

1. Defining law's political foundations

We begin in this chapter with a set of basic propositions defining for our purposes here what is meant by law, its elements, processes, aims, and development. They are essential to an understanding of the political foundations of law and underpin the argument and analysis in the chapters that follow on the formation of structures of government and law in Imperial China, Japan, and Western Europe. The critical factors were, as argued here, the capacity of early rulers during these formative periods to control material wealth and human resources, and their ability to allocate both for purposes of governance in light of more urgent demands for territorial acquisition and defense. This capacity was in turn significantly influenced by the manner and means of producing such wealth, as well as prevailing institutional and ideological systems of belief and values. All of these factors in combination—in short, the role and importance of rivers, rifles, rice, and religion—were, we argue, determinative in the formation of the two historically greatest legal traditions—the public law order of Imperial China and the private law order of Western Europe.

WHAT IS LAW?

This book is first and foremost about law. Hence, what I mean here by “law” and more particularly “private” and “public” law orders should be clarified at the outset. We need first to keep in mind that law is no more or no less than a matter of words. Law does not exist except in words. Every legal tradition has a special vocabulary, terms with special meanings, its particular “grammar,” to borrow Mirjan Damaška’s term.¹ English, for example, is a common law language but, except for Louisiana, only a common law language. Thus English is the legal

¹ Mirjan Damaška, “A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment,” *University of Pennsylvania Law Review*, vol. 116 (1968), pp. 1363–1378. Also available in Faculty Scholarship Series. Paper 1592. http://digitalcommons.law.yale.edu/fss_papers/1592. Last visited January 26, 2016.

language in all or virtually all common law systems around the world, from Australia to Zimbabwe.

The legal language—the “law words”—used in continental Europe and in all countries whose legal systems derive from those of continental Europe—i.e., virtually all countries outside of England and the former British colonies—generally have common origins in Roman law Latin and thus can usually be translated accurately in every language but English. No English law word exists for such basic terms as “real” or “thing” rights, although this is a basic concept in nearly all languages except English (e.g., *droits réels*, *diritto reale*, *derechos reales*, *direitos reais*, *Sachenrecht*, and 物權). The common law term “property” comes close in meaning but the most accurate equivalent requires Latin—in *rem* rights. Even the word “law” in English does not have a perfect equivalent in any other language, including those within the now universal Western legal tradition. How, for example, does one translate into English the Latin *ius* or *lex* or the German *Recht* or *Gezetz* or Japanese “*hō*” (法) or “*hōritsu*” (法律)? The meanings differ.

Added to the complexity of legal terminology even within a shared legal tradition is the use of different words that have the equivalent meanings within particular national legal systems as, for example, the term “natural justice” in English commonwealth countries and “due process” in the United States. Both include the right to a fair hearing with an unbiased adjudicator.

Remarkably, what we mean by the word “law” even within our own legal system is rarely defined. Most books and articles on or about law implicitly treat its meaning as self-evident. Even schools of law seldom if ever attempt to define with any precision what the members of their faculties teach as their common focus. The reason is simple. Law has no generally accepted or agreed definition. Within all national legal systems today a cluster of what H.L.A. Hart called “rules of recognition” determine which rules or standards are accorded the status of law as the “primary rules” of the particular legal system.²

Working or studying within a single national legal system, such rules and standards are largely learned interstitially and simply taken for granted. Lawyers and law students tend implicitly to accept the applicability of Hart’s secondary rules of recognition. Most seem silently to assume that the rules and standards they treat as law are indeed what they purport to be—what a teacher of logic might refer to as one of the

² H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 79, 97–107.

principal *enthymemes* of legal scholarship. The primary premise—the basic *lemma*—is left unstated. However, for any of the words we use in law actually to become law, including both Hart's rules of recognition and primary rules, something else is required. As explained below, that “something” is their recognition as binding *legal* rules by those with governmental authority to do so. In this sense, all law, as defined here, has political foundations.

For those concerned with more than one national legal system, with international law, or even comparative law, the lack of an agreed definition of law itself poses difficulties but not insurmountable problems—at least as long as they limit their focus to contemporary or relatively contemporary comparison and analysis. For the most part, the absence of universally shared definitions of law is not problematic. The rules of recognition may not be the same but they are sufficiently similar to allow comparative analysis. We seem to get along quite well so long as common understandings and conceptions are used within highly developed national or regional legal systems or even multiple legal systems or orders that share a common legal tradition. Few find it difficult to learn that the word “law” in English has several meanings that may be expressed in separate words in other languages. Hence “law” is best translated into German as *Recht* or in Japanese as *hō*, unless in context what is meant is a statute or legislation, for which *Gesetz* or *hōritsu* is the appropriate word. Conversely, the words *Gesetz* and *hōritsu* are best not translated as “law” in cases where they are used with the more narrow meaning of “legislation.”³ That still leaves room for doubt. Is *ius* to be understood in English as “law” or “rights”? Does *lex* necessarily mean statutes or legislation?

The problems of law as language are mitigated today in that, as noted, legal systems around the globe at least share a common heritage. Virtually all national legal systems as well as the basic understandings

³ One example of the negative effects of such mistranslation is the universal translation in English of the word *hōritsu* as “law” in provisions on the “Rights of Subjects” in the 1889 Constitution of the Empire of Japan (the Meiji Constitution) that expressly allowed abridgment of some enumerated rights only by statute. The mistranslation had led many—including some in the Allied Occupation involved in the drafting of the postwar Constitution—to characterize the Meiji Constitution “authoritarian” or “absolutist” for lack of meaningful protection of basic human rights. In fact, however, like British subjects under a constitutional regime that guaranteed parliamentary supremacy—the paramount liberal democracy of nineteenth century Europe—Japanese citizens enjoyed basic civil rights that could only be limited by legislation.

and institutions of transnational law have European, Roman law moorings. By imposition, choice, or a combination of both, the structures and institutions of law of virtually all countries today are founded on Western law and the Western legal tradition. From Chile to China, India to Indonesia, Malaysia to Malawi, national law worldwide originates in institutions that initially evolved from Roman private law, either on the continent of Western Europe or in England. In turn, private law institutions and structures have determined many of the most basic features of our contemporary public law regimes. At base our notion of “rights” is an institution of private law expanded and applied in “public law” spheres. As a result, Eurocentric conceptions and assumptions generally work reasonably well.

Before making the effort to determine what rules are “legal” in a given system, we might well ask why we should care. What difference does it make? If two rules are identical in content and function, why should we care whether we characterize either or both as “law”? If the effects or consequences are the same, isn’t whether a library rule is called a legal rule or not simply a semantic problem? The answer depends, of course, on whether or not the effects or consequences of the two rules are in fact the same despite identical content and function. Context also matters. An anthropologist might well treat a contemporary Navajo tribal norm as a legal rule, but a lawyer might with equal justification reject such characterization in a case in which a tribal law that does not recognize the norm applies. We have to take care what we call law.

The lack of universally accepted definitions poses special problems, however, for comparative law especially in historical contexts. Once we begin to consider the meaning of law in diverse cultures over time, the problem of definition becomes acute. Without common points of reference, meaningful comparison of legal systems in different, particularly non-Western, cultural and institutional contexts becomes difficult, if not impossible. Most comprehensive comparative law efforts suffer from the failure to offer an analytically useful conception of law. For a comparative venture such as this, to articulate some definition as a common basis for comparison seems essential.

To resolve this definitional conundrum, the recurring approach is to focus again on the function of law. Yet, we might ask whether all norms—expressed as rules or standards—that have or appear to have similar if not identical functions are to be defined as law? We might, for example, equate “customary” rules of the Japanese village with similar, if not identical, rules that are generally conceded to be law in classical Athens and Rome. If so, how then are we to differentiate rules or standards with identical functions that are unquestionably not law—at least for the

lawyer—in contemporary societies? To these and similar questions, social scientists, historians, and lawyers offer varied and at times conflicting answers.

The problems of words and their meanings are not limited to law words alone. We face equally difficult issues in translating into contemporary languages what appear to us at least today to be law-related words used in very different cultural and historical contexts. Take the example of the word “justice.” As defined in my well-worn copy of the Fifth Edition of *Webster's Intercollegiate Dictionary*, “justice” means:

1. The maintenance or administration of that which is just; also, merited reward or punishment.
2. A person duly commissioned to hold courts, or to try and decide controversies and administer justice; a judge or magistrate.
3. Administration of law, according to the rules of law or equity.
4. The principle of rectitude and just dealing of men with each other;—also, conformity to it; integrity; rectitude.
5. Rightfulness; as *the justice of a cause*.
6. *Obs.* A court of justice, or its jurisdiction.

“Justice” is above all a law-related word, connoting the inseparability of normative values and law. The standard Greek translation (or derivative) is δικαιοσύνη (*dikaiosune*). Hence *The New English Bible* translates the Greek into English as such (e.g., Matthew 6:33). Yet, as used by Matthew and especially Paul (e.g., Romans 3:5)—interestingly writing to Christian adherents in Rome in Greek—the word is better translated in my view as “righteousness.” But the Greek term as well as both of the English translations can be understood as law-related terms that conflate law with moral behavior and outcomes. Take, however, the compound of ideographs 正義 used in Chinese and Japanese as well as Korean. The standard English translation of the compound today in all three languages is indeed “justice.” However, it too may be more accurately translated as “righteousness.” As used historically it was not a law-related word in any sense. Instead, it reflected Imperial China's profoundly positivist legal tradition and the utter separation of law (法律) and morality (道德). Here we should note that law and morality were inseparably joined in both language and practice in all territories that had been or continued to be subject to rule by a Western European power as well as throughout the Russian and Ottoman empires. Understandings of law influenced by Judaism, Christianity, or Islam prevailed in each. Within each, admonitions of God were understood as predominant legal commands. By 1900 such conceptions of law and the joinder of legal and moral obligation thus held sway throughout the world outside of only four countries: China, Japan, Korea, and possibly Siam.

Suggested here to resolve these problems is a particular approach. Not all social scientists or lawyers will necessarily find it helpful or appropriate. Hopefully, however, it suffices for the purposes of the comparative historical analyses offered here. An attempt to compare law and legal institutions across time and cultures forces us to confront questions that go beyond definition—namely, whether regardless of content and function rules deemed to be law have attributes that distinguish them from rules that are not. Moreover, attempts to do so in static terms flounder. We must also ask whether ascribed attributes are shared by legal rules across systems, traditions, and cultures in both time and space. At least initially, therefore, I would put aside any emphasis on functional equivalents and, at the threshold of comparative inquiry, ask instead whether we can ascertain elements, features, and attributes of law in contemporary legal systems that also pertain, at least propositionally, in more culturally or temporally remote societies. In other words, can we identify basic elements and processes, as well as attributes common to law in multiple societies at all stages of development? To be sure, with contemporary legal systems as the definitional point of departure, this approach necessarily takes on a Eurocentric cast. Moreover, without perfect knowledge, no definitive answers to these questions are possible. At best we can modestly posit a few possibilities and test them in relation to at least a few representative legal systems.

LAW'S ELEMENTS

In contemporary contexts at least, the conception of “law” encompasses two separate but interrelated core elements—*norms* and *sanctions*—and the related institutions and processes for making and enforcing both. At first glance the initial cluster—norms and law-making institutions—would seem to require little explanation. In all contemporary societies, substantive norms expressed as rules or standards of law are as familiar as the institutions and processes of their making. We readily recognize as law, for example, rules directly or indirectly proscribing undesirable conduct—armed robbery, for instance—or mandating desired actions—such as paying taxes—enacted by legislatures, administrative agencies, courts, or analogous governmental organs as well as the procedures distinctive to each for making and enforcing such rules. Less apparent but no less significant are the constitutive relationships between legal norms and the formal processes and institutions through which they are recognized, articulated, changed, and ultimately enforced.

Within all developed political orders, certain institutions and processes are endowed or entrusted with “law making” competence or authority. Among my favored examples are rules for use of the Marian Gould Gallagher Law Library at the University of Washington in Seattle and identical rules for use of the law library at Washington University in St. Louis. The University of Washington is a public university and thus a state agency. As such, its library rules are legally enforceable administrative rules. They must be made through a statutorily prescribed process for administrative rulemaking. They are published in the state’s administrative law code. Moreover, the law library rules are justiciable as law in the courts. They are unquestionably legal rules—law. In contrast, identical rules for use of the law library at Washington University, a private university, are not subject to any statutorily prescribed procedures. They can be made, modified, or abandoned according to whatever procedures the university or the law school or perhaps even the law librarian might choose. They are not published in any state code. No one, except those who might credibly claim a “contractual” duty owed to them by the university (or conversely a “right” they hold against the university⁴), thereby endowing the rule with the attributes of law as a contract, has any justiciable claim to their enforcement in the courts. In other words, although identical to the library rules of the University of Washington, the Washington University rules are not legal rules.

Even more relevant to our inquiry here is the question whether the so-called *lex mercatoria* was initially “law” as a corpus of customary and legislated rules of commerce recognized and enforced within the merchant community. Only later were these commercial rules recognized by adjudication in England or both cases and code in continental Europe. What if similar rules tended to pertain in commercial dealings and trade globally and across time? For example, what if without any codification similar rules were recognized in commercial dealings by both Chinese and Spanish merchants? Should we deem them to be legal rules prior to their governmental recognition? Would we say that the sales of Chinese gold for Spanish silver in Manila during the seventeenth century were subject to Chinese or Spanish sales law? My answer is “no.” Such rules did not become legal rules, at least as defined here, until recognized by those with law-making authority. We revisit this issue below in the discussion of extralegal or “private” ordering as well as in subsequent

⁴ On the now classic correlation of “rights” and “duties” in Western private law, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven, CT: Yale University Press, 1919).

chapters in the context of customary commercial ordering in China and the embryonic development of a private law regime in Japan as well as the extensive commercial interactions between Chinese and Spanish merchants in Manila in the seventeenth century.

Just as only the rules or standards recognized by institutions with law-making authority can be considered to be law, similarly only those sanctions recognized and imposed through accepted processes by law-enforcing institutions with the requisite competence can be considered “legal” sanctions. Moreover, because only rules deemed to be “legal” are enforceable through these processes by virtue, as explained below, of the attribute of “justiciability,” law enforcement necessarily involves the formal recognition of a rule or standard as a rule or standard of law. Hence law-enforcing processes have a law-making function as well. This is not to say, I should emphasize, that all legal rules are justiciable. Some by their terms, as described below, are not. Nonetheless, only legal rules are justiciable, thereby giving adjudicatory and other law-enforcing governmental agencies the intrinsic capacity to recognize rules as law and thereby “make” law. I have more to say about this below.

The determination of which rules or standards are law begins, as noted, by delineating the specific institutions and processes that have the competence or authority to make or to enforce them. In other words, legal systems must internally define which norms and sanctions are accorded the status of law by designating which institutional processes make and enforce legal as opposed to non-legal rules. All legal orders must therefore have at least implicitly two separate categories of rules. The first encompasses those norms regarded as the law in that system. The second, however, includes those rules that define which norms are to be included in the first category. The selection of norms and rules defined, to return to H.L.A. Hart, as the “primary” legal rules of the law in a particular legal system,⁵ is determined by “secondary” rules of recognition.

As indicated, such “secondary” rules are not universal. They are the product of developed political orders and are most often particular to individual legal systems. To repeat what has been stated before, not all rules and sanctions recognized and applied by those who exercise political authority are deemed to be law. Legal comparativists who focus on contemporary legal systems may be able to rely on the prevalence of shared rules of recognition. However, contemporary rules of recognition are of little help for comparison of legal traditions or systems in separate

⁵ Hart, *Concept of Law*, pp. 77–96.

cultures in different historical periods. A more useful starting point is to identify attributes that seem to be common to all.

Implicit from what has been said, legal rules share a fundamental attribute. In all instances, by definition, they depend on recognition by those with *political authority*. Political authority, I posit, is the foundational feature of law in all contemporary societies. As noted above, within our conceptually Eurocentric legal world, lawyers today look to legislatures, administrative agencies, courts, or analogous governmental organs to determine what rules or standards have legal effect and can be considered to be law. All communities and organizations today have rules and standards of conduct, norms that are enforced in various ways by various means. Some, as we shall see, may be purely customary; others are adopted through some formal processes as what I shall refer to as nongovernmental or private institutional rules or standards. As in the case of the law library rules of Washington University in St. Louis or medieval European merchant guilds, such rules may even be identical in all respects to the rules or standards made by a similar governmental organ, such as a public university or a governmental regulatory agency, but they are not accorded the status of law unless and until recognized as such—for example, as a contract right—by some governmental organ with law-making or law-enforcing authority. Hence, by my definition, legal rules and standards require recognition by some sort of governmental or political authority.

As used here, the terms authority and legitimacy are nearly synonymous. Both denote widespread societal recognition and acceptance of an entitlement to deference and respect, leadership and command. In normative terms, those who request or demand obedience within the scope of their authority should be obeyed. In descriptive terms those who exercise authority in fact receive deference and respect and thereby possess the capacity to influence what others do and how they behave. A community's sense of legitimate authority is grounded in culture and custom. Shared religious symbols, social myths, and "folk ways" sanctified by habit and expectation are among the common sources. Like custom simply by longevity rulers tend to acquire a mantle of acceptance over time. Political legitimacy thus may be simply a function of time or "habitual legitimacy," to use Rodney Barker's phrase.⁶ The factors that contribute to political legitimacy ultimately also determine legal legitimacy.

⁶ Rodney Barker, *Political Legitimacy and the State* (Oxford: Clarendon Press, 1990), pp. 29–33.

Legal norms acquire legitimacy from two entirely separate sources. They are considered legitimate first because of the legitimacy of the norm itself. Thus norms may be accepted as legitimate because they are sourced in widely shared religious or ethical beliefs. A provision in a criminal code proscribing with more severe penalties the killing of a parent, for example, may be considered legitimate because of Mosaic Law within societies influenced by Judeo-Christian–Islamic beliefs or by virtue of other prevailing moral precepts as in Confucian-influenced cultures. Yet rules unrelated to any cultural norms may also be deemed as legitimate solely by virtue of the legitimacy or authority of the political authority that promulgates or enforces them as law.⁷ Smoking bans are a prime example.⁸ In other words, rules articulated in a statute, judicial decision, or administrative regulations are legitimate as law ultimately as a result of the legitimacy of those processes themselves. This is what I refer to as the “derivative legitimacy” of legal rules. Conversely, if either the actors or the processes they use for promulgating a rule as law are deemed illegitimate, the rules they create also risk being considered illegitimate. If, however, the institutions for law making are themselves viewed as legitimate, they tend to legitimate the rules they create. Judicial decisions on highly controversial issues, for example, may themselves foster consensus to the extent that the courts have a special degree of legitimacy.⁹ Potentially at least, law has therefore a consensus-creating capacity.

LAW'S ENFORCEMENT

The forms that legal rules take differ, however, depending on the nature of the political regime, particularly the extent and scope of its authority and its capacity to ensure compliance of those who rule—i.e., its power. The manner and means of law's enforcement are of special significance.

⁷ See Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (G. Roth and C. Wittich, eds., Berkeley, CA: University of California Press, 1978), pp. 212–215.

⁸ From my personal experience, smoking first in classrooms and ultimately on entire campuses ended abruptly with the introduction of such bans. Discussed below is the role of community disapproval as the primary if not sole sanction.

⁹ See, e.g., James W. Stoutenborough, Donald P. Haider-Markel, and Mahalley D. Allen, “Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases,” *Political Research Quarterly*, vol. 59(3) (September 2006), pp. 419–433.

Law enforcing differs from law making with respect to the underlying conditions for its effectiveness. Law making, as noted, depends upon the political legitimacy or authority of those who make the rules, the legitimacy of the rule itself, or better yet, both. Add legal sanctions and law enforcement to the mix and another, separate aspect of law becomes apparent—power. The terms authority and power in English as well as most Romance languages, such as French (*autorité* and *pouvoir*), and Spanish (*autoridad* and *poder*), are generally used interchangeably. For example, the French term *les pouvoirs publique* is quite accurately translated into English as “the public authorities.” For our analysis here, the terms *Autorität* and *Macht* in German more accurately reflect the applicable differences of meaning. As used herein, power means simply the *capacity* to coerce.

The distinction between authority and power with respect to coercion is particularly significant. Coercion can of course be defined to include various modes and degrees of persuasion. In relation to political rule or governance comprising political actors and institutions, certain political offices or actors may enjoy so substantial authority that, as a consequence solely of which, their commands may be obeyed despite their lack of any capacity to compel compliance by force. The Roman Catholic Church in medieval Europe, as described in Chapter 5, is exemplary of a “political” entity that could command compliance by means of its extraordinary legitimating authority without coercive power.

As a distinctive feature of legal rules, I have previously labeled their potential influence as consensus-creating capacity. Similarly, however, some commands are obeyed despite the lack of any claim to authority or political legitimacy of those who issue them solely because they have proven capacity to coerce compliance. Few if any of such regimes endure. Their ruins litter landscapes around the globe. To be sure, seldom do those with authority have no capacity at all to coerce or those with power make no claim to sources that entitle them to authority. One might well conceive of both positioned along a spectrum with authority without power and power without authority at the extremes. Conflating authority and power may also have utility as a rhetorical device.¹⁰ Ultimately, however, coercion requires more than bargaining leverage or dominant influence. At its core lies the capacity to compel compliance by the credible threat of the use of force. Not to differentiate coercion from

¹⁰ See, e.g., Michel Foucault, *The History of Sexuality: Volume 1: An Introduction* (New York: Vantage Books, 1990), on the “sovereign power” over life and death, pp. 135–145.

forms of persuasion that do not involve force or its threat inhibits clarity and rigorous analysis.

Authority with or without power and power with or without authority are of course possible. Authority and power become mutually necessary only with respect to effective law enforcement by those who govern. Authority is all that may be required to govern quite effectively. We can imagine, for example, a relatively elementary political order based on kinship ruled by a small group of household heads who by custom and convention are eldest sons who are in turn led by the eldest household head. By definition, therefore, an authoritative, legitimate basis exists for governance and succession. To the extent the group wishes to change the customary or conventional rules regarding succession to the household headship or the designation of the eldest as leader, they face problems of authority and power. First, the ruling household heads must have sufficient political authority to create a new norm—i.e., for the community to accept the new norm as legitimate, the community must have also accepted the law-making authority of those who made it. Such community consensus eliminates the need for any mechanism for enforcing the new rule. By definition community acceptance of its legitimacy produces compliance—in other words, the derivative legitimacy of the rule.¹¹ The viability rule will thus depend like any customary rule upon community acceptance and conformity. If the legitimacy of the new rule is effectively challenged, however, its formal enforcement becomes necessary. To the extent that the rulers can coerce compliance, they may be able to effect the change. But unless and until the community accepts the legitimacy of the new rule (and rulers), those who seek to govern will continue to need the capacity to coerce compliance. In such event our hypothetical simple polity risks transformation from one of authority without power to one of power without authority. By definition, the former remains a stable legal regime. The latter does not. With little if any claim to legitimacy, the regime is likely to be subject to competing claims to rule and remain unstable.

By treating law making and law enforcing as separate components of the legal process, we are able to explain both the fundamental dynamics of legal rules and factors that determine the role and limits of law in a given society. The resources devoted to the enforcement of particular legal rules also tell us much about law's aims, i.e., the priorities of the law makers. Many studies of law tend to focus on legal rules and the

¹¹ See John Owen Haley, *Authority without Power: Law and the Japanese Paradox* (Oxford and New York: Oxford University Press, 1991), p. 6.

processes for their recognition or creation and overlook the mechanisms for their enforcement. The consequence is to neglect a pivotal feature of all legal orders and the determinative role that law enforcement plays. Our analysis of this role begins with two propositions.

The first is that enforcement frees the viability of a legal norm from community consent and consensus. This can perhaps best be stated negatively: *unless a legal rule is enforced its viability depends like custom directly on the community's collective acceptance of the rule and its collective willingness to ensure that members comply*. This pertains with respect to the legitimacy of the content of the particular norm itself or the legitimacy of the norm as law or both. As illustrated once again by a taboo against smoking, the effectiveness of a statute prohibiting use or possession of tobacco without any penalty depends upon voluntary compliance—i.e., individual consent—or social sanctions for noncompliance. In both instances, the effectiveness of the rule depends on community acceptance. In other words, the rule largely functions as a customary norm. In my own experience, smoking bans have been overwhelmingly effective without any formal enforcement. Social disapproval—when someone might light up, polite nods toward the “no smoking” sign—has been sufficient. However, the value of having a legal rule rather than simply customary convention or a “private” institutionalized rule (e.g., a company rule) is its indirect or derivative legitimacy and thus its consensus-creating capacity. The “legalization” of a rule helps to foster or at least buttress consensus.

The second proposition follows from the first. If enforcement determines whether legal rules are viable independently from community acceptance, then, to this extent, those who control the enforcement process control or at least influence the viability of the legal rule. Prosecutorial discretion, broadly defined to include control over all forms of law enforcement, thus becomes or should become the central focus of any inquiry as to the role and efficacy of law in any community. The answer to the question of who exercises such discretion tells us much about who governs.

Control over the law enforcement process in most legal systems can be divided into two basic categories. In what I shall call regulatory or *public law regimes*, control over enforcement is entrusted to those with the political authority to govern, such as officials in law-enforcing bureaucracies. They may include prosecutors or police, magistrates or judges, or administrative officials of all sorts. Whatever the label, government officials in such regimes monopolize control over the coercive mechanisms for law enforcement. Although in some instances private parties may initiate enforcement by complaint or petition, the prosecution of the

case and control over its ultimate resolution, whether by settlement or the application of sanctions, rest with those who exercise political authority. Prosecutors, for example, exercise that discretion in most contemporary criminal justice systems with the notable exception of Germany and other countries that have adopted a system of mandatory prosecution influenced by the German legality principle.¹²

In *private law regimes*, in contrast, discretion or control over the means of formal law enforcement or legitimization of self-help is controlled by private parties, whose authority to exercise such “prosecutorial” powers is delineated in a variety of forms, such as standing, capacity, or indeed, the concept of *legal rights*. A private law regime requires some mechanism to allocate the authority to control the application of remedies and sanctions, to determine who could bring what action against whom and for what remedy. The concepts of “rights” and “duties” provide such means insofar as these notions serve to delineate persons with the legally recognized capacity to control the processes of enforcing prescribed substantive legal rules, whether made by legislative, judicial, or administrative organs or, as in the case of contracts, private citizens with rule-making capacity. Consequently, all private law regimes require some conception of legal “rights” and “duties” or their equivalent. The enforcement of the Athenian *eisphora* by citizen-initiated enforcement actions in the law courts¹³ exemplifies “private law” enforcement of what we would consider today to be a public law duty.

¹² The German principle of mandatory prosecution required under the legality principle (*Legalitätsprinzip*) was not coincidentally influenced by Friedrich Carl von Savigny (1779–1861), Germany’s preeminent nineteenth century private law scholar. See *Promemoria der Justizminister Savigny und [U]hden über die Einführung der Staats-Anwaltschaft* [Memorial of Justice Minister Savigny and Uden on the establishment of state prosecution in criminal procedure] in Werner Schubert and Jürgen Regge, eds., *Preussische Gesetzrevision, 1825–1848* [Prussian legislative reforms, 1825–1848], vol. 11 (Vaduz, Liechtenstein: Topos, 1981), p. 1284. By restricting prosecutorial discretion, German criminal law enforcement paralleled private law enforcement in that it ensured what were in effect legally enforceable claims—in effect “rights” to enforcement—by crime victims.

¹³ See Matthew R. Christ, “Liturgy Avoidance and *Antidosis* in Classical Athens,” *Transactions of the American Philological Association*, 120 (1990), pp. 147–169; also Carl Hampus Lyttkens, “Institutions, Taxation, and Market Relationships in Ancient Athens,” Working Paper, Department of Economics, Lund University, Sweden. http://ideas.repec.org/p/hhs/lunewp/2008_009.html. Last visited January 26, 2016.

Private law as process is central to the Western legal tradition. Roman private law—the *ius civilis*—was primarily a system of rights defined as the claims of individuals either to protection by specific procedures and remedies or to legitimate resort to self-help. Latin and other Western European languages do not distinguish between “law” and “right.” The words *ius*, *Recht*, *droit*, *derecho* denote both. In this sense, the *ius civilis* is by definition a system of rights. Stripped to essentials, the notion of a legal right or rights in Western law expresses the capacity of the individual to activate and control the process of enforcing legal norms. Although today the term in English is used more broadly—for instance, to define property—other terms such as interest, estates, entitlements, or simply the Latin *dominium* are more appropriate. The notion of a legal right is most meaningful, therefore, only when it entitles the holder to legal protection upon demand. The maxim *ubi ius ibi remedium* (“where there is a right, there is a remedy”) is more than an aphorism. It expresses the crux of private law.

A concept of rights is not necessary, of course, for the enforcement of legal rules in public law orders. Duties alone suffice. We rarely if ever speak of the government’s “right” to tax or the rights of either the public or, for that matter except in a very narrow sense, victims in criminal law. Similarly, law in Imperial China did not require a concept of rights for enforcement. The compound of ideographs 法律 (*falü*) that we translate as “law” meant regulatory penal rules. Codes and statutes were administrative and criminal. Legal rules were uniformly proscriptive. There were no rights, only duties. Although “civil” or private law rules as defined in substantive terms today can be identified in traditional East and South Asian law¹⁴—i.e., rules governing family, contracts, property, commercial transactions, and other private matters—they were generally expressed either as “minor matters” or more accurately minor crimes that could be compromised in the interests of resolving the dispute or, if significant to those who ruled as commands, violation of which was subject to some prescribed penalty or to what is best described as administrative enforcement by an essentially regulatory state. Viewed from this perspective, courts are above all else law-enforcing institutions. From a litigant’s perspective, at least, the primary function of litigation is to enforce legal rules, not to resolve disputes. The essential difference between private

¹⁴ See, e.g., *Laws of Manu*, Chapter VIII, Sections 3–7 (trans. Buhler), *Indian History Sourcebook*, www.fordham.edu/halsall/india/manu-full.html. Last visited January 26, 2016.

lawsuits and criminal or administrative proceedings is that private parties rather than state officials control the process of enforcement.

Do the distinctions among public, private, and customary processes for law enforcement really matter? After all, identical rules can be enforced in either or both processes. Legislators may proscribe dumping toxic waste in rivers as either a regulation subject to administrative fines or criminal sanctions or they may treat such dumping as a tort or civil delict to be enforced through litigation as a private law action with compensation to those harmed as the remedy. To increase preventive deterrence, class actions and treble damages may also be added to increase the incentives for such private law enforcement. What matters is not the “public” or “private” law category of the rules but control over the process of their enforcement.

As defined the mechanisms for law enforcement differ essentially in who manages and controls them. Control over the enforcement of the legal rules considered significant by those who govern is entrusted nearly always to one or more official, public agencies. In all public law regimes by definition those who rule control the enforcement processes. They choose whether and which legal rules to enforce. Those who rule and their agents thus have the discretion to enforce the law and in exercising that discretion not only what legal norms will be enforced but also what norms are legal. In the most elemental political orders, the rulers themselves may exercise this discretion; in the most complex, agents of the state, administrative officials, police, and prosecutors have this choice. The appropriateness of the choices they make may become issues of control between the governing principals and their prosecutorial agents but their subjects, those who are governed, do not get to choose. Private parties—the victims of a crime or of some other infraction—may file complaints and may thereby have some voice in initiating the enforcement process, but their voice diminishes once the process of enforcement is initiated. They may petition or plead, but they do not determine whether to proceed or to stop. Only in a few legal systems in rare instances—such as rape¹⁵—can they end the process by withdrawing their complaint or reaching a settlement with the offender. In most contemporary systems, the bargains reached with those accused of violating the applicable rules are negotiated between public officials and the miscreant, not the victims—those affected most by the infraction of the legal norm. Justified in terms of “public interest”—the rhetorical

¹⁵ See, e.g., the *querela* in Italian criminal law: Italian Penal Code of 1996, Art. 609.

rubric for the policy preferences of those who rule or seek influence—public law enforcement by definition lodges prosecutorial discretion and control in the hands of those who exercise political authority and power.

At this point some readers may ask, “what about the victims of administrative infractions? Don’t these involve lawsuits against officials and state agencies that the complainants control? Yet don’t we classify these as ‘public law’ rather than ‘private law’ actions?” The answer is of course “yes.” Some jurisdictions do denote suits against the state and state agencies for violations of “rights” as public law actions. The notion that we have “rights” of redress against the state as a matter of “public law” is, however, simply an extension of conceptions derived from private law and the mechanisms of private law enforcement into the public law arena. No notable differences exist between such suits adjudicated by the regular courts under German private law and those adjudicated by French administrative courts as a matter of “public law.”¹⁶ In either case a party asserts a “right” to compensation against the state for breach of a “duty” owed the claimant. Such “public law” rights in fact reflect the primacy of private law in the Western legal tradition and serve as a prime example of the continuing legacy of that primacy in the age of the regulatory state.

As defined here, private law enforcement also involves formal, ruler-sponsored mechanisms but, in contrast to public law enforcement, private law enforcement is subject to the control of private parties—in other words, the subjects of political authority. I argue here private law regimes, exemplified by their earliest development in Athens and Rome, are generally those in which by choice or necessity or a combination of both, those who ruled lacked the means or the desire for a public law system and relied instead on a system in which “citizens” had “rights” to have claims adjudicated and to control, manage, and themselves pay the costs of enforcement.

Private law enforcement thus usually represents either a willingness by rulers to give up control or, more commonly, recognition of their inability to control at least fully the enforcing process. Public law systems require dependent agents. Unless administrators, police, prosecutors are salaried and thereby made dependent on rulers as their principals, they are at least potentially capable of developing independent sources of wealth and thereby independent power and ultimately authority. Such dependency,

¹⁶ Duncan Fairgrieve, *State Liability in Tort: A Comparative Study* (London and New York: Oxford University Press, 2003).

however, requires revenue. Unless rulers are able to control and accumulate resources for redistribution as official salaries, they cannot create, expand, or sustain public law regimes. For public law orders those who rule have to be able to appropriate sufficient wealth to allocate resources for law enforcement. Other needs may take priority—such as warfare. If the resources at the disposal of the rulers are not sufficient, other, less costly means for enforcing law and maintaining order become necessary. Needless to say, this is a pivotal notion in any analysis of the development of political institutions. As detailed in subsequent chapters, our stories of rivers and rifles encompass such concerns.

The adjudication of private law rules is not necessarily distinct from the adjudication of public law rules. As legal systems develop, in transitions from meditation, to adjudication, to the prosecutorial and administrative enforcement of regulatory law, the basic distinctions drawn here are rarely ever clearly delineated. As, for example, the adjudication of claims for compensation based on wrongful injury moved toward criminal prosecution with non-compensatory sanctions, at least in Western Europe, the adjudicative procedures and control over prosecution changed only gradually. Even today, those convicted of crimes may be required to pay compensation. Well into the contemporary era, private prosecution of crimes remained a prominent feature in many European legal systems. Only with increasing revenues and the further development of governmental structures did public prosecutors become the norm.

Conceptualizations of law and the legal rules also matter. How, for example, do rulers justify collection of revenues? Is law or legal authority necessary? Historically for most rulers, legal justification was irrelevant. Aside from *corvée* labor and booty by conquest, tax collection was generally intrinsic to their legitimacy or authority. (Whether rulers were actually able to collect is a separate issue related to their coercive capacity.) For instance, the authority of those who ruled Imperial China required no legal basis or formulation. Law conceived as a set of regulatory rules enforced through penal sanctions was not relevant as a source or justification of such authority. Non-payment of taxes was not included as one of the ten abominations of Imperial Chinese law. Nor did classical Roman law provide much assistance. Importantly, Roman rulers, like their Imperial Chinese counterparts, could legally justify collection of tribute and revenue and all manner of booty gained simply by coercive power under the unlimited legal authority they exercised as holders of *imperium*. Otherwise, legal concepts related to public authority remained embryonic at best. In both Japan and Western Europe, however, legal concepts were decisive not only in justifying but also enforcing their appropriations of wealth from producers. As described subsequently in

Chapters 4 and 5, the development and use of concepts such as *shiki* in Japan and acquisition of royal estates and fiefs in Western Europe gave rulers proprietary interests to the produce of specific wealth-producing communities or land with “rents” rather than “taxes” as a principal source of revenue. As a result, law-enforcing processes with overlords as the ultimate adjudicators developed as the primary legal means for enforcing such proprietary claims by warrior retainers. Such adjudicatory processes were instrumental in the creation of an embryonic private law order in Japan and, conceptually as well as institutionally, an increasingly highly developed one in Western Europe.

The processes of both public and private law enforcement are, to repeat, formal and official. They involve resort to established state institutions and state actors. The difference is who exercises prosecutorial discretion and control. To focus on the norm or rule subject to enforcement as public or private law and to ignore the processes for their enforcement deflect attention from the pivotal difference in who controls. Those who rule and their agents do not control the process. Private law enforcement thus reflects constraints on the powers of those who rule and in effect limits at least the scope and reach of their authority. Even adjudicating judges in purely private law enforcement do not initiate or determine whether to proceed or whether to terminate the process. They may determine and permit the sanction but for the most part do not participate in its actual application. That aspect of the process is again left to the parties and the aid of law-enforcing authorities.

Law enforcement processes inexorably serve dual purposes. To the extent that law enforcement or its threat affects behavior, those who control enforcement control the efficacy of the legal rule. In other words, because enforcement ultimately determines the efficacy of the legal rules, those who control the public or private enforcement control the recognition and the continued viability of the norms.

The legal enforcement of norms whatever their source involves formal and official recognition and thus an independent phase in their “making” as law. For example, a customary rule subject to formal law enforcement becomes viable as a legal rule and indeed, as described below, inevitably acquires the attributes of the legal rule. For this reason, whether intended or not, through the articulation and enforcement of particular norms as either rules or standards, adjudicatory or “judicial” processes by those who rule are, or necessarily become, law-making processes in which judges have a decisive voice. With these insights we can begin to appreciate the central role of the magistrate in the public law system of Imperial China (Chapter 3) as well as the Castilian *audiencia* in the first

transformative era of Western law in Hispanic America (Chapter 6)—and perhaps even the contemporary “politicalization” of judiciaries worldwide.

We also speak of private law making by contract. However, it is not the adoption of rules by private consent in an agreement but the enforcement of that agreement as “contract” that transforms the rules of the agreement into rules of law. Were, for whatever reason, the agreement to be deemed legally invalid, then the rules set out by the parties would have neither the force nor the legitimacy of law; rather they would remain formally or legally unenforceable despite the fact that they might well be readily enforceable through marketplace or other extralegal sanctions. As suggested above, to the extent that the rules of commerce and trade are made (or recognized) and enforced through extralegal means—both the marketplace as well as extra-governmental institutions such as guilds—by definition such rules are not “legal” rules. In this sense, there can be private ordering, as detailed below, but not private law making.

Not all legal rules are ever formally or “legally” enforced. One can at least imagine a political order in which all legal rules are left to informal means of enforcement. In such systems of private ordering, legal rules as well as customary norms may indeed be enforced. Whatever the norms or their source, however, their viability or efficacy will depend on those who control such enforcement—perhaps the community at large or leaders of the gang. Such is the crux of private ordering.

Public international law exemplifies many aspects of our analysis. The actors are juridically recognized states—like, as it were, the citizens of Athens or Rome. A variety of recognized international law-making as well as law-enforcing organizations and processes exist. The United Nations, the World Trade Organization, and other supranational organizations have recognized competence to make internationally binding legal rules. States may individually agree to be bound by mutual agreement to rules in treaties and conventions that function like contracts as sources of legal rights and duties. Other rules may be “customary” in that they are accepted by state practice and general consensus (*opinio juris*) as a rule of law, but until otherwise recognized through some competent, formal law-making process, such as their “ratification,” or are actually enforced, by our definition, they lack status as legal rules. As a consequence, international law becomes a subtopic of comparative national law.

One example should suffice. Until recently, all but one state (the United States) have long refrained from taxing income derived from sources outside of the state’s territory by non-resident citizens (including those with dual nationality). Thus we might have concluded that a

customary international norm existed disallowing such practice—with allowances for the United States as the most powerful “citizen” in the community. Whether such norm constitutes a binding “legal” norm as a matter of public international law, however, would additionally require some authoritative statement to such effect. Inasmuch as such practice was tolerated and its disallowance not recognized as a legally binding rule through any competent law-making or law-enforcing process, the practice did not violate a “legal” norm. The United States Supreme Court rejected such claim in 1924¹⁷ and all tax treaties with the United States rest on the assumption that the US will otherwise legally tax the worldwide income of its non-resident citizens. And like all custom, advantageous non-conformity with a customary norm invites imitation. (Here I am reminded of an episode involving a chain-smoking university provost—who incidentally died in his late 60s of lung cancer. At a meeting I attended with him, despite a prominent no-smoking sign, he pulled out his package of cigarettes and lit up. No one, I first thought, even dared to object. Then one by one others pulled out cigarettes and began to smoke.)

International courts also exist. The International Court of Justice (ICJ) is an adjudicative body empowered to adjudicate the respective rights and duties of states pursuant to these and other international law rules. Insofar as the ICJ can only act at the initiative and continuing request of claimants, it functions like an adjudicative body in a private law regime. In contrast, the International Criminal Court and other international criminal tribunals with independent prosecutors are akin to criminal courts in public law regimes.

No international organization today, however, has the capacity to compel compliance with international law rules by force or its threat. Hence the efficacy of the rules of international law, even those recognized and “enforced” by international criminal tribunals, depends ultimately on state actors who do have the capacity to coerce and agree to assist. In other words, the rules of public and private international law, like the norms of customary orders and of gangs, depend upon consent and consensus by those who exercise power—the “gang” of world powers—in other words, those with more or better rifles.

¹⁷ *Tait v. Cook*, 265 U.S. 47 (1924).

LAW'S AIMS

As a tool or expression of political authority and power, the basic aims of law are easily perceived. If, by definition, legal rules depend on recognition by those with political authority, if they are made by those who exercise such authority, legal rules will necessarily reflect the aims and ambitions of those who rule. We can thus anticipate that similar rules or rules with similar purposes will exist in most if not all established political regimes.

Political regimes, it needs to be said, are generally not created by law but are protected and ordered by law. Those who draft constitutions may not have functioning political authority, as those in the late eighteenth century who drafted the constitutions in what became the United States and the First Republic in France. Yet they generally aspire, as presumably did John Adams, Thomas Jefferson, James Madison, as well as Maximilien de Robespierre and his Montagnard followers, to having a future role in the governing institutions they propose. Nonetheless, those who validate such proposals as law must already have sufficient authority as well as power to ensure that the effort can be realized. The aim of the constitution makers is to create a framework within which the political order that they envision can be established and long maintained. Adams, Jefferson, and Madison succeeded; Robespierre failed.

A principal purpose of law in all legal systems is thus to maintain an existing or an envisioned political order. Constitutional and subsequent legal rules vary, but the highest priority comprise rules designed to protect those who have already begun to rule and to preserve the system of governance in which they participate. Treason, sedition, threats to the security of existing political orders, for example, have been treated universally across time as the most serious criminal offenses. The first three of the ten abominations of all of Imperial Chinese dynastic codes were plotting rebellion, sedition, and treason against the imperial dynasty in place. They were the only "abominations" subject to a mandatory death penalty. Few readers need to be reminded of the priority of laws for national security in the United States.

By the same token rules designed to ensure that those who rule have and retain access to wealth and to its appropriation are also universally evident. To the extent that rulers seek to acquire the resources they need or want from landholding, we can expect that land ownership will receive a significant degree of legal recognition and protection. If instead a ruler's revenues depend on commercial activities, we can similarly

anticipate the imposition of various regulatory rules such as required licensing with fees or of direct taxation of business profits.

The maintenance of community peace and stability is a third discernible aim of legal rules across time and cultures. Few if any polities have not had legal rules (with sanctions) for murder, theft, and other behaviors considered by rulers and the communities they rule to threaten the social order.

The content of legal rules thus always reflects the priorities of rulers. To the extent that rulers depend on the consent of the governed, rulers will make and enforce rules that they believe those they govern want or need. Some rules reflect community values that are shared or at least recognized by those who rule. To take the life of a lineal ascendant was also one of the “ten abominations” of Imperial Chinese law and is still treated as a more severe criminal offense in South Korea. Sodomy was a crime in much of the United States, and adultery by a wife remains a crime in parts of the Islamic world. Values change and many of these are no longer proscribed offenses—more often than not as a result of judicial decisions and the changing values of the judges. Those who govern, including judges, control. Whatever the motive, the law’s aims are ultimately rulers’ aims.

LAW’S DEVELOPMENT

The trajectory of law’s political development has more than one path. Nor does advancement necessarily mean praiseworthy progress. Between the developmental extremes are varied forms of social organization and governance. This social and political complexity should be kept in mind. Even the most rudimentary political system will have developed some means to command and control the resources needed to sustain it. All political systems thus have as noted some means for securing revenue. Nor does any politically developed nation or state reflect a single homogeneous, cohesive community governed by a single set of informal or formal institutional arrangements.

In all societies exist lesser communities of neighborhoods, towns, and villages, of families and firms, of voluntary associations, occupational organizations, and other social organizations and subcultures. Within each, customary as well as both formal and informal processes for making and enforcing rules operate. Thus multiple forms of customary or private ordering exist. That complexity allows us to distinguish two primary modes of social ordering: customary and institutionalized. For our purposes, within both modes, two additional patterns stand out. The

first comprises purely customary orders or institutionalized private ordering in which the rules are both recognized and enforced without reference to law. Arguably at least, similar rules and practices were recognized and enforced because they made sense within the commercial and trading communities in Imperial China, Tokugawa Japan and medieval Europe. At that point and in that sense they exemplified the first pattern of private ordering. The second pattern includes a variety of mixed types in which either the rules are sourced or are at least enforceable through formal legal processes *but not both*. To the extent that the rules are legally enforceable, they become in effect legal rules. Thus in both Tokugawa Japan and Western Europe, as such commercially sensible rules and practices were recognized by adjudication or by codification, they became legal rules. If not enforced, however, in effect formally recognized legal rules become customary. Their efficacy, as with the purely customary commercial rules, depends on community disapproval of infractions or other extralegal means of enforcement. The first option takes us back to customary orders, the simplest and earliest form of social organization and private ordering.

Customary Orders

In purely customary orders, rules—or more general norms of behavior—are sourced in custom and customary norms and enforced by means of consensus and habitual community responses. Similarly the capacity for coercion depends on collective, community action. Enforcement is generally left to various expressions of community disapproval of inappropriate conduct—“shaming” to use John Braithwaite’s term.¹⁸ We might be hard pressed to identify a purely customary social order—for by definition no hierarchy of authority exists in such a society and thus equality of voice among all members (however defined) would be required. Customary orders of one kind or another exist, however, in all societies. Norms of behavior may even be imposed as legal rules by those who govern from the outside, but if their enforcement—and thus their continued viability—is left to some form of social disapproval, in terms of efficacy and change, such legal rules do not differ from purely customary rules.

Commercial private ordering under certain conditions provides a prime example of customary ordering. Sustainable commerce across cultures

¹⁸ John Braithwaite, *Crime, Shame and Reintegration* (Cambridge and New York: Cambridge University Press, 1989), p. 100.

and legal systems requires trust. Trade requires that the parties will adhere to basic rules and practices. Legal rules may matter. Infractions of the terms of agreements or shared practices may have legal consequences—such as breach of contract lawsuits. However, if such ordering operates fully outside of law's enforcing domain—as most do—or if the parties are not bargaining within law's "shadow" or the like, then such transactions can be understood as reflecting patterns of customary private ordering in which reputation for trustworthiness is essential. Any conduct that diminishes such trust risks expulsion from the commercial community. As described in Chapter 3, commerce in Imperial China operated in such a customary order in which the parties adhered to commercial rules and practices because they either shared belief that they were necessary or at least made commercial sense—coupled perhaps with concern that noncompliance would result in refusals to deal or some other form of unwanted commercial community disapproval, or a bit of both. Trust that all parties to the transaction would comply with the rules that they have agreed or are otherwise expected to honor was the essential glue that made such ordering feasible.

Anthropologists and archeologists commonly consider the development of sustainable political institutions and structures to have commenced within the earliest hunting and gathering societies. We think of them defined by kinship, lineage, mutual dependency, and the need for cooperative endeavor. Political and moral authority tended to be undifferentiated. Political organization was rudimentary and rare. Family hierarchy and accepted reference to what is "sacred" are common sources of authority. Despite inequalities, particularly in terms of status and wealth, such societies were largely equalitarian. Custom and customary processes prevailed. Distinctions between public and private spheres had little meaning. Everyday life was socially interactive within familial and communal structures. The norms and customary rules that provided order and channeled behavior related primarily to the responsibilities of each person to others and the community in general. Predominant were those related to marriage, kinship, and residence. They were transmitted and internalized through ritual, language, and legend.¹⁹

Compliance was generally also customary—the product of habit, attachment, and self-interest. As Bronislaw Malinowski put it: "The force of habit, the awe of traditional command and a sentimental attachment ...

¹⁹ Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 2nd ed., 1984), p. 122.

the desire to satisfy public opinion—all combine to make custom obeyed for its own sake.”²⁰ He appropriately adds reciprocity.²¹

When sanctions were considered necessary, expressions of community disapproval from ridicule to ostracism and other forms of out-casting were the principal means for maintaining and enforcing the norms that maintain the social order. Even in the simplest hunting and gathering societies without organized government, Robert Lowie notes, there are leaders whose opinions “carry weight,” but without means of coercion enforcement of community standards depends on community disapproval.²² The sanctions applied to persons who repeatedly offend community norms range from various forms of out-casting to threats of extreme physical injury.²³ For example, in the taro-producing communities of Hawai‘i, persons who “shirked” in their task of maintaining irrigation canals, which were critical to the well-being of the entire community, could be put to death and left in their assigned canal as an example to others.²⁴

Such sanctions—putting aside homicide or its threat—persist across time and cultures in all societies, including those with the most highly developed political systems. The English word *ostracism* derives from the ancient Athenian practice (*ostrakophoria*) of exiling citizens who threatened the stability of the political order. In Japanese villages the extreme form of community ostracism was called *Murahachibu*—cutting recalcitrant offenders from nearly all community contact and cooperative support.²⁵ Exotic examples aside, whatever the label—shunning, being “sent to Coventry,” and the like—social out-casting has been and remains a formidable penalty employed by communities through collective action and consensus to maintain adherence to customary norms. The more

²⁰ Bronislaw Malinowski, *Crime and Custom in Savage Society* (New York: The Humanities Press; London: Routledge & Kegan Paul, 1951), p. 52.

²¹ *Id.*, pp. 22–27.

²² See, e.g., Robert H. Lowie, *The Origin of the State* (New York: Harcourt, Brace & Company, 1927), pp. 5–6, citing A.R. Radcliffe-Brown, *The Andaman Islanders* (1922), pp. 13, 22–87. See also David Tait, “The Territorial Pattern on Lineage System of Konkomba,” in John Middleton and David Trait, eds., *Tribes Without Rulers* (London: Routledge & Kegan Paul, 1958), pp. 167, 189.

²³ For a vivid example, see J.P. Gillin, “Crime and Punishment Among the Barama River Carib,” *American Anthropologist*, vol. 36, pp. 331, 343, quoted in E. Adamson Hoebel, *The Law of Primitive Man* (Cambridge, MA: Harvard University Press, 1954), p. 300.

²⁴ Williamson Chang at the Richardson School of Law (University of Hawai‘i) informed me of this practice in July 2014.

²⁵ See Richard K. Beardsley, John W. Hall and Robert E. Ward, *Village Japan* (Chicago and London: University of Chicago Press, 1959), pp. 257–258.

mutually interdependent the community in terms of their collective well-being, as in the example of taro-producing Hawai'ians and rice-producing Japanese, the more effective community-imposed customary sanctions become.

All communities also develop processes for determining whether a violation of customary norms has occurred and whether persons accused are actually responsible. In most, if not all, of these societies reconciliation is also sought. The process is not always orderly. Even in societies lacking political organization, mediators appear. In some societies these persons may be identified as "the lawgiver" whose "primary function," as construed by Paul Vinogradoff, is "to *find the law* and give expression to the sense of the community."²⁶ Adamson Hoebel provides a telling example among the Ifugao, a mountain tribe in the Philippine island of Luzon, without chieftains or tribal or village councils. As disputes arise that cannot be resolved within a kinship group, a go-between becomes necessary. The Ifugao turn to a *monkalun*, an "admonishing mediator of limited authority but of usually persuasive effectiveness" to facilitate a settlement. In Hoebel's words:

The *monkalun* is always a member of the *kadangyang* class and ordinarily a man of reputation as a head hunter. This means that he enjoys general influence emanating from his personal prestige, but more than this he is in a position to marshal effective support from his own kinsmen in a pinch.²⁷

From such persons of authority—or "charisma" in Weberian terms²⁸—and potential power, chiefs emerge. Like all other aspects in the evolution of political institutions, their emergence is not linear. As subsequent chapters detail, organizational changes in governance occur within all societies. They reflect continuously changing internal as well as external conditions. Pressures from both within and without compel reorientation and various modes of organizational change. Governance in few if any societies is static. Nor are the consequences of change inexorable. Some societies organizationally move backwards to earlier stages in the trajectory; some more rapidly toward more developed forms. Patterns are difficult to discern, at least with certainty. Yet the common threads of the trajectory remain. We can identify factors and consequences that appear so repeatedly that we can at least surmise some causality.

²⁶ Paul Vinogradoff, *Historical Jurisprudence*, vol. 1 (London: Oxford University Press, 1920), p. 361.

²⁷ Hoebel, *The Law of Primitive Man*, p. 114.

²⁸ See Max Weber, *Economy and Society*, esp. pp. 241–244.

All societies even today contain a variety of constituent customary orders and variations of private ordering, however marginal or insignificant they may appear. In such contexts, both norms, as customary rules and standards, and sanctions exist, but both require community consensus to remain viable. Take, for example, a highly interdependent community at an early stage of development or a contemporary community in which shirking is unacceptable, a taboo, if you will, as in the taro-producing communities of Hawai'i. We can observe both the norm as taboo as well as the sanction by simple observation of what occurs when anyone fails to perform an assigned task. We would note that anyone who did shirk would be subjected to some sort of social disapproval or "shaming" that can take various forms from ridicule to physical injury. To the extent that the community begins to condone shirking, the norm has changed. The taboo no longer exists. As indicated subsequently, historically the best known and most influential private law regimes originated in customary orders as political authority emerged but was diffused among those entitled to govern in the early Athenian and Roman citizen-ruled republics.

Since custom to be custom depends upon mutual conformity, a norm that ceases to be recognized or obeyed by the community as a legitimate or binding guide for conduct ceases by definition to be a customary rule. Similarly, only the sanctions a community can and will apply against non-conforming conduct remain viable. We can thus identify customary rules of conduct by conforming conduct as well as the imposition of sanctions for non-conformity. Take a taboo against use of a particular word as an example; if conduct changes and an increasing number of members of the community or subculture begin to use the word without incurring some form of social disapproval, the rule is thereby altered. If, however, the community consensus holds—i.e., few if any use the word and anyone who does becomes subject to community sanctions and hardly anyone either continues to use it or even considers using it—the taboo is preserved. However, should others in increasing numbers imitate the non-conforming conduct and start themselves to speak the taboo word, we may correctly conclude that the norm is changing. The taboo is breaking down. Use of the word is becoming less unacceptable. The opposite is also true. Words once widely accepted and used can become taboo words.

Shirking and word taboos are only examples. Even taxation may be customary. The reliance in classical Athens on *liturgies*—contributions by the most prosperous citizens to be used for public purposes—is a case in point. Liturgies at some early stage are thought to have been purely voluntary and a mark of status for which the donor gained social prestige.

They eventually became a social duty, infractions of which were met by various forms of social disapproval. Ultimately, the liturgy atrophied, to be replaced by new forms of legal taxation of wealth. One, the *eisphora*, was enforced—albeit not very successfully—in the Athenian law courts as an essentially private law duty.²⁹ “There is” with custom, Roberto Unger notes, “a point at which deviations from the rule remake the rule itself. Thus, every act leads a double life: it constitutes conformity or disobedience to custom at the same time that it becomes part of the social process by which custom is defined.”³⁰

Once political authority and institutions for governance develop, custom may still be a source of legal rules but it ceases to function as law. Within politically organized societies, customary rules are not legal rules as defined at least for purposes of this study unless they are at least incidentally recognized and applied by those with recognized political authority. For those who govern either to codify or otherwise to identify a customary norm as an enforceable rule, as Unger also notes, transforms the norm from custom into law. Other legal rules may be understood to originate in a transcendental moral order or even deistic command, but only in fully theocratic states in which by definition religious and political authority combine can such commands or principles be considered law. Otherwise it is left to those who exercise political authority as rulers to determine whether and what moral or religious norms are deemed to be “law” or perhaps which religious actors and institutions are recognized to have law-making or -enforcing authority. The result, however, is to free what had been a customary rule from dependence upon habit and consent. Instead, as law the otherwise customary norm becomes dependent like all other legal norms on institutional processes for definition, change, and their continued legitimacy. In a sense two sets of norms or rules exist, one legal and as such dependent on institutional processes; the other customary, supported by persisting habit. In ancient Athens and Rome, custom became law as those entitled to rule as “citizens” began to make and enforce rules. In Japan, however, as we will see, within the ambit of Imperial Chinese conceptions of law and governance, the rules of the village, albeit functionally equivalent to legal rules in the Athenian *polis* and the Roman *civitas*, remained customary as made and enforced through private ordering by virtue of community consensus and collective action. Similarly commercial rules and trade

²⁹ See Christ, “Liturgy Avoidance.”

³⁰ Roberto Unger, *Law in Modern Society* (New York: The Free Press, 1976), p. 49.

practices remained customary among the Mediterranean traders at least prior to and after the *Pax Romana* as well as Japan until recognized through adjudication or codes in Western Europe and adjudication in England and Japan, whereupon constituted a corpus of commercial law rules and thereby at least embryonic private law regimes. In contrast, without such recognition they remained customary in Imperial China. The distinction remains obscure and functionally insignificant until one or the other changes and conflict between law and custom ensues.

Only a tiny fraction of all the norms and sanctions that order social life in any community are actually defined as law. In most societies, for example, to keep one's word or promise and to honor one's parents are widely accepted social norms. The first is commonly recognized in codes, statutes, and decisional law as a moral basis for the law of contract. But in no legal system does any legal rule obligate a person to keep all promises made. The legal rules reflect a selection of which promises the law makers have determined should be legally enforced. Similarly, a duty to honor one's parents as a clearly recognized legal norm is rare in legal systems within the Western European tradition even though perhaps incidentally reflected in certain legal rules. Yet violations of the duty of filial piety were subject to criminal sanctions in all of Imperial China's dynastic codes. It was also the basis for provisions in the criminal codes of both Japan and South Korea that impose heavier penalties for crimes against lineal ascendants than other persons. (These provisions in the Japanese Code were repealed in 1995.³¹)

Institutional Ordering—Private and Public (Legal)

As social and political structures become more complex, private ordering also becomes institutionalized. The consequence is an additional set of rules and means of enforcement. In the process, we begin to be able to discern and to distinguish rules and sanctions recognized and enforced within collective associations and other institutionalized private communities from those made and enforced by those who rule even though they may be functionally equivalent. The commercial rules developed and enforced within the merchant communities of the Mediterranean and trade guilds of medieval Europe were thus not "law" until incorporated into the *ius commune* by judicial decision and codes. Within Western

³¹ See Criminal Code (*Keihō*) [Law No.47, 1907 as amended], Articles 200 and 205(2). Repealed by Law No. 91 (1995). Over two decades earlier, in *Aizawa v. Japan*, 27 Keishū 265 (Sup. Ct., G.B.) (1973), the Japanese Supreme Court had held the former, Article 200, to be unconstitutional.

Europe they also developed within a legal culture in which law was increasingly understood in terms of a coherent system of private law rights and duties. As the *ius commune* expanded through official recognition, notions of law and accepted rules for commercial conduct also developed. In this regard, Paul Vinogradoff's description of the "ancient lawgiver," quoted above,³² seems especially apt. As the authority of the ruler-as-law maker becomes increasingly accepted, new rules can be promulgated by the rulers as positive law. At this point the authority of law-making rulers becomes increasingly critical. The greater the distance from custom, the more innovative become the rules themselves and the more necessary the authority of the ruler.

Moreover, in this process, hierarchies of control evolve and processes for rule making and enforcement also emerge that may be identical in every respect to legal or public ordering except the rules created or recognized and enforced are by definition not legal rules. As noted previously, only certain institutions in any society have authority to legislate or authority and capacity to enforce legal norms. These and only these constitute the institutions and processes of the legal system. The difference between institutionalized private and legal ordering is not limited to rules. As noted, the manner and means of enforcement too can be private (nongovernmental) or public (governmental). Take, for instance, the Tribunal of Water of Valencia, Spain. Established initially by Muslim peasant farmers prior to the conquest of Valencia by James I of Aragon,³³ it continues today to function as a water court within the agricultural communities of the *huerta* surrounding the city of Valencia to resolve disputes and enforce rules established for water flows and timing for those who depend on irrigation for their livelihood.³⁴ Since the thirteenth century, the Tribunal has been an integral component of the irrigation system formally recognized by law and integrated into the legal structure. The Tuna Court described by Eric Feldman for the contemporary Tokyo fish market³⁵ functions in a similar manner as a private ordering system. Functionally, it might seem, there is no difference. If,

³² Vinogradoff, *Historical Jurisprudence*, p. 361.

³³ See Thomas F. Glick, *Irrigation and Society in Medieval Valencia* (Cambridge, MA: Harvard University Press, 1970). The origins of the Valencia Tribunal of Water are described in greater detail in Chapter 5.

³⁴ Elinor Ostrom, *Governing the Commons: The Development of Institutions for Collective Action* (Cambridge and New York: Cambridge University Press, 1990), pp. 69–74.

³⁵ Eric Feldman, "The Tuna Court: Law and Norms in the World's Premier Fish Market," *California Law Review*, vol. 94 (2006), pp. 313–369.

however, changes to the system or those who manage it are desired or even when decisions are challenged, the distinction between institutionalized private and public adjudicatory organs becomes significant. For private systems, decisions made within the community by its prescribed rule-making procedures with all variations are determinative. For public, legal systems, those who govern—those who make the law—decide.

However otherwise law may be defined, the institutions that make and enforce law are instrumentalities of those who rule. So long as consensus and consent remained critical for both the recognition of norms of behavior as well as the means for their enforcement, the role of chiefs and others who exercised political authority remained circumscribed. Mediation, as Elman Service explains, is the predominant manner of resolving disputes in equalitarian societies.³⁶ They will tend like the Ifugao *monkalun* to mediate disputes brought to them and act as facilitators, if necessary, for collective community enforcement. Mediation in this form depends, as before, on community assent and consensus with respect to both the applicable norms as well as the sanctions that can be legitimately applied. Mediators in this role are essentially facilitators for collective action, a conduit through which the community speaks. Their function may also be prophylactic. They may direct community wrath away from persons accused of violating community norms or away from sanctions that, upon reflection, the community would consider inappropriate, at least with respect to the committed offense. Mediators may ideally be neutral facilitators of amicable settlement, but even as “go-betweens” mediators with even a vestige of authority are able to influence outcomes. Mediators in nearly all instances are able to select norms and sanctions that they perceive to be appropriate. To be sure, in customary orders their selection is circumscribed by community acceptance, but as both their authority and power increase they are able to choose among customarily acceptable norms and sanctions and to persuade the parties to accept solutions that seem fair to the mediator. Thus intrinsic even to mediation is a process of rule making and rule enforcing. Even this form of mediation, however, requires consent.

Such systems remain customary orders in that they are dependent on community-wide acceptance of both the rules being enforced as well as the sanctions to be applied. Mediators may act as catalysts for change by persuasion, but they cannot fully alter either norms or sanctions without

³⁶ Elman R. Service, *Origins of the State and Civilization: The Process of Cultural Evolution* (New York: W.W. Norton & Co., 1975), pp. 56–60.

community acceptance and approval. Only when the third party has the recognized authority to determine the outcome, when he or she is able to impose a decision based on personal authority, is mediation transformed by definition into private arbitration or adjudication.

Adjudication as a means of law enforcement does not necessitate power. As in early Athenian and Roman law, it may suffice to stigmatize wrongdoers socially or to legitimate resort to various forms of self-help. The result, of course, is to empower further those who have the capacity to coerce without the aid of those who govern. Adjudication does, however, require authority. As the ruler's capacity to coerce increases, however, the remedial features of adjudication become more concentrated as ruler prerogatives. Ruler-imposed sanctions thus tend to replace permissive self-help as decisions by adjudicators become enforceable orders. As a primary means of law enforcement, as detailed previously, adjudication, like mediation, is subject to constraints of both authority and power. With both modes the ruler acts reactively as a third party arbiter of voluntarily proffered claims. The claimant takes the initiative and retains with the option of withdrawal at least partial control.

Along with social and political stratification and hierarchy an even more significant change occurs. Those who rule are increasingly able to issue direct regulatory commands backed by sanctions they alone are legitimately entitled to impose. The effectiveness of such rule may be enhanced by the sense of legitimacy of the ruler and the rules themselves, but the threat of effective sanctions inevitably lurks behind compliance. Moreover, at this point on the trajectory, rulers begin to acquire the resources and manpower to permit oversight and policing to ensure the commands are obeyed. We can now distinguish between those who govern and those who are governed. Almost invariably commencing with tribute and other means for accumulating revenue, political regimes begin to introduce the fundamental features of public law regimes.

The capacity to coerce requires a particular sort of follower, persons willing to use violence against those who reject either the authority of the ruler in general or more specifically as maker of a particular rule. How such followers are recruited and maintained tells us much about the developmental maturity of any regime. Warrior bands recruited and held together by the promise of plunder or bonds of kinship or community identity are perhaps the most common. Whatever the origins, as rulers gain greater capacity to wage war with organized armies, they also acquire greater capacity to make and to enforce rules. With such capacity also come new modes of policing and regulatory enforcement.

Each of the three principal modes of law making and enforcing—mediation, adjudication, and regulation—thus corresponds to power,

dependency, and subordination: the greater the power of the ruler and the dependency of those governed, the greater their subordination; the greater the control over sources of wealth, and thus the greater the capacity of the ruler to issue new laws and to enforce them through direct means of coercion.

Even the most elemental of known societies were all historically to some degree socially stratified. As they evolved and became more complex and rulers emerged, such stratification became even greater. Chiefs with followers, to whom wealth produced by those they governed was redistributed, constituted by all accounts the prevailing pattern. Law and the modes of law enforcement reflected such stratification. Thus chiefs mediated and relied on customary norms in disputes among or with those who occupied the highest strata but directly commanded and coerced those at the lowest. 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.

Increased social and political stratification produced profound legal change in terms of both authority and power. David Webster emphasizes the dilemma that warfare renders “ineffective” preexisting constraints on institutional change while creating a need for internal stability.³⁷ Rulers resolved the problem through law. As chiefs began to gain more authority and power they were able to begin to do more than confirm what was customary. As the authority of individual or closely knit groups to rule became secure, a characteristic consequence was the introduction of the first set of non-customary rules related to succession and stratification. New rules were promulgated—first and foremost, in Service’s words, for “the creation and perpetuation of the office of Chief”³⁸ and secondarily to demarcate the hierarchical stratification of the society. They were generally followed closely by a second set of rules against acts and threats against the ruler and ruling elites. Rules designed to control force—the first in the trend toward Weber’s monopoly of the legitimate use of violence³⁹—soon appear, typically in the form of prohibitions against private revenge. Along with each set come rules designed to extend

³⁷ David Webster, “Warfare and the Evolution of the State: A Reconsideration,” *American Antiquity*, vol. 40(4), (1975), pp. 464–470, at p. 467.

³⁸ Service, *Origins of the State and Civilization*, p. 146.

³⁹ See Max Weber, *Politik als Beruf* (Munich and Leipzig: Duncker & Humblot, 1919), reprinted in *Max Weber Gesamt Ausgabe*, vol. 1/17 (W.J. Mommsen and W. Schluchter, eds., Tübingen: J.C.B. Mohr [Paul Siebeck], 1992), pp. 158–159.

ruler control over resources—including the resources of neighboring communities.

Whatever the catalyst, few today disagree that warfare—i.e., rifles—is, as Robert Carneiro puts it, “a prime mover” in the process of change.⁴⁰ The effect of the combination of each of these factors operating together is to transform otherwise equalitarian communal orders into increasingly stratified societies.

As chiefs and their successors established order and provided security, they also enhanced their authority and the stability of their rule. And, once established, centralized governance tended to endure so long as unthreatened by external forces. With enduring legitimacy rulers were able to expand control over resources—an opportunity that they rarely if ever declined. Social order and stable governance in turn enabled increases in wealth-generating activities that would otherwise have been diverted for protection. Along with expanding ruler control over resources was a concomitant expansion of the apparatus of governance, including regulatory legal controls, which in turn enabled further expansion of the territorial reach of their authority and power through the recruitment of new agents. Such expansion continued until various conditions precluded further growth. Among the primary constraints was scarcity of resources resulting from geographic factors, internal conflicts, and external forces. Once expansion ended, whatever the cause, a state of equilibrium was reached that was only disrupted by either internal conflict or external force. How the interplay of the diverse factors influenced the development of individual political systems historically around the globe is well beyond the scope of this study, much less its author. Posited here is simply the incapacity of political regimes to develop public law regimes absent that equilibrium. Until rulers established sufficient control over resources to withstand both internal and external threats, they lacked both the authority and power necessary for their regimes to endure.

Longevity also required some means to assure orderly succession. This basic political necessity helps to explain the universal tendency to pass on rule and control to biological offspring. In the context of political succession, deeply embedded and universally shared kinship claims seem best understood as a primal source of customary legitimacy. Resort to kinship is a particularly predicable outcome in political systems in which the legitimacy of rulers is based on personal qualities. Such societies, by

⁴⁰ Robert L. Carneiro, “A Theory of the Origin of the State,” *Science*, vol. 169(3947) (1970), pp. 733–738, at p. 734.

definition, lack the institutional maturity required for any other form of legitimate succession. The alternative to hereditary rule is some rule-based system that requires a relatively well-developed legal order. Heritable succession is of course no guarantee of internal political stability. Inexorably over time, intra-familial conflicts and contests over authority and power portend regime instability and further institutional change.

The intervention by those who govern may regularly take the form of mediation or adjudication depending upon the extent of their power to impose their preferences, but not until relatively advanced stages of political development are rulers generally able both to legislate and to enforce their preferred proscriptions. Centralized political authority governing through an increasingly complex variety of organized specialized agents with both effective authority and the capacity to coerce are common features of such orders. And as political institutions evolve so do understandings about the nature and conceptions of law.

Law operates within the dynamics of this framework. Rules are made and unmade, enforced and left to atrophy. Some are customary, others institutional. Some may be considered law; all impose a kind of order. The nature of the order depends only in part on the institutional arrangements for both law making and law enforcing—the traditional concern of lawyers and political scientists. Equally relevant are “cultural” factors: the habits that constitute custom and the values that both shape and sustain consensus and legitimacy. But culture too is dynamic. What I have described here as a “legal” process is in reality a process of social change. Habit and values are not exempt. They, too, change. What distinguishes one legal order from another, therefore, is less the role or rule of law, but who makes and enforces law by whatever means, and thus whose consensus and whose values control. In short, who enforces, governs. Ultimately, law’s development is political.