Rivers and Rice: What Lawyers and Legal Historians Should Know about Medieval Japan

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Abstract: A story of rivers in Europe and rice in Japan, the combination of the need of warrior rulers for political legitimacy (authority) coupled with a diffusion of their capacity to coerce (power) is argued here to explain the use of adjudication as a primary means for enforcing legal rules and maintaining order in both early medieval Europe and Japan. Explained in the process is the tendency in western Europe for the regulation of otherwise private relationships and behavior particularly within local communities to be absorbed into formal legal regulation in contrast to the Japanese experience of extralegal internal community controls that arguably produced a pervasive duality of legal and extralegal ordering.

Lawyers and legal historians today overwhelmingly take for granted the dominance of west European concepts as foundational to contemporary law. Such an assumption—albeit rarely expressly stated—is fully warranted. The Western legal tradition is today the prime source of our conceptions of law and our understandings of how legal rules are made and enforced. How this came to be is a relatively easy question to answer. By the end of the nineteenth century, only a handful of countries, almost all in East Asia, that had not been absorbed within the imperial Russian or Ottoman empires had effectively resisted or escaped colonization by west European nations and the imposition of their municipal law. Even these few remaining independent polities, Japan included, ultimately succumbed to Western military, industrial, and cultural dominance. Within a generation, all had reformed traditional political and legal institutions and structures along west European patterns—patterns derived from western Europe’s peculiar institutional experience. At its core, Western law is a system of private law and adjudication. Law is understood as predominantly a system of private

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rights enforced through litigation, evidenced by the centrality of civil (private law) codes or judicially constructed common (private) law. Equally implicit is the corollary assumption that west European conceptions and processes of law represent the most advanced stage to date of any trajectory of law’s evolution. The French and German civil law—that is, private law—codes are uniformly accepted as the great law-making achievements of the nineteenth century. From eleventh-century Bologna to Beijing today, conceptions of Roman private law, including the notion of legal rights, have been and continue to be taught as foundational features of the most advanced legal orders.

A Historical Conundrum

This said, we are left with what may seem to be a simple historical conundrum. How do we explain the emphasis on private law and adjudication in Western law? The prevailing explanation emphasizes the reception of Roman private law in the eleventh and twelfth centuries through the spread of universities after the discovery of fragments of an antiquated codex by Justinian, a sixth-century Byzantine (eastern Roman empire) emperor, in which bits and pieces of classical—that is, second- and third-century—Roman law were compiled and promulgated in their original Latin in the Corpus Juris Civilis as law for a Greek-speaking population. The transformational effect of this reception dominates quite reasonably the historical literature.1 Yet, explanations of its foundations have been almost totally ignored. Left unexplored are preexisting factors that explain why Roman private law conceptions could be received so readily and spread so swiftly throughout Western Europe.

From an evolutionary perspective, comparative institutional history seems to point in a very different direction. If we consider the legal institutions of the ancient world from the Mesopotamian empires and Pharaonic Egypt to imperial Rome and imperial China, not to mention the Aztec and Inca empires, arguably we would more reasonably conclude that at the most advanced end of uninterrupted evolutionary trajectories are legal orders in which administrative and criminal law prevail. At their institutionally most advanced stage, in all of these otherwise disparate systems, disputes that would in Western law involve private law “rights” enforceable in lawsuits were uniformly deemed “minor matters” best resolved through amicable settlement and mediation or some other alternative means of dispute resolution. In evolutionary terms, the legal order of nineteenth-century China, not western Europe, was fundamentally the more advanced. Lawyers and legal historians who may seek to resolve this conundrum of legal history should look to medieval Japan. The story begins with rivers and rice.

Throughout the ancient world, law's political evolution commenced with the emergence of social and political organization in sedentary agricultural communities in valleys and along the banks of rivers. Such communities began presumably as customary societies in which custom and consent prevailed as sources of social norms or, to use a contemporary expression, "civility," with social disapproval and collective community sanctions the primary means for their enforcement. The earliest known communities were defined by ties of kinship. Degrees of mutual dependence and the need for cooperative endeavor held them together. This proved to be particularly the case in the earliest sedentary agriculture communities of southeast Asia, southern China, and Japan that relied on a network of small irrigation systems for the cultivation of wet-paddy rice. In these and other early agricultural communities, political and social authority tended to be undifferentiated, rudimentary, and relatively weak. Law, as we understand it today and as defined here, did not exist. Only as some form of political authority emerged from within or without did communal norms and sanctions begin to yield to rules and principles recognized and enforced by those with political authority and, with the advent of warrior rulers, the capacity to coerce. From these beginnings, what we recognize today as law emerged.

Even the most simple of known societies were to some degree socially stratified. As they evolved and became more complex and rulers emerged, such stratification became even greater. Increasingly, wealth-producing agricultural communities were assimilated into larger territorial units by consent or force, and most were eventually ruled by warrior chiefs with followers to whom the wealth produced by those they governed was redistributed. Law and the modes of law enforcement reflected such stratification. Where political authority and power were weak, custom and mediation prevailed. Rulers with some degree of both, however, could mediate and rely on customary norms in disputes among or with those who occupied the highest

social strata but directly command and coerce those at the lowest strata. Resort to mediation, adjudication, or regulatory policing thus marked the extent and identity of the castes of social stratification and subordination, direct oversight and control.

The imperial civilizations of Mesopotamia, Egypt, South Asia, and China all originated in the fertile plains of major river valleys. The first sedentary agricultural communities known to have existed in China, for example, date from about the fifth millennium BCE along the Yellow River. From the river’s headwaters in the mountains and steppes to the west, it flows eastward into the north China plain. Further south is the Yangtze, the world’s third-longest river. Wet-field rice cultivation in China began in its eastern delta. The Yellow and Yangtze basins combine with the Huai to form the world’s largest and most fertile set of contiguous plains. Here evidence of the first grains in human history, millet in the north and rice in the south, has been found. In each instance, warrior rulers from upland hills descended and conquered. Those who managed to keep internal and external rivals effectively at bay and to establish and maintain order and control survived. Over time in each case—Pharaonic Egypt, the Incas, imperial China, even imperial Rome—they and their successors established regulatory, public law orders.

Both western Europe and Japan departed from this political trajectory. Again, rivers mattered. For Europe, four rivers paradoxically constituted both barriers and significant means of connection. Three—the Rhine, the Elbe, and the Oder—facilitated transport and communication from interior regions to the North Sea and the Baltic. The fourth, the Danube, similarly connected interior southeastern settlements with the Black Sea and the eastern Mediterranean. The Rhône is the only European river that provides access into the interior of western Europe from the Mediterranean. Not coincidentally, it was the Roman Republic’s principal military highway to its northwestern domains. Nor until the mid-twentieth century was any single political regime, including Rome, able to control all of these continental thoroughfares. None has ever succeeded in fully controlling access to the sea. The development of commerce and the diffusion of political authority and power in the territories along the northern coasts at the mouths of the Rhine, the Elbe, and the Oder can be almost fully explained by the incapacity of any ruler to control the entirety of these rivers, coupled with their related significance in providing access for commerce and trade with otherwise less accessible interior regions of western Europe.


Each of the first political regimes to develop in western Europe had full control of the major rivers within its territory. Dominion by the kings of Wessex over the Severn and the Thames coincided with their unification of England as a single kingdom. On the continent, the largest and most fertile river plains are those in France formed by the Seine, the Somme, the Loire, and the Garonne along with their tributaries, all flowing westward. Here, each with control over most if not all of these rivers, the first significant medieval polities developed. In Iberia, the longest river is the Tagus, also flowing westward to the Atlantic through Portugal. Equally significant is the Ebro, flowing southeastward through the mountains of the lower Pyrenees all emptying into the Mediterranean midway between Barcelona and Valencia. Both have historically delineated the borders of competing regimes. No ruler since the first Visigothic kingdom (409–711) has fully controlled both. In turn, the political history of Iberia is one of fragmented kingdoms ultimately united by marital rather than martial alliance. East of the Rhine lies a region of major continental rivers that has throughout history remained in continuous territorial flux. Except along the northern coasts, stable, territorially defined polities did not develop until the nineteenth century, except for Hungary in its mountain-protected valley. Even today, this remains the only territorially contested region of Europe.

The contrast with Japan could hardly be greater. Japan’s many rivers are short and swift. Only 20 per cent of the land is arable, 70 per cent of which is upland plateau. The Kanto plain is by far the most extensive, followed in size by the plains of Kinai (Osaka-Kyoto), Nobi (Nagoya), Echigo (north-central Honshu), and Sendai. None are contiguous; all are separated by mountains and other natural barriers. Topography thus precluded the establishment of any political regime with full and uncontested control over the entire archipelago until the nineteenth century. Rivals for power at the periphery with effective dominion over critical resources have been a recurring theme of Japanese political history.

Rice

However significant, rivers were only one among a number of geographical factors that shaped the evolution of political regimes and the legal orders they produced. Forms of agriculture too influenced law’s political evolution. The earliest rulers had to consolidate both the authority and power necessary for their regimes to endure. Above all, they had to establish sufficient control over human and material resources to withstand external and internal threats. For the Chinese imperial rulers, the millet-producing settlements of the Yellow River valley met many of their needs. In terms of manpower and agricultural production, the resources of what we think of today as north China surpassed the Mesopotamian and Egyptian empires.
As in Egypt, the Chinese rulers began to mobilize human resources and to impose controls that increased the production of wealth and enabled its distribution to those who ruled. Here originated the centralized irrigation projects that figure so prominently in Karl Wittfogel’s view of China’s “hydraulic society” as a basis for authoritarian rule.\(^5\) “North China,” as noted by Martin Heijdra, “is characterized by its jointly animal-driven wheat and millet agriculture” with “a resulting social structure with more managerial landlords and sharecropping peasants than elsewhere.”\(^6\) Heijdra adds that in the north, by the end of the fourteenth century, a “centuries-old legacy of numerous small and densely populated counties created opportunities for more penetrating government control and assistance than elsewhere.”\(^7\) As successive rulers from the west and north advanced into the most productive regions, particularly in the eastern Yangtze delta and lands further to the south, however, they encountered communities that had developed shared habits of interaction and ordering necessary for optimal production of wet-paddy rice.\(^8\)

Wet-paddy rice production requires coordinated, cooperative efforts to create, manage, and maintain complex systems of irrigation as well as to plant, cultivate, and harvest the end product—rice. Unlike the large centralized irrigation systems of northern China, the relative abundance of water made small irrigation efforts practicable in the south. As Francesca Bray points out,\(^9\) individual or cooperating cultivators and households could dig for themselves the necessary tanks and ponds to provide sufficient irrigation for their needs. Arguably at least, the patterns of agricultural production produced shared habits of interdependence and cooperation that significantly influenced prevailing modes of social organization in the region. To the extent that rulers also sought to maximize the wealth they could extract, they were forced to yield in varying degrees to local autonomy. Recurrent patterns of regional subjection and accommodation thus emerged as regimes rose and fell to be replaced after periods of political disarray by new imperial successors. In the west and north, the rulers were better able to


\(^{7}\) Ibid.


mobilize the population, enlisting huge armies and moving thousands into new city centers, and to impose direct control over land for its redistribution. In the rice-producing regions in the south and east, communities enjoyed greater autonomy with fewer or less onerous burdens for labor. Increasingly, rulers relied on prominent local households for the prescribed extractions of rice and labor, which in turn enabled leading households to achieve greater voice in local governance.

For Japan, rice production was until at least the eighteenth century the primary source of wealth and revenue. Its political history is a story of the various regimes that contended for access to rice and the exercise of effective control over its producers who in the process retained throughout a degree of community autonomy that remains a characteristic feature of Japan today. Even at the height of centralized imperial rule, fundamental patterns of social organization reflected the predominance of wet-paddy rice cultivation.

Most Japanese continued to live and work in territorially defined, stratified communities—the sato—villages in which most cultivating households retained at least a vestige of autonomy and freedom from direct central oversight and control. Over the course of several centuries, the first of these communities had multiplied with reclamation and development of new lands into clusters of new villages and hamlets surrounding the “mother” villages. This process of reclamation and the creation of new village communities was a constant feature of Japanese life through its early history. Despite the administrative enumeration of 50-family units (gō)—usually encompassing two or three sato—during the ritsuryō period (mid-seventh through tenth centuries), there appears to be no evidence of the displacement of the sato as a natural community. As noted below, villages within the tax-exempt estates (shōen) were administratively defined as myō. By the fourteenth century, newly redesignated as sō, villages had acquired a politically meaningful degree of formal, self-governing autonomy, which they would continue to enjoy as mura during the Tokugawa era.

Nor, unlike the Mediterranean civilizations, did Japan have a history of enslavement through conquest. Slavery existed but, as in imperial China, it was not then or ever a significant source of agricultural labor. Those who


can be described as slaves were apparently primarily young children who were sold or bartered by their parents. The population remained relatively unsubordinated with the capacity within the community for coercion depending primarily on collective action and with mediation as the prevailing means to resolve social conflict and maintain order.\textsuperscript{12} Mutual need and interdependence between those who ruled and cultivators also ensured that a degree of possessory proprietorship and autonomy of cultivators had become intrinsic features of the social and political environment by the ninth century.

For Europe, in contrast, the production of cereals and husbandry allowed rulers greater control over human as well as physical resources. Only in the remote, rice-producing region of Valencia in the thirteenth century do we find anything akin to the experience of either southern China or Japan. The Kingdom of Valencia was wrested in 1238 from its Muslim rulers by James I of Aragon (1208–76) and like Catalonia was recognized as a separate kingdom. It was a major Muslim commercial and agricultural center. James had to accommodate the urban Muslim shopkeepers as well as the rural Muslim communities in the rich alluvial plains surrounding the city and along the coast in order to preserve the kingdom’s revenue-producing vitality. The efforts of James I to obtain revenues for his continuing military campaigns, as Robert Burns notes, “were to comprise an important factor in transforming the realms of Aragon from a feudal to a constitutional monarchy.”\textsuperscript{13} Valencia accordingly received self-governing privileges. Despite immigration, for decades after the full Catholic reconquest of Spain from Muslim rule, the majority of its inhabitants remained Muslim or Muslim converts to Christianity. Not until 1609, over a century after the expulsion of Muslims and Jews from Castile (1492), were all Muslims and Muslim converts expelled.

Thus, for four centuries productive Muslim peasant farmers dominated the small agricultural communities of the alluvial plain. Growing a mix of cereals, fruits, nuts, vegetables, sugar cane, and rice, with olive oil and wine as staples and saffron and hemp among the most commercially profitable, they had improved existing irrigation networks with networks of their own. Most of these networks required collaborative efforts among several villages or within a village. Only the smallest could be managed by a single family. They had also established a Tribunal of Water with an arbiter to resolve disputes related to flows and timing. After conquest, this water court was


continued as a legally recognized adjudicatory organ, thus incorporating into the formal legal structures of the new kingdom what might otherwise have become a prominent example of private ordering. The parallels with southern China and village Japan are too obvious to ignore. In all three instances, warrior rulers left intact the self-governing structures of productive and highly interdependent communities in order to preserve their economic vitality. In Valencia, however, many of these structures could and would be integrated within an inclusive private law 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 by 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 significant 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 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.

**Origins**

The evolution of social and political organization in Japan as in other societies began with sedentary agricultural settlements. The archaeological evidence indicates that by the beginning of the Common Era, small predominantly kinship-based communities had become the prevailing social organization. These settlements, often hamlets of only a half dozen or so households, were commonly established on hillsides overlooking rivers and streams separated from neighboring communities across rice-producing paddy fields. Socially constructed, it appears, mostly along cognate rather than patrilineal lines, at least from the mid- to late Yayoi period (c. 500 BCE to 250 CE), these communities were subject to continual armed incursions. They developed defensive ditches and embankments and could call upon sibling ties for loyal manpower to provide armed resistance. The disappearance of such defensive fortifications is taken to indicate a degree of political consolidation and externally imposed security during the Kofun period (c. 250 CE to 550 CE).14

The burial mounds of the Kofun period begin to appear during the third century CE. These burial sites indicate greater social and political stratification and the predictable emergence of chieftains as well as an elite economic and governing class. During this era, smaller agricultural communities are believed to have begun to coalesce into larger territorial units that in turn had forged mutual alliances. In the process, the clan-based chiefdoms—the *uji*—of the late Yayoi and Kofun periods took form. As swamps were cleared and dikes built and new paddy fields were opened and developed, new settlements emerged. The introduction of iron tools from the Asian mainland and their augmented availability by local manufacture enabled the development of the uplands primarily for cereal production and husbandry, resulting in further expansion of settlements, additional sources of wealth, and new forms of social organization.

The process of consolidation continued, and a confederation under a single ruler emerged. As described by a Chinese source in the earliest known writing on Japan, by the end of the Yayoi era in the third century CE, a “queen” (*nü-wang*) known as Himiko reigned (perhaps with a male comonarch) over a confederation of “countries” (*guó*) that had joined together after seven or eight decades of war. The emergence of these larger *uji*—held together by mutual interest and cognate kinship (often fictive or created by adoption)—may have been, as Carl Steenstrup suggests, a first attempt at the reorganization and subordination of smaller agricultural communities: the old and newly formed villages and hamlets of protohistoric Japan. Among the most likely explanations for this process was a need for greater security. Smaller communities simply banded together and submitted to chieftains and others in return for protection against similarly confederating rivals. Also appearing were the more clearly subordinated artisan *be*, whose members apparently became responsible for producing a variety of products, from weaponry to burial mounds. Seemingly absorbed, preexisting settlements most likely remained essentially intact productive components of these newer polities. They were probably surpassed as sources of revenue and wealth, however, by new settlements established in the continuous expansion of rice cultivation through the almost endless process of land reclamation.

Until the eighth century, both old and new agricultural communities appear to have been largely self-governing. Outside the ambit of formal law,
customary modes of private ordering presumably continued to function as the primary means of maintaining internal order. Stratification of political and social authority had, however, also advanced, although presumably rudimentary and relatively weak. Family hierarchy (some suggest matriarchic tendencies\textsuperscript{18}) and accepted claims to religious authority appear to be the common sources for legitimacy. Custom and customary processes appear to have prevailed. Law as related to institutional processes 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\textsuperscript{19}.

The first significant influences from the Asian mainland had begun to penetrate into Japan by the fourth century. Whether simply the result of expanded contacts through emissaries to imperial China and skilled migrants from southern Korea or, less probable, “horserider” conquest of parts of Kyushu and western Japan, the impact on language, technologies, and ideas proved to be profound\textsuperscript{20}. Mainland influence politically accelerated the process of confederation of \textit{uji} chiefdoms into a centralizing polity under what are today referred to as the Yamato kings. The acquisition by elites of what Gina Barnes describes as “prestige goods,” such as bronze bells, iron implements and weapons, even gold seals as gifts from Han Dynasty rulers to Japanese emissaries in return for pledges of allegiance, assisted the process\textsuperscript{21}. The adaptability of the Chinese ideographs to disparate spoken languages enabled the introduction of a sophisticated writing system in the fifth century and the expansion of literate, hereditary elites. In royal sponsorship of Buddhism and the ceremonial trappings of an imperial Chinese court—to which emissaries were now routinely sent—centralizing rulers also found new sources of political legitimacy and, in law, tools of governance.

\textbf{The Foundations of Adjudication and Private Law in Medieval Europe and Japan}

The consolidation of chiefdoms into a centralized polity based on Chinese models was a gigantic leap. Japan in one bound bypassed all intermediate steps of evolutionary political change. By emulating the political and legal models of the most advanced civilization on the globe, Japan seemed

\begin{footnotesize}
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\item Kidder, “Earliest Societies,” p. 93.
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to achieve in a century or two what for western Europe would require over a millennium of institutional development. Beginning with the sources of legitimacy and borrowed language, the contrasts between the early European kingdoms and imperial Japan seemed stark and promised to be enduring. Yet, behind the facade of imperial rule were deeply embedded structures that ultimately prevailed, producing an institutional convergence with respect to adjudication and private law as exemplary patterns of political ordering and control.

**Legitimacy and the Language of Law**

The centrality of adjudication and private law in the evolution of west European kingdoms can be explained by a number of factors. Among the most significant was the Roman Catholic Church. The contribution of the Church to the foundations of adjudication and private law are difficult to exaggerate. Unique among the world’s religions in its hierarchic organization, the Church’s institutional presence territorially delineates western Europe. By the eighth century, papal coronation of kings functioned as a critical legitimating ceremony. With that legitimizing role, the Church in effect defined kingship. Under its tutelage throughout the region, justice-dispensing adjudication became an integral feature of royal governance. By adopting Latin, the Church also provided a common written language for all of western Europe. Latin made accessible the written legacies of the Roman Empire—including law. All written laws until the thirteenth century were inscribed 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 reliance on Latin in itself ensured the influence of Roman private law. Combined with claim to autonomous control over the appointment of clergy, it expanded that influence even further. The Church hosted the earliest centers of literacy and learning. Its missionaries and priests gave the early political rulers their primary initial access to written communication and to a pool of talent. The Church provided Europe with its first judges as well as courts. Church authority over sacraments and sin, not to mention its own landed wealth, endowed ecclesiastical courts with region-wide adjudicatory jurisdiction over disputes involving marriage, succession, contracts, property, and even crime. For the Church, with expansive authority but no capacity to coerce, adjudication of disputes was among its principal instruments of influence.

Japan’s political evolution moved initially in the opposite direction. Japan found both sources of legitimacy and a written language in imperial China, a civilization surpassing even that of Rome in its axial stature.22 We

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need to keep in mind at the outset that Japan had not experienced any significant migration from the Asian mainland since Paleolithic times. Nor were the islands subject to conquest and occupation by any outside invader until 1945. Unlike western Europe, the forces shaping its political evolution came entirely from within. With the absorption of Chinese ideographs as its written language and the advent of the Taika reforms in the seventh century, instead of structures for adjudication and private law, Japan adopted the language and the law of an advanced public law order. Commencing with the Ōmi Code in the 660s and the Kiyomihara Code two decades later, successive rulers recreated fundamental institutions and conceptions of law based on the criminal proscriptions (ritsu) and administrative regulations (ryō) of Tang China. The first known fully integrated ritsuryō code was the Taihō Code promulgated in 702. The only complete extant code, known as the Yōrō Code, followed in 757 (drafted in 718). As the reforms were implemented, Japan underwent an institutional and cultural transformation. From chiefdoms, suddenly a Sinified imperial polity emerged.

Political legitimacy was an element of governance as essential for the new Japanese imperium as for the early European kings. Chinese models, however, could not fully satisfy this need. The new Japanese regime lacked the historical and embedded philosophical foundations for a normative claim to rule. As Joan Piggott persuasively argues, Japan’s imperial rulers purposefully adopted some Chinese models to construct their legitimacy, emulating, for example, the imperial Chinese palace and system of court ranks and promulgating the 17-article “constitution” on the principles of governance by Prince Shotoku in 604. As in other early kingdoms and empires, they also, Piggott points out, turned to sacred symbols and relationships with claims to deistic origin rooted in indigenous folk beliefs as well as identification with Mahayana Buddhism, a recently introduced and rapidly expanding belief system.

**Fragmentation of Governance: Power at the Periphery**

Dissimilarities between western Europe and Japan began to fade as the early kingdoms started to consolidate into regional “empires” with a concomitant progression toward regulatory and criminal law as the primary instruments of political control. This progression was interrupted by external invasions. Their catalytic impact, however, strengthened other forces that

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23. For a controversial view, see Oka, Yawata, and Egami, “Nihon minzoku bunka no genryū to Nihon kokka no keisei.” In English, see Ledyard, “Galloping along with the Horseriders.”

produced in Europe as in Japan a fragmentation of authority and power that led to the ultimate convergence in both of warrior governance, the “privatization” of public revenues, and adjudication.

In western Europe by the end of the eighth century, a political and economic revival had commenced. In northern France the Carolingians under Charlemagne (747–814) replaced the Merovingian kings to create an invigorated united kingdom that grew into the largest political domain of the Middle Ages, incorporating a large portion of both western and central Europe, even briefly including much of the northern Italian peninsula. Crowned Holy Roman Emperor by Pope St. Leo III (d. 816) in 800, Charlemagne represented western Europe’s first and grandest effort to replicate the still-extant Roman empire in the east.

Invasions on all sides during the eighth and ninth centuries arrested this progression. Vikings and Danes in north and west, Magyars from the east, and Islamic invaders from the east and south placed even greater demands for military resources to maintain control and order on each of these emerging regimes. By the end of the second decade of the eighth century, Visigothic Spain—western Europe’s largest and institutionally most advanced regime—had been successfully invaded and conquered by Islamic Berbers from North Africa. By the mid-ninth century, Viking and Danish raiders had made significant territorial conquests in Ireland and Scotland as well as in France and southern Italy. They temporarily ruled England under Cnut (c. 985–1035) and established a permanent settlement in France that, as Normandy, stills bears their name. At the end of the ninth century, the Magyars had entered the Carpathian basin 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 form of governance emerged. With incessant warfare and the overriding demand for security, systems of decentralized rule formed in their place. These were predominantly based on consensual alliances among those with sufficient military prowess to make credible promises to provide security and reward in return for loyalty and service. The tie between lord and vassal, participation within the ruling elite—and by extension, the relationship of subject and ruler—were now conceived as founded upon consensual undertakings with reciprocal and conditional obligations. One immediate consequence for western Europe was that Roman law conceptions of ownership and contract now became the basis for claims by those who ruled. Formal processes for adjudication of competing claims among the ruling elites also became all the more necessary.

On the eve of the tenth century, a 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 communi-
ties in interior regions, a remarkable variety of political orders had emerged. Warfare and insecurity along with the collapse of a money-based economy and disruption of established trading routes and networks led to declines in population and urban life. European communities became increasingly isolated into nucleated villages, local trading zones, and subsistence-based agricultural households. Even the Church seemed to follow suit as the monastic orders appeared as essentially self-contained communities.

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. Throughout western Europe, merchants were able to establish largely autonomous means for ordering their commercial relationships. Until the eighteenth century, European *lex mercatoria* consisted mostly of rules and practices established and enforced by merchants themselves. The inhabitants of rural areas were much more constrained. Warrior kings and their vassal delegates, whose 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 the proprietary interests of both ruler and cultivator in the land on the one hand and allegiance to overlords above them on the other. Access to judicial enforcement of proprietary rights was a means to protect and to consolidate their respective sources of wealth. For the peasant cultivator and herdsmen, the limited recognition of proprietorship and possession they may have gained cost a concomitant degree of freedom as constraints on their mobility were imposed and enforced by private law.

The heirs of Clovis (466–511) and Charlemagne presided over a continuously fragmenting domain. The empire split into separate territorial polities. Menaced on all sides by Vikings, Magyars, Slavs, even the heirs of Constantine, not to mention a rising threat from Muslim invaders, Charlemagne’s son and heir, Louis the Pious (778–840), barely managed to maintain the empire’s borders. Internally, the empire had begun to come apart. Paralleling the Japanese experience, territorial governors—the Carolingian counts assigned the responsibility for military defenses, maintaining order, and collection of taxes on Charlemagne’s behalf—succeeded in appropriating royal revenues for their own use and subverting their agency to become largely independent rulers. Throughout the continent, royal power was forfeited to local magnates, both lay and ecclesiastical. In the process, although not entirely eclipsed, centralized royal authority greatly diminished. The empire was formally divided into three separate kingdoms by Louis’s three sons. To Charles the Bald (823–77) went the lands roughly west of the
Scheldt, Meuse, Saône, and Rhône Rivers; to Louis (806–76), those east of the Rhine and north of the Alps; with Lothair (818–55) left to rule the remaining strip of territory from the North Sea through northern Italy. Their kingdoms soon disintegrated even further. By the eleventh century, the German territories had divided into multiple, competing polities. The kingdom of the Franks itself was effectively governed by several largely independent duchies only nominally subject to the king. Territorially combined, they constituted nearly all of the kingdom: Aquitaine, Burgundy, Gascony, Normandy, Provence. The king was left with little more than the Île de France under his direct rule. Not until the reign of Louis XIV (1638–1715) was France to be fully unified under the king.

While Charlemagne was beginning the reconsolidation of the Kingdom of the Franks, Japan was in form a unified realm, divided into provinces, each with a provincial capital and an appointed governor with a six-year term. The rulers at the center asserted imperial ownership of all land. Censuses were taken, households duly registered, and communities reorganized or simply reformulated as administratively defined units of 50 families (ご漢). Rice-cultivated land was surveyed and redistributed plot by plot (くぶん）。In the uplands, land was granted to households without restriction or qualification based on composition or status. Cultivators allocated land were subject to both payments to the authorities in kind (rice) and mandatory labor, including military service. Coinage was also initiated, laying the foundations for a monetized economy. Taxation replaced tribute. With payment principally in rice but also other produce and goods, notably silk, a commodity barter trade began to develop along with concomitant proliferation of attendant practices and institutions. Included, despite attempted proscription, were private loans in money or rice. Also introduced to encourage agriculture was a system of public loans of seed rice (すいくお） repayable with interest at harvest.

At the local level, however, many of the centralizing reforms were short-lived. The 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. Kinship, clan status, and hereditary office continued to be the determining criteria for imperial appointment. Powerful local chiefs or their kin received imperial appointments and ceremonial offices as officials, administrators, and courtiers with heritable entitlements to stipends and revenues. Local elites with familial ties to the court occupied key posts and increasingly exercised independent control over local resources, especially new lands being reclaimed and

cultivated under their supervision. Politically favored temples and shrines also received reclaimed, tax-exempt lands. Other means of co-optation also existed. Despite legal prohibition, intermarriage of officials and immigrant nobles with local elites was common.  

Like the Carolingian counts, provincial governors and favored families in the capital with longstanding local ties also began to subvert the centralizing process first by skimming off tax revenues and labor services for their own use. In addition, removed from public policing and the tax rolls altogether were ever-expanding areas of rice cultivation. Under the patronage of noble houses and Buddhist institutions in the capital, newly reclaimed and adjacent land became subject to commendation as tax-exempt estates (shōen). The shōen typically comprised disparate villages and hamlets clustered around newly reclaimed land as well as existing cultivated fields that for purposes of control and revenue extraction were recognized as myō, the smallest administrative unit within a shōen. The new estate holders, mostly in Nara and Kyoto, held offices (shiki) with entitlements to revenue from land that continued to be cultivated by existing holders as well as by paid laborers, many of whom had possessory entitlement to adjacent fields. Along with the steadily growing number and expanse of these estates, traditional patterns of social organization and tenure also began to change. A blend of traditional and newly evolving forms of social organization, land-holding patterns, and local control reshaped basic structures of authority and power within local and regional governance. Although the authority of the center remained, its coercive capacities, already constrained, were furthered weakened in a spiral of inexorable decline.

Unlike the Chinese experience at least in the north, no massive relocation of the peasant population was undertaken. Except for the building of Tōdai-ji and the capitals at Nara and Kyoto, there was apparently no significant mobilization of labor. Compulsory labor service (zōyō) was limited to 30 days per year. Recruited labor tended to be either for local projects or military service. The Japanese cultivator, at least within household or lineage groupings, retained an apparently increasing degree of dominion over the land that produced the rents and revenue parceled out as entitlements of office. Economic and status stratification among cultivating families within the shōen had likewise increased with more prosperous cultivators themselves becoming managers or independent farmers, acquiring in the process entitlements to revenues.

The expansion of shōen coincided with the development of a complex

29. See, for example, Piggott, Emergence of Japanese Kingship, pp. 263–79.
system of proprietorship that included the transformation of *shiki* from offices to proprietary transferable claims to the revenue or produce of cultivated land. The creation of a transferable claim to such revenues in effect represented the “privatization” of taxation akin in effect, as described below, to the European reconstruction of rights to revenue as proprietary interests in land. With the development of *shōen*, the offices with rights to revenue from rice-producing communities proliferated. By the end of the eleventh century, the entitlement to revenue had separated completely from any particular office. The recognition of such newly defined *shiki* as transferable private entitlements was a major conceptual innovation. To the extent that rulers recognized the claims of those who held *shiki*, either by virtue of an original grant of office or its transfer, an enforceable property interest was in effect created. *Shiki* were thus conceptually transformed into a novel form of intangible but still contingent property. This recognition of a transferable private claim to such revenues also represented a significant step in the development of a private law system.

The validity of such entitlements required continued formal recognition and enforcement by those with political authority. *Shiki* holders enjoyed independent access to wealth at the expense of the ruler but remained paradoxically dependent on the ruler’s authority for recognition of their entitlements. As *shiki* proliferated, an increasing number of actors moved beyond the coercive capacity of the rulers at the center but also continued to have a significant stake in the political legitimacy of the institutions of governance and the maintenance of the political and social order. Disputes multiplied and claims to these entitlements had to be adjudicated. The combination of these factors—the paradox itself—thus helped to foster the development of the adjudicatory institutions of early and medieval Japan.

Although proprietary entitlements, *shiki*, unlike the proprietary estates of European rulers and their erstwhile delegates, did not include the more fundamental claim to possession and the entitlement to cultivate the land in question. As detailed by Kan’ichi Asakura 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.” In the most productive and prosperous regions of west central Japan nearest the capital in Kyoto, Asakawa identifies six cultivator status groups that persisted into the twelfth century: the *myōshu*, local land managers who held proprietary claims within the *myō*; *kobyakushō*, small cultivators with landholding entitlement; *zōmen-byakushō*, less numerous small cultiva-

tors subject to myōshu direction; mōto, transient agricultural laborers; and genin, the least numerous whose status was closest to chattel slavery and who served primarily the myōshu and other shōen officials. At the apex of the hierarchy was the principal proprietor, the honjo, commonly a temple or court noble, usually absentee. Below the honjo was the “lord”—the ryōshu or ryōke—who exercised local oversight and control.

The expansion of shōen estates combined with aggregation of official office and private interest by provincial officials also promoted a provincial elite with growing autonomy in local governance. Along with exemption from taxes, the shōen proprietors enjoyed exemption from entry by provincial officials. They became as a result territorially expanding self-governing communities with internally developed means of ordering. In the words of John Whitney Hall:

Under the proprietor, the shōen came to embrace a regular system of customary law deriving in large part from those aspects of imperial local administration which had been displaced by the immunities granted the proprietor. As the various levels of proprietors, managers, cultivators, and tenants worked out their relationships by agreement with each other, and as the increasing acquisition of immunities placed more and more of the responsibility of government into the hands of the proprietor, a virtual system of local administration came into being which looked to the honjo as the ultimate authority.

The abandonment of a paid professional military with a conscripted peasant army under central control was one more example of the disintegration of centralized ritsuryō governance. With shōen self-governance came responsibility to maintain order and security. Shōen proprietors as well as provincial officials thus began to recruit and command warriors (tsuwamono) as armed guards. By the end of the tenth century, the conscript imperial army had been replaced by small, independent units increasingly employed by provincial governors and shōen managers to maintain internal order and protect against external encroachment. The growing number of shōen administered by local managers further reduced both effective control over wealth-producing resources and revenues by those who governed at the center. Local managers as ryōshu, many of whom were warriors, were also able to extract more from the cultivating communities within the shōen, which led to an escalating number of futile complaints and petitions.


to absentee principals for redress. In the wake of this spiraling disintegration of effective rule, piracy, brigandage, and forced dispossession of land reached critical levels. Faced with mounting insecurity, smaller proprietors in record numbers started to commend their *shiki* holdings to Buddhist temples, shrines, and larger and more powerful families in return for the protection the imperial regime could no longer guarantee. Small armies controlled by the largest landholders as well as by provincial officials with ties to the court were a consequence.

As a result of such catalysts, historians agree, within a relatively short time warriors had seized or otherwise acquired control of revenue-producing land, not only in the frontier regions of the northeast where they and reclamation projects were most numerous but throughout Japan. Many of the emergent warriors had local kinship ties. Others were more recent settlers, especially in areas such as the northeast, where arable public land was reclaimed and effectively privatized. Obayashi Taryo attributes their rise in part to the availability of upland pastures, especially in the northeast, which were ideal for raising horses. Murakami Yasusuke, Kumon Shumpei, and Satō Seizaburō similarly identify newly created, warrior-led agricultural communities especially in the more remote regions of the “east country” (Tōgoku) with a new form of “house-based” (*ie*) social organization. Whether aptly described as indigenous “horseriders” or not, the emergence of a professional warrior (*bushi*) caste and hereditary warrior houses was the consequence. In command more often than not, however, were scions of noble families who, as *shōen* proprietors or as provincial governors, had both control over land and access to military office. The privatization of governance had proceeded to its militarization.

**Warrior Governance**

Warriors ruled western Europe from the start. Warrior chiefs led the “barbarian” migrations and conquests of the western Roman empire. Warrior kings established the first polities. The advent of warrior governance

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41. Oka, Yawata, and Egami, “Nihon minzoku bunka no genryū to Nihon kokka no keisei”; Ledyard, “Galloping along with the Horseriders.”
in Japan was more gradual but had similar consequences. In both western Europe and Japan, warrior rule reinforced private law and adjudication.

In Japan, warrior governance began, as noted, with the creation of private militia under the personal command of provincial officials and shoën estate holders and their managers. Local warrior houses began to emerge organized around newly created agricultural communities. The organization of warrior bands into forces capable of effective rule, however, required an ascending order of allegiances and alliances that would eventually parallel the structures of centralized governance of the ritsuryō imperium. This was achieved by means of a hierarchy of consensual undertakings framed within shared patterns of cooperation. Loyal service was offered in return for the promise of protection and land—or, more accurately, a share in the wealth produced by the land’s cultivators. Binding these bargains were familiar forms of relational ties and sanctions: fictive familial ties and threats of supernatural sanctions.42

By the middle of the twelfth century, two patterns of warrior rule had evolved. Western warriors led by the Taira dominated the imperial system through a process of infiltration by official appointment combined with the capacity to command armed coercion. The challenge to a unified imperial system dominated by western warriors came from the eastern provinces. By means of direct recruitment, alliances, and other consensual undertakings, all with the promise of reward, the warrior house of Minamoto no Yoritomo (1147–99)—also personally tied by kinship to the court—was able to command an armed force centered in eastern Japan that became the supreme warrior organization. The defeat of the Taira in a series of military engagements that ended with the victory at Dan-no-ura in 1185 left Yoritomo without a major warrior rival. Yoritomo was named seii tai-shōgun (or simply shōgun) in 1192. Not until after his death and the Jōkyū War of 1221 was control over the archipelago by the eastern warriors, now commanded by Yoritomo’s Hōjō heirs, ensured. Kamakura had become the administrative capital of Japan, a position it retained until 1333, when the Kamakura bakufu fell victim to the same forces that had fatally eroded the ritsuryō system.

Granted the authority to appoint allied warriors in official positions in each province as constables (shugo) and stewards (jūtō), the warrior rulers in Kamakura created an administrative structure that paralleled and overwhelmed the imperial system but did not displace it. Adhering to Sinified administrative models, neither office was to be filled by warriors from the province to which they were assigned—a rule that also justified the transfer of loyal warriors from the eastern provinces to the domains of defeated

rivals in the west. Neither office, however, 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. Their intensified oversight, control, and outright appropriation restricted cultivator as well as imperial dominion nationwide. Even interest from suiko rice loans, whether actually extended or not, had become simply another tax, collected and appropriated by office-holding warriors. The incentives created by the system fostered the rise of local warrior houses that would eventually challenge once again the authority and power of those who ruled from the center. As before, control over resources determined Japan’s political evolution as local warriors, particularly the shugo, gained in power.

In 1333 Emperor Go-Daigo (1288–1339) attempted to end the duality of rule under the Kamakura bakufu and to restore imperial rule. Weakened by the diffusion of resources under the effective control of the shugo, the so-called Kenmu Restoration under Go-Daigo was briefly successful but the attempt faltered three years later with the advent of a new shōgun and bakufu regime under the Ashikaga house centered at its headquarters in the Muromachi district of Kyoto. Never fully capable of fully reining in the disparate warrior houses that had proliferated throughout Japan, the Ashikaga presided over a century-long era—known as the Ashikaga or Muromachi period—of civil war and general disorder.

As the shōen system collapsed during the fourteenth and fifteenth centuries, warriors increasingly took over ryōshu offices, producing predictable conflict with nonwarrior myōshu and other cultivators. They resorted individually and as communities to petitioning shōen principals for redress with little apparent success. Collapse of effective rule from the center accelerated. Between 1467 and 1493, competing warlords (daimyō)—most of whom held hereditary shugo office—fought a series of battles commonly referred to as the Ōnin Wars mainly near the capital in Kyoto. From these conflicts, a new set of warlords emerged. The majority of the victors had no claim to imperially delegated or subdelegated authority as either shōgun or shugo. As a result of military success as well as compensation for the loss of revenues from dispersed holdings, they began to acquire control over revenue sources in territorially contiguous agricultural communities. They then proceeded during the next century to consolidate their power and position over the territorially defined land and people they now effectively ruled.

The sixteenth century was medieval Japan’s pivotal century as this new class of “warring states” warlords (sengoku daimyō)—controlling 150 territorially defined domains by one estimate—individually began to initiate

policies that by accident or design avoided the errors of past rulers. One by one they introduced reforms that would have national significance by the end of the century. First and foremost, they took stock of the resources under their territorial control with plot-by-plot cadastral surveys based on tiller households and the yields of agricultural land under their cultivation. Closely related, they also required personal registration of all inhabitants. Neither of these measures was novel. Both had antecedents in the Taika reforms of the seventh century. Second, they began to convert existing castles or build new ones at sites of strategic importance to serve as their personal residences and headquarters. They also began to legislate, promulgating codes for their “countries” (kuni) with general applicability to all subjects within their territorial control. Not since the seventh century had any rulers claimed the authority to legislate so broadly. The fourth reform was the most transformative. The sengoku daimyō began to remove their warrior retainers from the villages, compelling them to reside in the environs of the castle, often rendering 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 for which they had oversight and control. As warfare subsided, these warrior retainers became the administrators for their overlords who ruled. Those warriors who chose to remain on the land lost their warrior status, presumably preferring status as members of the local wealthy landholding elite within the peasantry.

These individual transformations in governance were replicated and consolidated nationally over the course of the century under three successive “unifiers”—Oda Nobunaga (1534–82), Toyotomi Hideyoshi (1537–98), and finally Tokugawa Ieyasu (1543–1616). By 1600 a national cadastral survey had been completed. Castle towns marked the new urban centers of Japan. Also completed was the exit of warriors from the village. By separate decrees in the 1580s, Hideyoshi disarmed the peasantry, required all warriors to reside in castle towns, and restricted movement out of one’s registered domain (han) without official permission.

The Tokugawa settlement in the aftermath of the Battle of Sekigahara in 1600 ended the civil wars and ushered in two and a half centuries of peace, order, and both commercial and agricultural advancement. Japan was unified in effect as a confederation of from 200 to as many as 625 warrior domains44 under the Tokugawa shogunate with its headquarters in the now central castle town of Edo (Tokyo). Most warrior domains were quite small.

Only four or five can be considered major. Ieyasu’s principal rivals among these were relocated to domains at the periphery in western Japan. Allies—the *fudai daimyō*—were granted preferred lands, while those related to the Tokugawa house were given control over the more strategic of these choice domains. The shogunate itself, however, directly controlled about a quarter of all wealth-producing land and established direct control over important towns and ports, including three of the most important castle towns—Osaka, Niigata, and Shizuoka—in addition to Kyoto, the imperial capital; Nara, the ancient capital and center for Japan’s oldest temples; Nikkō, where Ieyasu’s mausoleum was to be located; the only two ports through which foreign trade would be permitted, Nagasaki and Hakodate; and Sado Island, the locale of Japan’s principal gold deposits. All were designated as special districts.

The warlords (*daimyō*) were required to maintain an official residence in Edo with their wives and children serving, in effect, as hostages. Every two years, each was also required to return from his personal domain to reaffirm his allegiance and loyalty to the Tokugawa house as the supreme overlord. Some neo-Confucian advisers urged Ieyasu to justify his political authority, however acquired, in the manner of imperial Chinese dynastic change by appeal to a mandate from heaven. Ieyasu, however, chose to construe his legitimacy in traditional Japanese terms: kinship with the Minamoto and imperial appointment as shogun.45

The Tokugawa regime also reverted to older models and began the recreation of a regulatory order. The administrative institutions within Tokugawa domains represented a blend of new and old. Under Hideyoshi, the last formal vestiges of the *shōen* estates had been dismantled with the elimination of older village units—such as the *myō* and *sō*—and administrative reorganization of the country into provinces (*kuni*), districts (*kōri*), urban centers (*machi*), and villages (now designated by a common appellation as *mura*). For each district, which included the special districts under direct Tokugawa control, a warrior-official was posted as *daikan* to function like an imperial Chinese magistrate with full administrative and judicial authority. The Tokugawa rulers similarly reinforced other sixteenth-century reforms. They added to Hideyoshi’s division of the population into a hierarchy of five permanently fixed, hereditary status or caste groupings: warriors at the apex, followed by cultivators, artisans, merchants, and “nonpersons” (*hinin*) at the bottom. They introduced three additional castes—the nobility (*kuge*) and Buddhist and Shintō priests (*sōni* and *shinkan*)—expanded the formal groupings of five households, and introduced new registration requirements. Births, adoptions, marriages, and divorces had to be recorded

in the personal registry (ninbetsuchō) maintained in each urban district and village. In addition, as a means to enforce the ban on Christianity, all households had to maintain a registry with their local Buddhist temple.

Topping the administrative structure were three commissions located in Edo, each with responsibility for supervision and oversight: the Temple and Shrine Commission (Jisha Bugyō), the Edo Town Commission (Edo Machi Bugyō), and the Finance Commission (Kanjō Bugyō). Headed by fudai daimyō, the Temple and Shrine Commission was the most prestigious. The Finance Commission was the most important. In addition to fiscal responsibilities that included supervision of tax receipts, the Finance Commission was responsible for most ordinary adjudication as well as oversight of the daikan under shogunate control.

**Law Making and Adjudication**

In redressing the grievances of petitioning subjects, the early kings of western Europe and their delegates relied on a combination of communal custom, Biblical admonition, and their own edicts, all mixed in varying degrees with vestiges of Roman law. As described by Julia Smith:

All the kingdoms that emerged on the Continent during the fifth century relied directly on these inherited techniques of ruling. By appropriating traditional mechanisms of government for their own use, fifth- and sixth-century warrior kings asserted legitimacy, collected revenue, made law, and proclaimed their power.46

The first actual lawmakers were the Visigothic kings of the Iberian peninsula. King Euric (r. 456–84) is believed to have issued the earliest Visigothic law book, the *Codex Euricianus*. Praised by Ernst Levy as the “best legislative work of the fifth century,”47 Euric’s code is believed to have been promulgated circa 476. In 506 Euric’s son and successor, Alaric II (r. 484–507), issued his own set of laws known best as the Lex Romana Visigothorum or simply the Brevarium Alarici, apparently based on the Theodosian Code. Whether territorial or personal in scope—their application remains contested—neither appears to have significantly influenced subsequent Spanish law.48 The legislation of Spain’s earliest kingdom with lasting influence was the Liber Judiciorium or Fuero Juzgo (also known as

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the Libro de las Leyes or Lex Barbara Visigothorum) that was developed over four reigns—Kings Chindasvinth (r. 641–52), Reckesvinth (r. 652–72), Ervig (r. 680–87), and Egica (r. 687–701). Also written in Latin, the Fuero Juzgo continued to be applied with modification in Castile and later all of Spain and its empire into the nineteenth century.

Clovis and England’s Saxon kings also made law. Clovis’s Pactus Legis Salicae is generally believed to have been compiled during his reign in about 496. As a collection of royal decrees and legal procedures applicable in the Frankish region between the Loire and the Rhine, Roman influence in its content, except for language, is much less apparent. Like other written laws of the period, it specifies the compensatory monetary payments to be made for various wrongs, including payment to plaintiffs by defendants for failing to answer a summons. The earliest known written laws in England were the decrees issued by Ethelbert, the King of Kent (c. 560–616), in about 602 stating the penalties for a long list of offenses. Like procedures under the Legis Salicae, most were fines to be paid to the person who suffered the harm, but many were payable to the king as, for instance, a freeman’s theft from another freeman for which the fine was threefold the value of the goods or the goods themselves payable to the king.49 Later that century, King Ine (r. 688–726) issued what is believed to be the first written set of laws by a Wessex king.50

The contents of the general laws of the early kingdoms evidence the foremost concerns of the kings who made them. Their emphasis on wrongs and penalties reflects social stability and order as their prime purpose. The civil and criminal fines they collected were also, it might be noted, handsome additions to the kings’ revenues. Whatever their motivations, they thereby laid the foundation for a core conception of law as a system of rules designed to redress “private” grievances through an adjudicatory process that at its core excluded regulatory controls. Once developed, however, the law-enforcing structures built on this foundation became the chief means for enforcing all legal rules. Notably absent are comprehensive rules for the imposition and collection of revenues. One explanation is that such rules were simply stated in incremental edicts, not general law, which most contemporary historians tend to ignore. Another, not inconsistent, explanation is that our contemporary understandings of “taxation” as a governmental, public law imposition conceptually simply did not exist. As noted previously, Roman private law, much less public law, had not matured into coherent conceptual systems. Claims to revenues by both the early European kings and local magnates therefore were at best conceived as proprietary

50. Ibid., p. 364.
interests in the lands they governed. The conceptual basis for claims to revenue by those who ruled was a private, proprietary interest in the land and thus a private law right to rents as revenue. Without a conception of “public revenue,” all income to those who ruled had to be construed as private property thereby further reinforcing the primacy of private law. As with shiki, revenue became a private claim.

The early kingdoms reached the nadir of fragmentation at the end of the tenth century. By the middle of the eleventh century, processes of reconsolidation had already made their mark. A glance at the political map reveals that in terms of territorial dominion at least three future nation-states had emerged—the kingdoms of Sweden, Portugal, and, above all, England.

In England, Alfred the Great (849–99) had defeated the Vikings and united warring Angles and Saxons under Wessex-based rule as an Anglo-Saxon Kingdom, interrupted only by the brief interval of Danish rule (1018–35) under Cnut. Among Alfred’s most enduring contributions to English institutional development was the introduction of fortified centers, known today as the “burghal system,” for purposes of defense. With the influx of traders, these provided regional marketplaces that would become centers for trade and commerce. The Anglo-Saxon kings also introduced the territorial division of England into shires, hundreds, and tithings, which, as in China and Japan, established a system of vicarious liability for the designated groupings of ten adult men (households in China and Japan). As units of governance under the king, shires and hundreds acquired combined administrative and judicial functions. By the time of the Norman Conquest (1066), relatively extensive and well-developed structures for local governance and adjudication were in place. As elsewhere, adjudication had become the prevailing means for maintaining order in Saxon England.

The Norman kings inherited a structure for royal administration and revenue. Surrounding the Saxon monarchs was a cluster of officials—seneschals, chamberlains, marshals, and stewards—all nobles, who collectively constituted the peripatetic royal court. Permanently posted in the countryside and town were the reeves who administered the royal estates and the ealdormen assigned to districts comprising one or more shires. The ealdorman was the local representative of the king with both military and judicial responsibilities. His treasuries relied almost exclusively on rents from his personal estates, payments made in place of military or corvée service, customs, various special taxes, and, whenever possible, extractions from the nobility.

Normans also found a common law of the kingdom. Credited with promulgating the Deemings, or Book of Dooms (Book of Laws), Alfred, as other kings before and since, used law as a means of unification. Also as in other early kingdoms, the rules did not distinguish between civil and criminal wrongs. Essentially a compensatory system, they typically provided for
payments to the injured party or kinsmen based on the wrong committed and, if homicide, *wergeld* based on the value by fixed social class of the decedent. An edict attributed to Cnut made membership in both a tithing and a hundred mandatory for standing to defend oneself against a charge of wrongdoing or recovery of *wergeld* in a hundred court.\(^{51}\) Shire courts, which had been functioning since at least the last decades of the seventh century, heard appeals and were the principal vehicle of local control, exercised through the ealdorman (later the sheriffs) who were appointed as the royal officials responsible for administration and adjudication in each shire.

The first Norman rulers faced the immediate need to subdue a conquered people within their new realm and to defend against threats from without by Scots, Welsh, and above all Danes. Their consequent concern for security made them particularly vulnerable in their dependency on their Norman warlord vassals who had made the conquest possible. Coupled with familial rivalries, the forces of decentralization robbed them of many of the benefits of the preexisting structures of local governance. However, the final conflict between Stephen and Matilda ended in the accession in 1154 of Henry II of Anjou (1133–89) and ushered in an era of foundational consolidation and reform.

Attributed to Henry II is a transformation of the adjudicatory institutions of medieval England. Making use of existing institutions, Henry and his agents created a unified system of governance and royal justice that has gained him a permanent place of honor in English legal history. Royal revenue was a paramount concern. W. L. Warren makes the point: however “precocious and justly admired,” government under Henry II “was predatory.”\(^{52}\) The other, closely related, aim was to restore order after years of civil war. Among the earliest actions of Henry II within his English realm were reforming coinage, creating a more orderly system of administration, and gathering information. At the beginning of his reign, Henry commanded his tenants-in-chief to account for their subtenancies and service duties. Such information was a means to determine misappropriation of land and rents. Inasmuch as proprietary royal lands produced much of the king’s revenue, the objective, as many of those who resisted correctly perceived, was to restore royal revenues to pay the debts incurred in his accession and refill his coffers, and not incidentally those of his closest associates. At the end of his reign, his itinerant judges were delegated a similar task. The king thus benefited as much as his subjects from ensuing reforms of the adju-

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dictatory procedures that enabled the return of land and revenues to their rightful owners. Similar motivations prompted him to encourage scutage, a monetary payment in lieu of military service, which allowed him to use hired troops under his command instead of reliance on warriors mustered by the barons.

Other administrative and legal reforms under Henry II were more lasting. They commenced with the assertion (attributed to Ranulf de Glanvill, his chief justiciar) of ultimate royal jurisdiction by right of removal or appeal over all free tenements and exclusive jurisdiction over all criminal cases. Both jurisdictional claims were justified as customary but neither reflected existing practice. Henry’s pronouncements significantly augmented the authority of the sheriff as the king’s chief local representative. By the removal of the majority of all serving sheriffs under the Inquest of Sheriffs of 1170, Henry also assured that the office would not become proprietary but remain subject to his approval and direction. Together with the institution of royal “assizes” as an alternative to manorial courts, reliance on trial by juries and the reaffirmation of royal rather than baronial protection of towns combined both to extend and cement royal authority. Henry similarly—and famously in his conflict with Thomas Becket (1118–70)—asserted final jurisdiction in cases viewed by the Church as matters for ecclesiastical adjudication and subject to final appeal to the pope. Adjudicatory jurisdiction thereby became the central focus of political competition and conflict between the Crown and both the nobility and the Church.

By the eleventh century, adjudication had become the predominant mode for maintaining order and enforcing legal rules at all levels of medieval European society. Within extended families, settlements, and communities all across western Europe as elsewhere, mediation and arbitration had been from their inception the means chosen by communities and their leaders for ensuring the peaceful resolution of grievances as an alternative to private vendettas and violence. As political structures evolved, in western Europe as in Japan, formal adjudication similarly became the preferred means for such redress. In the process, unlike Japan, lawyers and notaries—whose documentation provided proof and finality—rather than administrative officials were becoming primary actors in law’s enforcement. Latin as the common written language and the language of the Church ensured a vocabulary of law and the Bible ensured much of its content. As noted previously, the Church had led the way.

Parish priests and bishops had long functioned as local arbitrators and judges for both informal and formal resolution of grievances and redress of wrongs. As rulers extended and sought to consolidate their territorial jurisdiction, they began to establish structures of governance, commissioning officials to collect rents and to mobilize military defenses. In the process, they established more accessible mechanisms and procedures for formal
adjudication. To maintain peace and do justice had, as noted, become prime requisites of kingship. Ecclesiastical coronation had become universal with the monarch promising, as in the words of the Wessex king Ethelred (c. 968–1016), “that God’s Church and all Christian people in my dominions shall keep true peace . . . that I promise and command justice and mercy in all judgments.” 53 As a system for maintaining order, formal adjudication—lawsuits—by those seeking to maintain or expand their political authority had compelling advantages. First, 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. The superior status of adjudicators over the parties was acknowledged by virtue of either prior mutual consent as in arbitration or some sort of officially recognized authority. Most important, 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. Thus, as early as the tenth century, formal adjudication of private claims had become the prevailing mode of law enforcement throughout western Europe.

The seventh-century Visigoth Fuero Juzgo exemplifies the early emphasis. The king is viewed above all as a dispenser of fair justice through royal courts, even admonished to order judges “to practice moderation” in their adjudicatory functions (Book 12, Title 1).54 Law’s enforcement is presumed to be adjudicatory. The second book sets out in detail the requirements for adjudicatory procedures; the role of judges, lawyers, and witnesses; as well as authentication of documents. No distinction is made between civil and criminal offenses. Both are enforced within essentially the same adjudicatory framework.

Throughout the continent, similar premises prevailed. Courts and adjudicatory assemblies at all levels—royal, seigniorial, local—proliferated. Most had, without distinction, merged judicial and administrative functions. Many administered tax assessments. With increasing trade, merchant guilds expanded private adjudication for commercial disputes. Throughout western Europe, adjudication had become virtually the sole mode for the formal settlement of disputes and the enforcement of law.

Formal mediation and adjudication have been integral features of governance from the beginning of Japan’s political evolution. We can only sur-

54. Quoted in van Kleffens, Hispanic Law, p. 77.
mise the manner and means for the resolution of disputes in prehistoric periods. As chiefdoms appeared and the authority and capacity for coercive ordering developed, communal mediation was as likely in Japan as elsewhere to have yielded to adjudication. Reliance on customary norms and community sanctions may similarly be presumed to have been replaced by decisions by chiefs and elites based on rules they made and enforced. The introduction of advanced conceptions of law and law enforcement from imperial China, however, enabled new forms of regulatory lawmaking and law enforcement. Unlike imperial China, however, the combination of decentralizing forces with the expanding complexity of individual, household, and corporate entitlements to land and its produce fostered increasingly complex mechanisms for adjudication of land-related disputes. By the ninth century, adjudication of land disputes had become an integral feature of governance.

To maintain order and to consolidate their capacity to command were high political priorities for the Kamakura rulers. Public order under their control and at least partial command was essential for purposes of enhancing both their political authority and power. Most important was their capacity to reward and protect allied warrior houses. The nature of their rule through layers of consensual undertakings between overlords and subordinate warrior retainers with reciprocal obligations for protection and a promise of reward in return for loyalty and service meant that by definition, like their imperial predecessors, no warrior rulers could be fully in control. Without the resources to provide stipends to agent administrators, those who ruled at the center suffered from weakened means for control and 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, the Kamakura and Muromachi overlords at the center, like their ritsuryō predecessors, relied extensively on adjudication, particularly over land claims (that is, control of revenue-producing territory) to maintain order as well as enhance their authority.

The warrior ruler of Kamakura did not replace the imperial regime but had instead initiated a process that only gradually supplanted it, which ultimately by the seventeenth century under the Tokugawa rulers narrowed its jurisdiction and the scope of ritsuryō law to a tiny class of nobles within the environs of Kyoto. The concomitant diffusion of authority and power coupled with development of shiki as private entitlements to revenue produced similar changes in the patterns of law enforcement within the imperial system. Kyoto remained the imperial center where the principal offices of governance were located. One, a Bureau of Records (Kirokujo), as de-
scribed by Cornelius Kiley, had, when established in the twelfth century, administrative functions as an office for record keeping and documentation. As the office for formal recognition of documented claims to imperial grants of offices, land, and related entitlements, with the development of *shiki* as transferable entitlements to revenue, the Kirokujo began to adjudicate an increasing volume of competing claims. It thereby progressively acquired judicial functions and soon became the office for civil suits. With jurisdiction for all criminal matters, the Bureau of Police (Kebiishichō) in contrast functioned along familiar imperial Chinese patterns as a criminal court—although, unlike imperial China, criminal law enforcement was never a defining feature of Japanese governance. The work of the Kirokujo was a form of what might best be called “administrative adjudication” in that it primarily involved determining the validity of conflicting claims on the basis of the presentation and authentication of documents evidencing conferrals or transfers of entitlements. As its decisions were based on precedents, the Kirokujo appears to have acquired in the process a significant lawmaking function as exemplified by the recognition of *shiki* as a transferable property interest.

During the course of the twelfth century, Japan’s warrior and imperial rulers had established the necessary and sufficient structures for an embryonic private law system. By the end of the thirteenth century, an institutional structure for adjudication of private claims and recognition of applicable legal rules had almost fully evolved. Functioning within conceptions of law and governance borrowed initially from imperial China and modified and adapted for warrior rule, the consequence was a legal order that included what we can describe as an incidental system of judicial precedents and private law within an essentially administrative order.

Under the Kamakura bakufu, adjudication became the primary means of maintaining order and control. A system of predictable procedures based on both edict and practice had fully emerged. The sources of decisional rules and principles included recognized customary practice, administrative precedent, and proscriptions legislated by both imperial and bakufu authorities. 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 inde-
pendent 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 legitimate their rule.56 “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.”57

As the bakufu strengthened, the warrior officials at the center began to issue a growing number of orders and instructions to subordinates and officials responsible for administration and the adjudication of disputes among the men-at-arms under bakufu jurisdiction. The most complete set of such instructions was contained in the 53-article Goseibai Shikimoku, known in English as the Jōei formulary of 1232, with hundreds of supplemental orders. Its promulgation was an exercise in legitimization as a set of rules for the warrior class with nationwide applicability. The legitimizing function of this lawmaking effort was even more apparent in its successor a century later, the Kenmu formulary (Kenmu Shikimoku) issued by the Ashikaga shōgun in 1336, which has been described aptly as “an attempt to legitimize his coup d’État.”58

Neither formulary was a “code” in the contemporary sense. Both are brief. The Jōei formulary has 51 articles; the Kenmu formulary, only 17. Both, however, were supplemented by edicts with an increasing number of legal rules (tsuikahō). They combined admonitions and commands based on precedent and customary norms within the warrior community. The Jōei formulary is foundational. It comprises a collection of general instructions to the bakufu warrior officials with respect to a variety of issues. The formulary begins with exhortations on the maintenance and repair of shrines and temples. Most, however, relate to the handling of cases brought to the authorities for adjudication. The primary purpose was to set out the basic rules on how to proceed—such as the necessity for documentary evidence—as well as substantive rules and principles to be applied, including interstitial identification of criminal offenses of concern. As supplemented, they constituted the written corpus of bakufu law. By its terms, the Kenmu formulary and supplementary instructions were intended to restore order and compliance with the instructions of its Jōei predecessor. They

reflect an overriding need to restore and maintain order in the wake of increasing lawlessness by warriors in particular. The 17 articles of the formulary deal with the decorum of warrior officials, the selection of able officials, and finally the need for access by commoners to hearings and redress of grievances. The supplementary laws lack organization and conceptual coherence. Missing are the general proscriptions and related penalties that constituted so conspicuous a feature of imperial Chinese law.

The formularies are for the most part a collection of particularized commands ordering miscreant warriors to comply with precedents and prior commands to vacate improperly acquired lands, relinquish illegally claimed offices, return misappropriated goods, or pay taxes or revenues in default. Included also are provisions to protect—through regulation of interest—the supply of credit by moneylenders with pledges of commodities and goods. Lack of any apparent coercive element and the repetition of suits and appeals suggest that the bakufu in fact lacked the means to compel compliance. The actual enforcement of bakufu judgments was, it appears, left to a combination of their consensus-creating legitimacy and self-help.

Whatever bakufu adjudication seems to have lacked in coercion, procedurally it functioned within a well-developed structure pursuant to well-defined evidentiary rules. Disputes classified as shomusata could be tried in either Kamakura or 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 monchūjo under direct control of the bakufu. Documentary evidence of official appointment or investiture as well as commercial and other contractual instruments relating to debts, land, and distribution of property nevertheless determined the outcome of the vast majority of cases. Thus, the Kamakura and imperial magistrates continued the development begun at least by the tenth century of lawmaking by adjudication through precedent based on documentation or what might best be called “notarial” law.

Legislated rules, precedent, and documentary evidence were not the only bases for judicial decisions. Resort to “reason” or dōri was always an option. An open-ended principle that could be used whenever deemed necessary to fill gaps or to justify deviation from legislated rules or precedent, dōri represented in effect the consensus or sense of the warrior community. Although dōri provided a means for the recognition of community values, it was not a substitute for a conception of principled judicial reasoning or a
belief in any universally applicable set of norms. Unlike Rome or China, no notion of universally applicable, transcendental norms whether conceived as natural law or a separate moral order took hold in Japan. Historically, Japanese culture did not include shared belief in universal values nor a dichotomy between “good” and “evil.” Despite the influence of universalistic modes of thought advanced in Buddhism and neo-Confucianism, particularistic values remained primary. As expressed by Robert Bellah, “It [was] 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.” 59 Assessing similar observations, S. N. Eisenstadt views Japan as a “de-Axializing” culture in which the universalistic and transcendental orientations were muted, segregated, and bracketed out. 60

As a result, no conception could have taken root in Japan of universally applicable legal rules or principles, especially ones against the legitimacy or “legality” of those imposed by rulers. Without a conception of principled judicial reasoning or a belief in any universally applicable set of norms, Japan’s legal system could not evolve beyond the procedural framework for a private legal order. Natural law theory in western Europe combined with 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.

Nor did Japan’s reliance on imperial Chinese conception of law as a set of ruler-determined administrative regulations and criminal penalties allow for the development of any generalized conception of private or civil law. In their place was an emphasis on dōri, community consensus, “harmony” (wa), and the legitimacy of those who governed as benevolent rulers maintaining the common “public” welfare as overriding social and political values. Without such a conceptual framework, Japan’s embryonic private law order could not, therefore, evolve beyond a basic institutional framework.

The emphasis on adjudication as a primary means of maintaining order and social control continued into the nineteenth century as the systematic adjudication of claims based on precedent developed even more fully under Tokugawa rule (1600–1867). The consequence was a growing volume and variety of rules and practices that constituted private law in all but name.

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By the eighteenth century, Tokugawa edicts had recognized two types of adjudication—one labeled “inquisitorial” (gimmi suji), the other “adversarial” (derisuji)—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 procedures further differentiated “adversarial” suits into four categories: “main suits” (honkuji), those related to land and water (ronsho), “money suits” (kanekuji), and mutual affairs (nakama-goto). Honkuji was a generic category for all private law claims other than those that came within one of the three particular categories. Ronsho cases had special importance for the regime in that this category of suits covered disputes over irrigation entitlements. Kanekuji were essentially claims by creditors seeking to collect on defaults of loans with or without collateral, but in context they involved various commercial transactions and instruments. Earlier forms were being adjudicated, however, at the outset of the Tokugawa era. The Tokugawa authorities had little interest in adjudicating nakama-goto suits in that they involved disputed distributions of profit within an association, which Tokugawa officials regarded as best resolved internally.

Influenced by imperial Chinese law—particularly the Ming Code—these classifications and the differential treatment each received reflected a decision to allow official discretion and claimant voice in cases involving matters deemed less significant 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 and preferably by mutually acceptable compromise. Unlike the discretionary enforcement of “private law rules” in China, however, in Japan these suits, particularly commercial suits, became increasingly common fare as they were resolved through well-established adjudicatory procedures. With the frequency of like claims, a system of private law rules established by precedent developed. By the end of the seventeenth century, the adjudicating officials of the Tokugawa regime had developed “by judicial precedent,” in the words of John H. Wigmore, “a body of native law and practice, which can only be compared with the English independent development after the 1400’s.”

Epilogue

The endurance of the village as a paradigm of governance is among the most striking features of Japan’s institutional history. The resilience of various forms of collective, private ordering within communities of shared interests distinguishes contemporary Japan from both its Asian neighbors and its Western peers. No contemporary industrial nation surpasses Japan’s capacity to devise and use so effectively such a variety of applications of private ordering. The tuna court of the Tokyo fish market65 and the bank clearinghouse rules for the enforcement of promissory notes66 are simply two prime examples. In terms of institutional design, no employment system anywhere replicates the incentives of Japanese patterns to ensure that members of the community align individual, self-regarding conduct with the collective interest of the organization.67 Even the judiciary reflects such communitarian orientations in its organizational features68 as well as its decisional law. As the courts have repeatedly held, the “sense of the community” determines the law.69 The legacy of rivers and rice endures.

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