Danube similarly connecting interior southeastern settlements with the Black Sea and the Eastern Mediterranean. Until the 20th century no single political regime was ever able to control all of these continental thoroughfares. None has ever controlled all access to the sea.

The second was the great tribal migrations of the third through sixth centuries. Prevented by the population and overall military superiority of the Eastern Empire from crossing the Danube and moving into the rich and well populated lands of the Eastern Mediterranean, the Goths, Vandals, Huns and Magyars in succession migrated eastwards into regions already settled by various Germanic tribes and then across the Rhine and into the heart of the Western Empire. As these tribes and their predecessors settled they represented step backward on the evolutionary trajectory as relatively primitive chiefdoms replacing the much more advanced centralized administrative system of the Roman Empire.

No feature of early West European history, however, rivals the formative influence of the Roman Catholic Church. The Church inherited that administrative structure and language of the Empire. By adopting Latin, the Church provided a common written language for all of Western Europe and also ensured access the written legacies of the Empire—including law. All written laws were in Latin and thus by default the customary norms and legal rules of the Germanic tribes and other non-Romans had to be

expressed in the legal terminology of Roman law. This process alone ensured Roman legal influence. The Church also thereby hosted the centers of literacy and learning. Its missionaries and priests thus provided political rulers with their primary initial access to written communication. By the middle of the fourteenth century the reach of the Church extended from the Straits of Gibraltar through the lands bordering the Baltic Sea thereby defining Western Europe even today.

Our post-Enlightenment, modern perspectives tend to marginalize the role of the Church in the formation of a legal tradition common throughout Western Europe, including England's rather aberrational experience. For our purposes here two fundamental aspects of the Church's influence need to be stressed. The first is that the Church epitomizes a regime with authority but without coercive power. Not coincidentally, I argue, such regimes tend to rely on adjudication of disputes brought by litigants as a primary means for the enforcement and recognition of legal rules. Ecclesiastical courts throughout the Church's West European domain played a foundational role from the inception of the Church in the West European emphasis on adjudication and private law. The availability of this supranational, regional system of courts also enabled the development of a conceptual system of natural *rights* in the wake of the reformulation of natural law theory within the Church via Thomas Aquinas.

The second contribution of the Church was its competitive role. The Church functioned in all meaningful respects as a political competitor for allegiance and resources with all of the emerging political regimes in Western Europe. Until the Papal Revolution at the end of the 11th century, the demarcation of authority or jurisdiction between the Church and secular political authorities was unclear and contested. In places the Church was a territorial ruler but throughout Western Europe it claimed overriding authority and jurisdiction over certain matters *(ratione materiae*) of core importance to secular rulers as, for example, ecclesiastical jurisdiction over marriage and divorce. Such jurisdictional reach The Church's claim to jurisdiction "by reason of persons" (*ratione personarum*) provided at least a degree of protection against secular political authorities for various categories of persons, such as clergy and their households and also students and "travelers," particularly merchants and sailors. As such claims became increasingly recognized and effective, they constrained both the authority and power of secular rulers within the territories they otherwise controlled. A significant effect of the Church's omnipresence was to restrict secular control throughout Western Europe over significant sources of wealth and wealth-creating activities. Unlike the political regimes of Eastern Europe as well as Asia, the Church thus imposed significant structural as well as ideological constraints on all emerging political regimes in Western Europe.

Law and the Early Kingdoms

By the end of the 10th century embryonic national political orders had emerged in the Iberian and Italian peninsulas, the British Isles and Northern France. Each evidenced law's evolutionary progression from essentially consensual, communitarian systems based on custom and consensus with rulers acting more as responsive mediators to institutional legal orders in which rulers actively redefined and enforced legal rules.

Customary norms applicable to communities with common ancestors gave way to rules made by those who governed and applied through the territory under their control. Equally if not more significant for the argument offered here, rulers gradually transformed private law delicts (torts) into public law crimes as they transformed compensatory sanctions into fines and punishments. Seventh and eighth century Alamanic Laws (*Lex Alamannorum)* as well as Bavarian laws (*Lex Baiuvaiorum*) , for example, typically provided for a specified amount in compensation to be paid as *wergeld* to those harmed by specified wrongs. The Capitularies of the Carolinian kings similarly identified specific wrongs but replaced compensatory sanctions with fines to be paid those who ruled. In the process adjudicators increasingly acquired policing and prosecutorial as well as administrative functions.

Invasions on all sides during the 8th and 9th centuries arrested this progression. Vikings and Danes in North and West, Magyars from the East, Islamic invaders from the East and South placed new demands for military resources to maintain control and order on each of these emerging regimes. By the end of the second decade of the 8th century Visigothic Spain—Western Europe's largest and most advanced political regime-- had been successfully invaded and conquered by Islamic Berbers from North Africa. By the mid 9th century Viking and Danish raiders had made significant territorial conquests in Ireland, Scotland, as well as France. At the end of the 9th century the Magyars had entered the Carpathian Basis and commenced their enduring settlement. Unable to gain new territory and resources and increasingly unable to maintain control within territory previously acquired and ruled, the early West European political regimes collapsed as a new from of governance emerged. With incessant warfare and overriding demand for security, in their place developed systems of decentralized rule based on consensual alliances among those with sufficient military prowess to make credible promises to provide security in return for loyalty and service—in a word, feudalism.

By the dawn of the 12th century complex network of diverse, competing systems of autonomy and control characterized all of Western Europe. From urban centers in the South and North, to isolated agricultural communities in interior regions, a remarkable variety of political orders had emerged. Access to the sea enabled the growth of relatively autonomous city-states, generally ruled by merchant oligarchies, which, largely free of external political control, were able to develop into thriving commercial and banking centers. Without the means for expansive administrative regulation, few if any political regimes could subject merchant communities to their control. Hence throughout Western Europe merchants were able to establish largely autonomous means of private ordering. Until the 18th century European *lex mercatoria* consisted largely of rules and practices established and enforced by merchants themselves. The inhabitants of rural areas were much more constrained. Warrior-rulers whose immediate control over productive land allowed direct supervision of agricultural labor enabled a new system of subordination of agricultural labor to develop. Such local manorial rule was made possible, however, by recognition of both cultivator proprietary interest in the land on the one hand and allegiance to overlords above them on the other. For the peasant cultivator and herdsmen limited recognition of proprietorship and possession that they gained cost a concomitant degree of freedom as constraints on their mobility were imposed. The Church had begun

the Papal revolution that consolidated its autonomy and control over directly governed territories as well as the clergy and other institutions and persons subject to its supervised protection.

Also by this time adjudication of private claims had become the prevailing mode of law enforcement throughout Western Europe. From ecclesiastical courts and royal courts, to manorial courts and merchant guilds, at all levels of medieval European society third party adjudication had became the principal means for maintaining order and enforcing legal rules. As a system for maintaining order formal adjudication by those seeking to maintain or expand their political authority, adjudication had compelling advantages. Fist, it empowered rulers by reinforcing their authority as adjudicators to find facts, identify and apply the appropriate rule and thereby determine the outcome of submitted disputes. Their superior status over the parties was also acknowledged by virtue of either prior mutual consent as in arbitration or some sort of officially recognized authority. Most importantly, adjudication required fewer resources than other forms of law enforcement. Lacking sufficient resources or a constabulary or overseeing officialdom, medieval kings and other rulers had little choice but to rely on a few designated officials as adjudicators who thereby maintained a sense of lawful order and also expressed and enhanced their political authority.

Because adjudication is a process through which persons with a cognizable claim have access to its recognition and enforcement, some core conception of enforceable claims against others--some conception of "rights" and correlative "duties" or their equivalent--is notionally necessary. In other words, the legal rules enforced through adjudication become by definition private law rules. No wonder then that the discovery of a six-century-old set of books that restated and explained the conceptual formulations of classical Roman private law could have produced an intellectual transformation and set into motion the creation of the *ius commune* of continental Europe and foundational features of the Western Legal Tradition. The books—the Digest, the Institutes and the Novella of the *Corpus Juris Civilis*—had at best some limited currency in the isolated areas of the Italian peninsular over which Justinian and his successors managed to hold or temporarily regain control. Even in the Eastern Empire at the time of their making, they are probably had little if any actual application except as academic texts that, written in Latin, all but a few of the Greek-speaking populace could even read. It is doubtful that they had any meaning as "living" law in the politically advanced, highly bureaucratic public law system of the late Eastern Empire. The ready reception of Roman private law in the 11th and 12th centuries resulted a millennium later in the conceptual foundations of private law around the globe

3. Japanese Parallels

Conventional views of Japanese law tend correctly to emphasize Japan's indebtedness to the Chinese imperial tradition as the conceptual foundation for Japanese law. Until the mid 19th century and Japan's reception of Western law, China's advanced administrative state provided the conceptional framework within which both native political and legal institutions evolved. Thus the notion of an administrative state and law

as essentially a set of administrative and penal regulations dominated all juridical thought. Yet Japan never fully replicated the Chinese imperial state, not was its closest approximation from the 7th century long-lasting. The advent of warrior governance in the 12th and 13th centuries in fact posed challenges similar to those confronted by the feudal kings of Western Europe. The warrior rulers needed to extend their jurisdictional reach for purposes of both authority and power. The nature of their rule through layers of consensual undertakings between lord and vassal with reciprocal obligations for protection and a promise of potential gain in return for loyalty and service meant that by definition no overlord could fully control. Without the resources to provide stipends to agent administrators, those who ruled at the center also suffered from both weakened means for control and also created additional incentives for officials at the local level to expropriate local resources for their own benefit. As officials in the provinces gained control over wealth-creating resources they were to establish independent bases for power. Thus for lack of more effective options overlords at the center relied extensively on adjudication, particularly over land claims (i.e., control of revenue producing territory) to maintain order as well as enhance their authority. This emphasis on adjudication continued into the 19th century. In the process Japan replicated many if not most of the features of a private law system, including the development of commercial instruments as well as a complex institutional system for adjudication. Functioning within conceptions of law and governance borrowed initially from imperial China as modified and adapted for warrior rule, the consequence was a legal order that included what we can describe a an incidental system of judicial precedents and private law rules within an essentially administrative order.

From the perspective of the ruled, the most effective strategy for survival and a meaningful degree of autonomy proved to be collective solidarity through a combination of ostensible deference to authority and in effect bargained for possession and control of wealth-producing resources. As in Western Europe although subordinated first by imperial authorities then by estate managers and finally warrior officials, peasant cultivators gained what were in effect proprietary rights to land. Although subject to sumptuary regulations restricting mobility and lifestyle, they nevertheless managed to preserve a signifi9cant degree of actual autonomy and freedom of movement. Instead of regulatory control from those who ruled, private community ordering functioned as the principal source of constraint for the vast majority of Japanese. The *mura*—the village--has been the most significant and enduring feature of Japanese institutional development. In this respect the Japanese experience represents a significant departure from that of both Western Europe and China.

The consequence for Japan has been multifaceted. Above all the combination of the authority of legal rules and their consensus-creating capacity coupled with the strength of informal, social mechanisms for behavioral control enabled Japan to maintain and to continue to enjoy a robust legal system despite the lack of fully effective means for enforcement of legal rights.

Foundations

Most historians and archeologists agree that through a process of settlement and conquest in Kyushu and western Honshu an indigenous people had assimilated with new comers from the Asian mainland. Between 300 BCE and 300 CE—the Yayoi period—rice cultivation and metallurgy had spread throughout the archipelago. The earliest known records indicate that by *mura,* small predominately kinship-based hamlets dependent on the cultivation of neighboring land first for millet and later rice had become the prevailing social organization. Until the 8th century the *mura* appear to have been largely self-governing. Stratification of political and social authority had also advanced, although presumably rudimentary and relatively weak. Family hierarchy (some suggest matriarchic tendencies) and accepted claims religious authority appear to be the common sources for legitimacy. Custom and customary processes appear to have prevailed. Law as related to institutional processes had just commenced as governing hierarchies developed, especially in those areas closest to mainland influences and settlers. The most advanced of the known communities appear to have been highly collectivized. Unlike Western Europe or Korea slavery was not then or ever a significant as a source of labor. Japan has no history of enslavement through conquest. Those who can be described as slaves were apparently primarily young children who for whatever reason were sold or bartered by their parents. Hence the capacity within the *mura* for coercion depended primarily on collective, community action with mediation the prevailing means to resolve social conflict and maintain order.

The resilience of the *mura* with their panoply of communitarian orientations is an enduring feature of Japanese institutional history. Aided by geography and the cooperation-imposing requirements of rice cultivation, as a social and political organization the *mura* resisted externally imposed controls well into the 20th century. By the 9th century a degree of cultivator proprietorship and autonomy had become intrinsic features of the social and political environment. The first attempt at their reorganization and subordination may have been, as Carl Steenstrup suggests, with the emergence of the kinship-based *uji* and subordinated artisan *be,* whose members were apparently became responsible for producing a variety of products from weaponry to burial mounds, under what is today referred to as the Yamato kings. Both seemingly absorbed the *mura*, leaving them essentially intact as components of the newer polities. A direct onslaught came with the imposition of sinofied administrative rule at the end of the 7th century.

Between the 7th and 9th centuries Japan underwent an institutional and cultural transformation. From the Yamato plain near Nara successive rulers borrowed language, religion as well as fundamental institutions and conceptions of governance and law from imperial China, already, as we have seen, one of the most institutionally advanced centralized empires. This era of Japanese history is commonly referred to as the *ritsuryō* period by virtue of the legal institutions that were adapted and imposed—a system of criminal proscriptions (*ritsu*) and administrative regulation (*ryō*) based on imperial Chinese law, particularly the T'ang Code. At the end of the 7th century the rulers of the new sinofied imperium asserted state ownership of all cultivated land with household registration and reallotment of landholding as well as reorganization of communities into administratively defined units of fifty families. Cultivators allocated land were subject to both payments to the state in kind (rice) and labor, including military service. However,

the new regime by law also distinguished “private land” with entitlement to personal possession and production from unallocated “public land” possessed by agents of the state. State coinage was also initiated, laying the foundations for a monetarized economy. With payment of taxes principally in rice but also other produce and products, notably silk, a commodity barter trade began to develop along with concomitant proliferation of attendant practices and institutions. Included, despite attempted proscription, were loans in money or rice.

At the local level many of these reforms were short-lived. The centralizing rulers in the capital failed to implement an examination system for qualification for appointment as an imperial official--among the most critical features of the imperial Chinese model. Consequently kinship and clan status became a determining criterion for imperial appointment. Powerful local chiefs or their kin received imperial appointments as local officials and administrators, leaving more or less intact the basic features local and regional governance. Other means of co-option also existed. Despite legal prohibition, intermarriage of officials and immigrant nobles with local elites was common. Traditional forms of social organization and landholding patterns and local control thus revived. Under patronage of noble houses and Buddhist or Shinto institutions in the capital, newly reclaimed and adjacent land also became increasingly subject to commendation as tax exempt estates (*shoen*), comprising disparate *mura* and existing cultivated fields as well as newly reclaimed land. The new estate holders, mostly in Nara and Kyoto, the capital cities (Nara from 710 to 794, Kyoto from 794 to 1869), received tax exempt entitlements to revenue from land (*shiki*) that continued to be cultivated by both existing holders as well paid laborers, many of whom had possessory entitlement to adjacent land. Along with the steadily growing number and expanse of these estates, traditional forms of social organization and tenure also persisted.

Historians generally attribute the rise of a local-based warrior class to a combination of predatory force as well an accompanying need for protection and order prompted by the diminution of imperial rule. The abandonment of a paid professional military with a conscripted peasant army under central control was another example of the disintegration of centralized *risturyō* governance. By the end of the 10th century a conscript army had been replaced by small, independent units increasingly employed by provincial governors and *shoen* managers to maintain internal order and protect against external encroachment. Within a relatively short time warriors had seized or otherwise acquired control of revenue-producing land, particularly in the frontier regions of the northeast where they and reclamation projects were most numerous.

The growing number of tax exempt estates administered by local managers reduced both effective control over wealth-producing resources and revenues by those who governed at the center. Many of the emergent warriors may have had local kinship ties. Others were more recent settlers, especially in areas such as the northeast, where arable public land was being reclaimed and effectively privatized.

The emergence of warrior rulers also coincided with the development of an increasingly complex system of proprietorship based on the recognition of *shiki* as

transferable claims to the revenue or produce of cultivated land. Such proprietary "rights," it should be noted, did not exclude the more fundamental claim to possession and the entitlement to cultivate the land in question. As noted by Kan'ichi Aakura in his 1925 collection of documents from the Iriki region of southwestern Kyushu, "men held on to the soil of the land, but divided and disposed of part of the income."[1] By the 12th century at least in the most productive and prosperous regions of west central Japan nearest the capital in Kyoto, six cultivator status groups are identified—the *myōshu*, local land managers who held proprietary claims within the *myō,* the smallest administrative unit of the *shoen*; *kobyakusho*, small cultivators with landholding entitlement; *zōmen-byakusho*, less numerous small cultivators subject to *myōshu* direction; *mōto,* transient agricultural laborers; and *genin* the lest numerous whose status was closest to chattel slavery and who served primarily *myōshu* and other *shoen* officials.

Thus by the 12th century on the eve century warrior rule, Japan differed from Western Europe in several significant ways. First, most Japanese continued to live and work in territorial communities in which albeit stratified most cultivating households retained at least a vestige of autonomy and freedom from direct central oversight and control. Unlike Europe and its closest continental neighbor, Korea, cultivation did not depend on a servile peasantry. Slaves (*genin*) existed but were not a significant source of agricultural labor. Nor was Japanese cultivator subjected to the restraints of serfdom that became increasingly common by the 11th century in Western Europe. Rather wage labor and a commodity market had appeared. The Japanese cultivator at least within household or lineage groupings retained an apparently increasing degree of *dominion* to the land that produced the rents and revenue parceled out as *shiki*. Economic and status stratification among cultivating families within the *shoen* had likewise increased with more prosperous cultivators themselves become managers or independent farmers acquiring entitlements to revenues. Another perhaps most telling feature of early Japan in contrast to Western Europe was the reliance on written records and documentation. The household and land registers of the 7th and 8th centuries were an enduring legacy. From China Japan had received not only conceptions of administrative governance but also its tools. Registers and written records were thereafter to have a determinative role in governance generally but especially for the adjudicatory system of ordering that became a hallmark of warrior rule.

Along with increasing decentralized, de facto local rule, the advent of warrior governance under the central direction of the Kamakura *bakufu*—principally through constables (*shugo*) and stewards (*jitō*)--intensified both oversight and control and presumably restricted cultivator *dominion* even further. . Adhering to a sinofied administrative model, neither office was to be filled by warriors from the [province to which they were assigned. However, neither office received a stipend that might have made the holders dependent on the *bakufu*. Instead the holders of both offices had to extract from local sources the means for their support. The incentives created by such dependency fostered the development of a new group of local warriors who would

[1] Kan'ichi Asakura, *The Documents of Iriki* (Westport, CN, Greenwood Press, 1925), at 71.

eventually challenge the authority and power of those who ruled from the center. Once again, control over resources determined Japan's political evolution as local warriors, particularly the *shugo* gained in power.

By the mid 15th century as collapse of effective rule from the center accelerated, warfare among competing *shugo* warlords (*daimyo*) broke out. In a series of battles commonly referred to as the Ōnin wars—fought mainly near the capital in Kyoto between 1467 and 1493—a new set of warlords emerged. The victors had no claim to imperial delegated or sub-delegated authority as either *shogun* or *shugo.* As a result of military success, however, they held territory and proceeded during the next century to consolidate their power and position over the land and people they now effectively ruled. The sixteenth century is as pivotal for Japan as Western Europe as this new class of Warring States warlords (*sengoku daimyo*) initiated policies designed to avoid the errors of past centralized warrior as well as imperial rule within the various territories they now effectively governed.

One by one the *sengoku daimyo* initiated reforms that would have national significance by the end of the century. First and foremost, the began to take stock of the resources under their territorial control cadastral survey by plot based on the tiller of agricultural land and its yield. Closely related, they also require personal registration of all inhabitants. Neither of these measures was novel. Both had antecedents in the sinofied reforms of the 7th century. Second, they began to build castles at sites of strategic importance that were to serve as their respective personal residences and headquarters. The third reform was equally transformative. They ordered their warrior retainers out of the villages, compelling them to reside in the environs of the caste, often transforming small villages into urban centers. In return the warrior retainers were to receive monetary stipends based on their previously acquired claims to the product of the lands over which they had oversight and control and they became the administrators for their overlords who ruled.

These local transformations in governance that commenced at the end of the 15th century were replicated and consolidated nationally over the course of the16th century under the three successive "unifiers"—Oda Nobunagoa, Tototomi Hideyoshi and finally Tokugawa Ieyasu. By 1600 a national cadastral survey had been competed. Castle towns marked the new urban centers of Japan. Also completed was the exit from the village of warriors, who became peacetime administrators for their warrior lords. Unification also brought a national market with the elimination of local extractions. Added was formal stratification of Japanese society—again along an adapted sinofied model—into a hierarchy of social and legal status with warrior-administrators at the apex, followed by cultivators, artisans, merchants, and "non-persons" *(hinin*) at the bottom. The result was a political equilibrium that lasted for two and a half century. On a national level these reforms had lasting influence. Most important they further reinforced village autonomy and mechanisms for self-governance.

Adjudication

Under the Kamakura *bakufu* adjudication became the primary means of maintaining order and control. The process required outside complaint or accusation generally, and remained dependent on the petitioners' initiative and direction. The warrior adjudicators in Kamakura and those acting under imperial authority in Kyoto functioned as neutral arbiters. Without the means for direct supervision and control or the resources necessary for direct policing and coercion, adjudication was the only alternative as a means of control over the warrior class with increasingly independent sources of wealth that still buttressed *bakufu* authority. Yet also by giving those subject to warrior rule some voice in the principal means for maintaining order and positioning those who ruled as neutral arbiters applying precedent, custom and reason (*dōri*) as the primary source of legal rules, *bakufu* officials helped to legitimize their rule. "The system was effective," Mass concludes, "because the Bakufu served as arbitrator, not as prosecutor, within an exclusively accusatorial process. Kamakura thus remained outside and above the suits it sought to resolve, and in the process insulated itself from undue partisanship and criticism."[2]

Disputes classified as *shomusata* and were tried in both Kamakura and *bakufu* offices in Kyoto. What would today be classified as criminal actions involving rebellion, theft, brigandry, homicide, rape, violent assaults, and similar conduct-were tried by special *bakufu* offices in either Kamakura or Kyoto under *shomusata* procedures. The third category of miscellaneous cases, referred to as *zatsumusata,* encompassed various claims to property, other than land, arising from interest-bearing loans, bills of exchange, mortgages, and sales. At least by the fourteenth century these suits were being tried in Kamakura before the *monchiijo* under direct control of the *bakufu.*

Under the *bakufu* a system of regular, predictable procedures based on both edict and practice emerged. The sources of decisional rules and principles included recognized customary practice, administrative precedent as well as proscriptions legislated by both imperial or *bakufu* authorities. Resort to *dori,* or "reason" or, more accurately, the prevailing consensus of the warrior community, was common.

Documentary evidence of official appointment or investiture as well as commercial and other contractual instruments relating to debts, land, and distributions of property nevertheless determined the outcome of the vast majority of cases. Thus the Kamakura and imperial magistrates developed in effect a form of precedent based on what might best be called "notarial" law.

Adjudication as a primary means for social control developed even more fully under Tokugawa rule (1600-1867). They consequence was a system of rules and practices that constitute private law in all but name. Tokugawa edicts recognized two types of adjudication—one labeled "inquisitorial," the other "adversarial" (in

[2] Jeffrey P. Mass, The Development of Kamakura Rule, 1180-1250 (Stanford, CA: Stanford University Press, 1979), at .

translation)—differentiated by the subject matter of the complaint and the extent to which the matter in dispute related to the interests of the Tokugawa overlords. Japanese adjudicatory procedure further differentiated "adversarial" suits into four categories: those related to land and water *(ronsho*), "main suits," (*honkuji)*, "money suits" (*kanekuji*) and mutual affairs (*nakama-goto)*. Unquestionably influenced by imperial Chinese law, these classifications and the differential treatment each received reflected a similar decision to allow official discretion and claimant voice in cases involving matters deemed insignificant to the interests of the rulers. As in China the outcome of disputes left to the initiative of claimants was considered to be of so little concern to the ruling authorities that they could receive official attention but could and indeed should be settled quickly preferably by some mutually acceptable compromise. Unlike China, it appears, these suits, particularly commercial "money" suits, became increasingly common fare. And with the frequency of like claims, a system of precedents developed. In the words of John H. Wigmore: "From the 1600's onward, the highly organized judiciary system began to develop by judicial precedent a body of native law and practice, which can only be compared with the English independent development after the 1400's."[3]

Consensual Governance

From an evolutionary perspective no feature of Japan's institutional history is more striking than the consolidation of the *mura* and endurance into the modern era of an essentially primitive form of governance. Between the 14th and 15th centuries, the intensification of agriculture, the availability of new paddy fields, and new technologies contributed to a rise in productivity and population. Small land holders were increasing in number. Cultivators were independent of those who held claims to revenues, such as the *kajishi* surtax on land. Villages had also become increasing self-governing with overlord support. Village shrine associations (*miyaza*) provided a vehicle. Self-designed and imposed village regulations appeared. Adjudication or perhaps more accurately mediation also prevailed. The foundations for village autonomy that began to flourish under Tokugawa rule were already in place. They have helped to produce a society in which private ordering prevails.

No Natural law

Without a conception of principled judicial reasoning or a belief in any universally applicable set of norms it could not evolve beyond the institutional framework for a private legal order. As related in the previous chapter, natural law theory in Western Europe combined with the Roman law to introduce a notion of "rights" and correlative "duties" as moral entitlements of those subject to governmental authority and the correlative obligations borne by those in authority. In effect such inchoate rights represent political claims to governmental action. Natural law in Europe thus posited "rights" as both legal and moral claims.

[3] John Henry Wigmore, *Panorama of the World's Legal Systems* 504 (St. Paul: West Publishing Co., 1928). p. 504..

Unlike Europe and China, the notion of universally applicable, transcendental norms whether conceived as natural law or a separate moral order did not take hold in Japan.[4] Historically Japanese culture did not include shared belief in universal values nor a dichotomy between "good" and "evil".[5] Despite the influence of universalistic modes of thought advanced in Buddhism and Neo-Confucianism, the particularist value remained primary. As expressed by Robert Bellah, "It is the particular system or collectivity of which one is a member which counts, whether it be family, *han* or Japan as a whole. Commitment to these tends to take precedence over universalistic commitments, such as commitment to truth and justice." Assessing similar observations S.N. Eisenstadt sees Japan as a "de-Axializing" culture in which the universalistic and transcendental orientations are muted, segregated and bracketed out. As a result, no conception could have taken root in Japan of universally applicable legal rules or principles, especially ones against which the legitimacy or "legality" of those imposed by rulers. In its place an emphasis on community consensus, "harmony" (*wa*) and the legitimacy of those who governed as benevolent rulers maintaining the common "public" welfare were the overriding social and political values.

4. Conclusion

Japan had reached what some might refer to as institutional equilibrium at the beginning of the 17th century with the establishment of Tokugawa rule. This equilibrium continued to the Meiji Restoration in 1867. By the end of the 19th century in Japan the Meiji state had successfully adapted Western law and legal institutions to achieve unification and the establishment of stable state authority in what was and remains in public law terms a relatively weak state. Japan has lagged behind its industrial peers as public law and the law-enforcing mechanisms of advanced administrative states during the late 19th and early 20th centuries began to prevail over private law and adjudication as the primary means of state-directed ordering. Age-old tensions of state power remained as state institutions expanded and reinforced their authority and attempted to increase their capacity to coerce. Japan still today evidences fundamental features of continuity, including institutional patterns, highly competitive, closely knit communities—public and private—constantly seeking ways to maintain their autonomy from external control, and above all else, an overriding communitarian orientation. Whatever the differences, however, Japan shares with Western Europe a common legacy resulting from shared institutional experience in which adjudication developed as the primary means of maintaining order. The emergence of Japan in the late 19th century as successful westernizing state in contrast to the great Eurasian bureaucratic empires of Russia and the Ottomans as well as China is thus not as coincidental nor as surprising as it may otherwise seem.

---

[4] See, e.g., K. van Wolferen, *The Enigma of Japanese Power* (New York: Alfered A. Knopf, 1989), p. 9.

[5] See, e.g., John C. Petzel, "Human Nature in the Japanese Myths," in T.S. Lebra and W. B. Lebra, eds., *Japanese Culture and Behavior* (Honolulu: University of Hawaii Press, 1974), pp. 3, 15-25; Takie Sugiyama Lebra, *Japanese Patterns of Behavior* (Honolulu: University of Hawaii Press, 1976), pp. 11-16.

Principal References:

Harold J. Berman, *Law and Revolution: The Formatiuon of the Western Legal Tradition* (Cambridge, MA and London: Harvard University Press, 1983).

Marc Bloch, *Feudal Society* [L.A. Manyon trans.], 2 vols. (Chicago: University of Chicago Press, 7th ed. 1978).

Euan Cameron, ed., *Early Modern Europe*(Oxford and New York: Oxford University Press, 1999).

Wendy Davies and Paul Fouracere, eds., *Settlement of Disputes in Early Medieval Europe* (Cambridge and New York: Cambridge University Press, 1986).

Judith Frőhlich, "Land Administration in Medieval Japan: Ito no shō in Chikuzen Province, 1131-1336," The Historical Association (Oxford: Blackwell Publishing Ltd.., 2003).

Simeon L. Guterman, *From Personal to Territorial Law* (Metuchen, NJ: The Scarecrow Press, 1972).

John Owen Haley, *Authority without Power: Law and the Japanese Paradox* (Oxford and New York Oxford University Press, 1991).

J.W. Hall, et al, eds., *The Cambridge History of Japan*, vols. 1, 2 & 3 (Cambridge & New York: Cambridge University Press, 1993-1995).

John W. Hall and Jeffrey P. Mass, eds., *Medieval Japan: Essays in Institutional History* (Stanford, CA: Stanford University Press, 1974).

Dan Fenno Henderson, *Conciliation and Japanese Law*, 2 vols. (Seattle: University of Washington Press, 1965).

`

Yoshirō Hiramatsu, "Tokugawa Law," 14 *Law in Japan* 1 (1981).

Jacques Le Goff, ed., *The Medieval World* [Lydia G. Cochrane trans.] (London: Parkgate Books, 1997).

Ernst Levy, *West Roman Vulgar Law: The Law of Property* (Buffalo, NY: William S. Hein & Co., 2003).

Maurizio Lupoi, *The Origins of the European Legal Order* [Adrian Belton trans.] (Cambridge and New York: Cambridge University Press, 2000).

Jeffery P. Mass, *The Development of Kamakura Rule, 1180-1250* (Stanford, CA: Stanford University Press, 1979).

Jeffrey P. Mass, *The Kamakura Bakufu: A Study in Documents* (Stanford, CA: Stanford University Press, 1976).

Jeffey P. Mass, ed., *The Origins of Japan's Medieval World* (Stanford: Stanford University Press, 1997).

Jean-Pierre Poly and Eric Bournazel, *The Feudal Transformation* [Caroline Higgitt trans.] (New York and London: Holmes & Meier, 1991).

Theodore John Rivers, *Laws of the Alamans and Bavarians* (Philadelphia: University of Pennsylvania Press, 1977).

O.F. Robinson, T.D. Fergus and W.M. Gordon, *An Introduction to European Legal History* (Abingdon: Professional Books Limited, 1985).

Carl Steenstrup, *A History of Law in Japan until 1868* (Leiden, New York, Copenhagen, and Cologne: E.J. Brill, 1991).

John Henry Wigmore, *Panorama of the World's Legal Systems* 504 (St. Paul: West Publishing Co., 1928).