Introduction

This book began as an effort to explain a fundamental divergence in the legal regimes of the world's two most highly developed and influential legal traditions—the centrality of public law in Imperial China and the contrasting primacy of private law in Western Europe. It soon became an even more daunting venture. By all accounts, systems of private and public law developed historically within the context of the diverse configurations of multiple political regimes. The political foundations of these two basic systems of law—indeed even more broadly of law itself—became increasingly apparent. Consequently, to answer the question of how and why private and public law regimes (as defined here) develop, one must first understand how the political systems in which they first appeared evolved. In the process, a second theme emerged: how and why patterns of extralegal ordering within legal orders persist or are transformed into legal rules.

From inception my inquiry related primarily to China not only as one of the earliest but also the most enduring public law order and to Western Europe as the source of what became the private law structures of legal systems worldwide. Japan is also an essential central focus. For over a millennium Japan had adapted Chinese political and legal institutions. Yet Japan also developed an embryonic private law system through adjudication that paralleled European developments. Moreover, Japan was the first and most successful independent nation to transplant Western-sourced political and legal institutions. Its experience is also singular as the world's only major polity that for nearly two millennia did not experience either conquest or even significant migration from abroad. Along with China Japan was among a mere handful of contemporary nation-states that at the turn of the twentieth century had remained independent in a world ruled by Western European powers, the Russian czars, and the Ottoman Turks. They included only Korea (until 1910), Iran (Persia), Thailand (Siam), and Ethiopia, as well as Afghanistan and a cluster of Himalayan kingdoms. The political and legal systems of these few at least nominally independent states were thus of their own making. None compare to either China or Japan in terms of institutional continuity or enduring economic and political influence.
My principal arguments and conclusions are explained in Chapters 1 and 2 in the context of defining law, its elements, aims, paradigms, and trajectories. They rest on two simple propositions. The first is that rulers past and present share above all else a need and deeply rooted desire for resources and control. Acquisition of wealth and its allocation for structures of governance by those who rule past and present are thus keystones of the argument. The second is the positivist proposition that legal institutions and processes—even the definition of law itself—ultimately are products of the systems of governance within which they function.

Inasmuch as law reflects the authority as well as the power (also as defined for our purposes in Chapter 1) of those who govern, in all societies across time and cultures, political institutions determine processes for both the recognition and enforcement of legal rules. Those who govern define the content of legal rules and also create the means for their enforcement. In so doing, they profoundly influence perceptions of law itself. The means of law enforcement are critical. Herein lies the basic distinction between private and public legal orders as well as the differentiation of private ordering from both. All legal orders require authority—that is, the legitimacy of those who rule. Private legal orders, however, do not involve the same manner of law enforcement as public legal orders. A cadre of adjudicating judges suffices for the former but an array of law-enforcing officials who police and prosecute is necessary for the latter. Rather, private law enforcement enables judges and the parties to define the focal issues and aims of legal rules that are made in the process. Public law orders require more resources and some sort of command-and-control mechanisms—salaried officials, for example—to be effective and enduring. Private ordering in turn substitutes for both. By definition, within private orders those who rule neither determine the applicable rules nor participate, even in the “shadows,” in their enforcement.

The institutions and processes of law thus necessarily vary with the patterns of governance or, simply put, the capacity of those who govern to enforce legal rules. To the extent that those who rule are able to maintain order and to implement policies by means of an effective regulatory system, as exemplified by virtually all industrial democracies today, private law becomes at best a residual, less preferred means of governance. Civil suits are left to minor matters of relatively little concern of the state. If, however, those who rule for lack of resources or other cause lack the means of coercion—defined here as “power”—either they must rely on private law or private ordering. To the extent that rulers seek a degree of control over the legal rules, they will, I argue, favor
private law. From the perspective of those who govern, private ordering is thus the least desirable means of maintaining order.

The development of political institutions is a complex and, as demonstrated here, a varied story. Basic features of political regimes, their authority or legitimacy as well as their power or ability to coerce, have historically been greatly influenced if not determined in turn by geography, the manner and means of producing wealth, and the capacity of rulers to appropriate wealth and to muster and control human resources, and, most importantly, new technologies. As detailed in the chapters that follow, geography and early agriculture played instrumental roles. Legal regimes like their political foundations develop along trajectories that are shaped by the past. Shared beliefs also play a significant role in shaping the formation and development of both political and legal structures. In combination all of these factors contribute in determining the paths that such formation and development take. Path dependency is thus as fundamental to the narratives of how legal systems develop as it is to the trajectories of political and economic change.

Multiple stories can be told of the development of political systems and legal institutions. Both have evolved historically in varying ways. Yet all share certain common threads. The political foundations of law, its origins, aims and development, and especially the modes of its enforcement in China, Japan, and Western Europe, three dominant legal orders bridging both past and present, involve diverse yet related narratives, capsulated here as stories of rivers, rifles, rice, and religion.¹

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