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Author(s): Brian M. Downing

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# Medieval origins of constitutional government in the West

BRIAN M. DOWNING

*The University of Chicago*

To say that European social, political, and economic history is markedly different from that of the rest of the world is to say nothing new. Western Europe<sup>1</sup> was the first to develop new agricultural techniques, large-scale capitalist production, a network of commercial centers, and a system of powerful states. But Europe was also the first – and, alas, virtually the last – to develop liberal democratic political systems providing institutional checks on monarchal and state tendencies toward political monopoly, varying degrees of representation, the endowment of men (and later, women) with chartered rights of citizenship, and the subordination of the state to the rule of law.

The vast social, political, and economic changes that decisively patterned European and consequently world history have usually been interpreted as coterminous, interrelated processes. The notion that modern liberal democracy developed as the political consequence of economic changes and the rise of the middle classes is deeply ingrained in many social theories, and is found in various forms with numerous admixtures and points of view in remarkably disparate places. Karl Marx noted the progressive political products of the strong, assertive bourgeois classes while caustically contrasting them with their supine German counterparts of the mid-nineteenth century. More recently, however, students of political development posited that economic modernization would engender civil society, party politics, and a pluralist polity much like those of the advanced western nations.

The political struggles of nineteenth-century Europe, though decisive for the *growth* of liberal democracy, must not be mistaken for its *origins*. When Chartists marched for citizenship rights, when new middle classes pressed for parliamentary reforms, when subjects demanded legal guarantees, and when representative assemblies attempted to

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check the power of monarchs, they were fighting very old battles over institutions, rights, and ideas that had marked much of the history of western Europe since the medieval era. The towns of the middle ages provided basic citizenship rights for their inhabitants that separated them from much of the villeinage outside the walls. Throughout the patchwork of kingdoms, duchies, and bishoprics were elective representative assemblies in which nobles, burghers, clerics, and sometimes even peasants shaped policy with the prince. The principle of royal subordination to law had been reasserted at Runnymede and elsewhere.

I argue here that the critical institutional groundwork upon which western European liberal democracy was built in the nineteenth and twentieth centuries predates both the commercialization of agriculture and modernization. Liberal democracy's tenuous foundations were laid centuries prior to the great transformations of the modern period with the convocation of representative bodies, the crown's accountability to law, the protection of personal liberties and freedoms, and the establishment of local self government – all critical aspects of modern liberal democracy. I examine here the social context in which constitutionalism emerged, the institutions themselves, and then contrast western patterns with those of Russia, Japan, and China.

### **Social origins of Western constitutionalism**

Before examining the components of medieval constitutionalism, we will find it useful to understand their structural origins in the middle ages. This predisposition toward liberal democracy was afforded by four principal characteristics: *a rough balance between crown and nobility, decentralized military systems, the preservation in some regions of Germanic tribal customs, and peasant property rights with reciprocal ties to the landlord*. Though one or more of these may have existed in other regions, the combination of all four and the strength of each were unique to western Europe.

The key to the rough balance between crown and nobility lies in the *incomplete* collapse of the Carolingian Empire in the ninth century and the Holy Roman Empire in the thirteenth, which was followed by the reemergence of central authority, then contestation between the prince and local centers of power. Within this dual sovereignty emerged com-

promises, power sharing, and a climate of partial trust and partial mistrust that formed much of medieval constitutionalism.

The Carolingian Empire of the eighth and early ninth centuries was built by military conquest and held together by ephemeral fealty and by the centripetal effects of external threat from Islam. Beyond this, the Carolingian state was limited to a rudimentary household government with only the barest functional specialization among the *vassi dominici* who resided with the great warrior at Aachen. There was no communication system as the Romans had had with their roads and naval commerce to provide effective supervision from the center, in this empire built in the northern limits of the old Roman domain away from the maritime traffic of the Mediterranean. No central finance was developed; the Carolingians relied primarily on the royal demesne and war booty. The administration of justice, though administered by circuit judges (*scabini*, *Schöffen*, *echevin*), was based not on a central legal codification but, rather, on numerous tribal customs. Military levies, too, came to rely increasingly on mobilization of the heteroclite tribes of the empire.

It is not surprising that disintegration began (even during Charlemagne's lifetime) in the marchlands where margraves had been delegated greater authority. With his death (814) the empire was torn asunder by aristocratic opportunism, appanage struggles, and destructive invasions from the Muslims, Vikings, and Magyars. By the early ninth century the empire had largely disintegrated, though some semblance of monarchy remained that would be rebuilt several centuries later.

The Holy Roman Empire was built in the tenth century out of the territories of the eastern parts of the Carolingian Empire. Otto the Great restored empire in central Europe through vanquishing the Magyars much as the Carolingians had built their empire by defeating the Muslim invasion from the Iberian peninsula. Otto would be no more successful than Charles in maintaining aristocratic fealty and constructing a coherent, efficient imperial system. Otto and the successive Salic and Hohenstauffen kings endeavored to build networks of local officials, the *ministeriales*, who would carry through their directives. The baronage responded by developing its own countervailing *ministeriales*, thereby obstructing centralization. Neither type of *ministeriales* remained loyal to its nominal lord; each "formed a fraternity that was very conscious of its position, full of demands, and loudly insistent on its rights."<sup>2</sup>

Kings were nonetheless able to build a state with the assistance of the considerable economic resources of the Church as well as the ecclesiastical monopoly on skilled administrative elites: This fortuitous coalition augured well for the empire until the Hohenstauffen state ran afoul of the Church's post-Cluniac ambitions to develop its own corporate structure independent of secular authority. The ensuing Investiture Controversy (1075) that saw a Church-aristocracy coalition poised against the state and towns, crippled the Salic emperors though not as decisively as often thought. Power shifted away from the center into the hands of the electors, nobles, bishops, and town leagues. Attendant with this power shift was a swift legitimization of the new order that was not without bearing for constitutional history. What Brooke says of the Hohenstauffens could also be said of the Carolingians and the Angevins facing baronial revolts: "If the central authority was weak, the nobles began at once to encroach; usurpations were in a few years translated into *rights*, and it was difficult, if not impossible, for the king to recover what had been lost."<sup>3</sup>

Despite these obstacles, central authority was never completely eliminated in either the Carolingian or German empire. In the Frankish lands, where the relatively weak Capetians were no threat to ecclesiastical corporateness, the Church acted to bolster the king against the centrifugal nobility. Throughout Europe, the weakened crown was still able to ally with the lower nobility who feared ducal subjugation and depredation. Finally, contumacious nobles themselves were reluctant to do completely away with the monarchy inasmuch as they derived legitimacy from even their highly tenuous ties with it.<sup>4</sup>

By the late middle ages central authority was beginning to reemerge in France and also in the major principalities of the Holy Roman Empire. Louis VI and VII (r. 1108–1180) were able to consolidate their positions in the *ile de France* through military prowess and the support of the lower classes who sought a more peaceful climate than that of continuous feudal warfare. In Germany the balance of power was, in effect, transferred to a lower political level as the crown-noble balance of France was paralleled by a similar balance between the nobles and the princes, dukes, and margraves. In England, the Duke of Normandy's conquest of the loose Anglo-Saxon confederations in the eleventh century laid the basis of a central state. But his Plantagenet and Angevin successors faced a strong, unified baronage that formed one side of the crucial balance.<sup>5</sup>

The constitutional consequences of this balance were manifold and decisive for European political history. Foremost among these was the rise of representative or parliamentary bodies in which monarch, aristocracy, burghers, and clerics formulated basic policy matters including taxation and war. Monarchs were, at least initially, only too eager to convoke these assemblies, which they thought would streamline the unwieldy process of winning revenue levies. MacIlwain observes that many monarchs believed that parliaments would be a mechanism for coordinating the estates of the realm with royal policy.<sup>6</sup>

Second, towns, which were evolving from their early, medieval forms of ecclesiastic, military, and administrative centers, emerged as vital commercial centers whose wealth and expertise did not go unnoticed. Towns were able to negotiate crucial freedoms from external authority by playing off noble and king. Fixed sums of money (to be collected by the burghers themselves, not by royal bailiffs), artisanal weaponry, and administrative specialists were exchanged for clearly stipulated rights, freedoms, and immunities. Considerable variation in town alliances may be noted. In southern France, towns typically allied with nobles against the growing power of the king to the north. Similarly, the great Northern Italian cities allied with nobles in order to break away from the interference of both the Holy Roman Empire and the Church. In the more northern regions of the empire, however, towns feared the independence and power of the nobility that had grown considerably following the Investiture Controversy. Accordingly, they made ties with the emperor against covetous dukes, electors, and margraves. A similar town-king alliance was forged by the commercial centers of Northern France with the Capetian kings, whose state-building activities were greatly facilitated by the steady revenue from the towns.<sup>7</sup>

The third consequence of the balance of power between crown and nobility is the *modus vivendi*, charters, and legal norms agreed to by both sides, usually the crown and the upper strata of the aristocracy. The best-known *modus vivendi* is of course Magna Carta won by the English baronage at Runnymede. Here the medieval principles of magnate representation in the *curia regis*, consultation on matters of taxation, rule of law, and due process were *formalized*, that is, removed from the tenuous realm of amorphous agreement – precisely where the king preferred them to remain – and concretized into a written charter that thenceforth would be the basis of all crown-noble relations. Parallel agreements were hammered out in the Empire at the Diet of Worms (1225), which checked the emperor's power and began the electoral

principle for imperial successions, and in Sweden with the Land Law of 1350.

The second source of constitutional growth lies in the military systems of Europe, the feudal levies and militias. The military structure of Europe as well as much of its landholding relations were patterned in the early eighth century by the mayor of the Merovingian palace, Charles Martel. Lacking the resources to pay and equip a centrally administered force, the hero of Tours spoliated Church land and distributed it as benefices to his armored cavalymen. The benefice, replete with labor, afforded the knight sufficient resources upon which he could draw in order to maintain his armor, horses, weaponry, and retinue – a considerable expense for a period in which economic activity in the region was very low. In exchange, the vassal owed his lord fealty and military service. But as we shall see, the exchange was more nuanced than just land for knight service.

As subinfeudation and *precaria* spread with the feudalization of central Europe and the Baltic littoral, the social structure of Europe became a network of mutual obligations predicated on feudal military exchange. Weber described this social structure as “a cosmos, and according to the circumstances, also a chaos of concrete subjective rights and duties of the lord, the office-holders and the ruled.”<sup>8</sup> Within that cosmos was contained a basis for citizenship and representative institutions. The knight, as Hintze has argued, was endowed with definite jurisdictional and administrative immunities, which limited or proscribed the lord’s control over him and his benefice; his relationship to superiors was based not on overt command but, rather, on the basis of a freely entered contract; and the right of resistance to unfair authority was effectively guaranteed. Weber repeatedly points to endowment of citizenship rights, the franchise, political representation, immunities, as reward for military service, especially in decentralized military systems such as those of feudal Europe. To regulate and protect these rights there emerged a corpus of legal thinking that settled disputes stemming from the more chaotic aspects of the feudal network.<sup>9</sup>

The parliaments of the late medieval period evolved in part from the Carolingian assemblies of military vassals. Consistent with the essentially contractual nature of military service, Carolingian kings convoked assemblies of knights in which matters of general policy and impending military operations were discussed by all, with the king acting as a first among equals. This practice continued throughout the medi-

eval period until the warrior assemblies emerged with the baronial *curia regis* and estate representations mentioned earlier.<sup>10</sup>

A second military impetus to constitutional forms was the militia that either supplemented or took the place of the more familiar armored knight. These formations were found in their greatest strength where geography was unfavorable to the knight as in Switzerland and Scandinavia, where feudalism had simply not spread, or where conflict with irregular military units (e.g., Welsh and Scottish frontier bands) mandated a more rapidly mobilized and adaptable force. Though prevalent throughout England and Sweden, Germanic tribal levies demonstrate the links between citizenship rights and military service. The village "hundreds," themselves important to constitutional development in Scandinavia, levied infantry formations from the male population who, in return, were given voice in popular assemblies. As if to underscore the relationship between military service and participation in local government, members of the assembly arrived with their weapons. Consent was indicated by raising one's javelin (*fram*). Furthermore, the act of entering into a free contact was conducted by a ritual during which each party was armed.<sup>11</sup>

A close parallel may be drawn between rural militia participation and service defending the medieval town from royal or seigneurial assaults. Municipal soldiers were also endowed with fundamental privileges, the most important of which were voice in town assemblies, immunities, and guarantees of legal access. Weber's succinctness is unsurpassed:

The basis of democratization is everywhere purely military in character: it lies in the rise of disciplined infantry, the *hoplites* of antiquity, the guild army of the middle ages.... Military discipline meant the triumph of democracy because the community wished and was compelled to secure the cooperation of the non-artistocratic masses and hence put arms, and along with arms political power, into their hands.<sup>12</sup>

The Germanic militias were part of a broader social organization that provides the third source of medieval constitutionalism, which, though absent in many regions with democratic outcomes, was nonetheless critical in others. Although the system of military benefices constructed by the Carolingians and Hohenstauffens had undermined the networks of local government in most of Europe by tying peasants to the lord's demesnes, this system, as mentioned earlier, did not penetrate Scandinavia, the Swiss cantons, and other remote or mountainous territories. Vigorous popular assemblies, where judicial, legislative, and



executive matters were handled, leaders elected, and policies weighed carefully against the principles of communal custom, would serve as the basis for Swiss democracy and provide a bulwark against absolutism in Sweden.

The final wellspring of constitutionalism is peasant property rights and reciprocal ties between tiller and lord. As suggested by the discussion of the Germanic tribal organizations, medieval Europe was hardly a uniform society that conforms neatly with simplistic views of “feudal” civilization. Just as there was appreciable variation in military systems and municipal dynamics, so too was there variation in property ownership and agrarian relations. Though much land was held conditionally according to the system of military benefices, the apothegm *nulle terre sans seigneur* conveys in only the most general way the agrarian patterns of the region. Allodial property was found – and in considerable measures – even in the most heavily feudalized parts of Northern France. Independent aristocrats as well as a large number of free peasants held tracts of land without conditions set by feudal authority.

Property among the peasantry provided a solid basis for solidarity in the face of aristocratic pressures: in the thirteenth century free peasants “were able to compel the lord to join with all his dependents in forming a manorial court in which the dependent persons functioned as magistrates. Thus the lord lost the power of arbitrary control over the obligations of his dependents and these became traditionalized.”<sup>13</sup> Even the more paradigmatic feudal landholdings, that is, those largely uncluttered by freeholding peasants, contained patterns of reciprocal ties between lord and serf.

The lord was a monarch on the manor, but a monarch fettered by a customary constitution and by contractual rights. He was often strong enough to break through these customs and agreements, to act in an arbitrary way, to indulge in cruelty and violence.... A mean line had to be struck between the claims of the rulers and the interests of the subjects, and along this mean line by-laws were framed and customs grew up which protected the tenantry even though it was forsaken by the king's judges. This unwritten constitution was safeguarded not only by the apprehension that its infringement might scatter the rustic population on whose labor the well being of the lord and his retainers after all depended, but also by the necessity of keeping within bounds the power of the manorial staff of which the lord had to avail himself.... It was in the interest of the lord himself to strengthen the customary order which prevented grasping stewards and serjeants from ruining the peasantry by extortions and arbitrary rule.<sup>14</sup>

Between the thirteenth and fifteenth centuries demographic shifts brought on by the Black Death as well as additional revenue demands from the crown led to increased bargaining power in the hands of the peasants resulting in the rapid dissolution of feudal ties and the consolidation of protective custom into law administered by courts. This movement was only too eagerly aided by monarchs who were ever welcoming ways of diminishing the power and potential power of unruly nobles.<sup>15</sup> In summary, feudal relations on the manor were less oppressive than they might initially appear. Between lord and peasant was a buffer consisting of custom, law, and the possibility of royal alliance, which protected the peasant and endowed him with rudimentary rights and legal guarantees.

### **Components of medieval constitutionalism**

Four principal configurations, rough balance between crown and nobility, decentralized military organization, survival (in some areas) of tribal customs, and feudal lord-peasant relations, provided the sources of most of European constitutionalism in the late medieval period. In this section, I address the various institutions of medieval constitutionalism (rural local government, autonomous towns, estates, and the rule of law).

Four significant forms of local government may be identified on the medieval European landscape: *Germanic tribal government*, *village communes*, *chartered frontier villages*, and *aristocratic local control*. As we have seen, Germanic tribal government survived for largely geographic reasons in the mountainous cantons of what would become the Swiss Confederation and also in the relatively remote Scandinavian lands. The key institution of government was the popular assembly, an extremely informal gathering that nonetheless acted as executive, legislature, and judiciary, and elected chieftains and magistrates. Procedures and values were governed by custom law, which despite its essentially unwritten character nevertheless was an effective guideline that generally prevented arbitrary and ad hoc decisions.<sup>16</sup> As these communities came into contact with growing state apparatuses, they were not necessarily destroyed, coopted, or synchronized: in England the village hundred became an essential part of the Common Law courts in the twelfth century; in a manner comparable to the “civil disobedience” of our own day, Swedish local governments were able to coordinate op-

position to the king and effect *mass* non-compliance to his policies, which resulted in his ouster.<sup>17</sup>

What has been said of the great medieval towns exploiting the balance of power can also be said of numerous humble villages that were able to wrest liberties and charters from feudal authorities during the thirteenth century. These villages, which called themselves *communes* after the term used by the larger towns, developed their own judicial and administrative organs as well as popular assemblies for determining village policies. Where nobles threatened to defeat and reabsorb these communities, villages banded together in common defense. These clusters were most common in valley regions cut off from routine contact with the outside and enjoying natural defenses. The Swiss communes (*Markgenossenschaften*) allied with the village hundreds and later the commercial centers of Berne and Basel to form a powerful tripartite basis of confederal constitutionalism.<sup>18</sup>

The chartered villages of the frontier regions are quite similar to the village communes in constitutional relevance but differ from them in their origins and relationship to the aristocracy. The rising population pressures of the late medieval period led to village settlements in two types of areas: in the woodlands and wastelands of unsettled regions of France and the Empire, and also in the newly conquered regions of Prussia, Poland, and Spain. In order to attract peasants to these frontiers, knights and non-noble "locators" offered settlers extremely light dues, rights of mobility and property, as well as voice in local assemblies and courts. The relationship to the aristocracy, then, was essentially a cooperative one in which the lord played a role in defending the newly settled area without acquiring the political predominance found in the older, feudalized areas. In return, peasants paid only light dues to the lord; they were neither tied to the soil nor subject to his administrative or judicial power.<sup>19</sup>

Despite these various forms of peasant self government, the aristocracy still dominated the European countryside. In most of Europe the aristocracy had effectively transferred the conditional benefice into de facto, hereditary property. Furthermore, they had retained administrative control of their manor and adjacent lands, or at least had substantial control over the king's or duke's appointments in the vicinity.

Although the Norman conquest of the eleventh century had laid the foundations of a central state with royal officials in every county and

shire, the nobility nonetheless was able to require the monarch to select the sheriffs and magistrates in concert with the local aristocracy and gentry and from among the local aristocracy and gentry. In Brandenburg and Pomerania nobles built local assemblies and other instruments of government (*Kreisdirektoren*), which jealously guarded against ducal penetration.<sup>20</sup>

After the threat of raids had subsided in the late tenth century, great commercial towns developed from the walled administrative, military, and ecclesiastical centers of the early medieval period. They were poised at this juncture to take advantage of the crown-aristocracy standoff. The charter granted Worms in 1074 by the Salic leader of the Holy Roman Empire was among the first, and is of great significance in that here, for the first time, town dwellers were referred to as *cives*, whereas heretofore, legal documents had utilized the nonlegal terms *mercatores* or *negotiatores*. Similar charters were granted by ensuing emperors to the Flemish, Dutch, and Italian towns in exchange for fixed revenue, weapons, and administrative assistance.

The towns were swift to take advantage of their charters and construct complex organs of self-government that were in most cases outside the administrative web of the king and nobles. Government began with councils comprising a small number of men, but these were soon replaced as the tasks of municipal administration became increasingly differentiated and the "committees" came to replace them. Committees were composed of three to six members representing different town groups, including the local juries, guilds, and patriciate. By 1450 Frankfurt am Main had eighteen committees supervising the military, buildings, finance, justice, and law. Royal or seigneurial meddling with municipal government was either nonexistent or radically proscribed. In many less wealthy towns, however, completely autocephalous administration was impossible: Philippe Augustus' bailiffs and burghers codetermined policy in the northern French towns, but English towns were able to refuse entry to royal sheriffs and magistrates. Although towns were required to follow specified policy directives of English kings, actual implementation was left to the burghers themselves who would carry them through or drag their feet as they saw fit.

Town governments were highly oligarchic, especially in their early forms prior to the onset of class pressures for increased voice in determining municipal affairs. The elites that governed the Northern Italian towns were drawn from the merchants, military specialists, and legal

experts. Although they can rightly be called oligarchic, there was considerable stratification insofar as they included three widely distinct social groups with at least potentially diverging interests and outlooks. Towns nevertheless provided “negative” freedom for the lower orders who were excluded from the franchise and other aspects of citizenship. They were freed from feudal ties, services, and attendant vagaries, and enjoyed access to more rational law.

There was considerable variation in the rights enjoyed by the lower classes. Basel, Strasburg, and Ulm allowed substantial voice to the numerous guilds, while to the north, the imperial towns remained narrowly oligarchic. Proximity to the popular democracy of the *Markgenossenschaften* and village hundreds in the Swiss Confederation seems to have been decisive in accounting for this variation.<sup>21</sup>

Two forms of class conflict served to expand the citizenship rights of the lower orders. Seigneurial and royal authorities, eager to gain control over the lucrative islands of capitalism to which they had previously granted charters, endeavored to ally with the lower classes to overthrow oligarchic rule. Burghers typically thwarted this movement by themselves extending rights thereby coopting outside entreaties. Second, the free-trade patriciate and the vulnerable guilds eventually came into conflict over representation in government and protectionism. Overt conflict was often precluded by the two parties hammering out agreements regarding basic policy matters and by negotiating charters that extended voice and other citizenship rights. In the Low Countries, however, the late thirteenth and fourteenth centuries witnessed strikes, migrations, and even pitched battles leading to the replacement of narrow merchant-oligarchy with a broader government including the numerous craft guilds.<sup>22</sup>

The representative assemblies or estates that reached institutional solidification during the balance of power of the late thirteenth and early fourteenth century, as we have seen, had prototypical forms in the baronial *curia regis*, feudal military councils, and local assemblies. Enjoying liberties and immunities since the time of Charlemagne and Otto the Great, the aristocracy and the clergy had already acquired the status and power in the feudal hierarchy to guarantee representation in the new, increasingly formal assemblies. The communal movement, the town-monarch working relationship, and the growing financial power of the towns, led to the “estatization” of the burghers and to their taking places alongside nobles and clerics as an order of the realm. Peasants

were rarely represented in the estates in regions where feudal military and economic arrangements had been built, but where tribal customs had survived – most notably in Scandinavia – peasants constituted a fourth estate.

The power of the estates as well as the scope of the matters under their purview varied substantially, but five principal functions can be identified. First, the nobles, clergy, and burghers in the estates represented both regional and class interests to the court of the king. Second, the expression “redress before supply” conveyed the primarily defensive posture of representatives. Their principal mission, they felt, was to defend class and regional interests from the incursions and expedient measures of the crown. Third, the estates were an essential part of medieval government that provided the finances and territorial consensus necessary for the increasingly complicated policy measures of societies making the transition from feudalism to capitalism. The estates began to conduct debates on *national* matters including those of war, foreign policy, trade, justice, and industry. Fourth, estates took advantage of any upper hand they might have had by enhancing their privileges and liberties, and by extending their role in the machinery of government. In exchange for financial support (more often than not in time of war) the estates obtained the right of sole originators of law, and parliamentary committees became fused with the royal administrative apparatus or at least maintained a stern supervisory role vis-à-vis the crown’s ministers.<sup>23</sup> Finally, the estates provided a basis of national integration that precluded splintering into city states that Northern Italy and Southern Germany had undergone. Accordingly, the constitutional qualities of the towns were preserved within the protective boundaries of an emerging nation-state where they were less likely to be destroyed by foreign conquest.

Law was not the instrument of implementing royal policy and removing obstacles to those policies that it was in much of the rest of the world. Late medieval and early modern Europe are distinguished from other parts of the world by the prevalence of legal writings that set procedural and substantive bounds for many aspects of social, economic, and political life. Law, at least as it took form in western Europe, was far more than mere superstructural sanctification of existing social relationships. It was an interlocking network of procedural and substantive norms that served as an obstacle – though certainly not an insurmountable one – to the actions of kings and other powerholders in an era before “L’Etat c’est moi” could be proclaimed.

A number of impetuses contributing to the rule of law may be found in medieval society. The objective nature of law was firmly rooted in Germanic society, in its customary law, as well as in tribal codes such as the Salic Law and *Sachsenspiegel*. But this reflects a more general phenomenon in the sociology of law whereby law develops out of traditions and values deeply imbedded in its society or, as Maitland and Montagu expressed it, out of the “common wisdom and experiences of society.”<sup>24</sup> A second source of the European legal achievement lies in the systems of manorial law arrived at by free peasants and landlords, and also by the parallel feudal law worked out between lord and vassal. Feudal law emerged as the formalized regulation of the contractual ambiguities of military service, transferring service into payments in cash or kind, forfeiture of fiefs, and royal jurisdictions on the fief. Both systems had developed out of formal and informal negotiations between two essentially antagonistic groups, lord and peasant, king and vassal. Thus, these forms of law lacked the quality of having been *imposed* on lower groups from above by an irresistible authority. This *contractual* nature of law, that is, its origins in negotiated settlements between conflicting social classes, is crucial to the rise of law as “a kind of protective power which existed independently of any human agency, and which not only men but kings were thought powerless to change.”<sup>25</sup>

But the recrudescence of monarchical authority in the thirteenth and fourteenth centuries threatened to afford the monarchs and their legal experts the opportunity to rise above the law. A key instrument of the centralizing efforts of the royal state was Roman Law, which broke down feudal courts, shifted judicial power into the crown's hands, and threatened to offset the constitutional balance. Roman Law brought with it certain advantages for central authority. Coming itself from the centralized imperial system of antiquity, it had an ingrained bias towards central authority. The concepts, procedures, and individual courts relied upon and pointed toward an appellate and administrative hierarchy that culminated in the royal court. The entire system depended on an orderly, rational bureaucracy to maintain conceptual, procedural, and substantive standards. The second advantage for the monarchical state was the increased revenue sources provided by the growing royal monopoly on justice. Litigants came to prefer the swifter, less arbitrary, and more decisive royal courts over the patchwork of feudal, merchant, and Canon Law courts scattered across Europe. A concomitant to the rise of royal revenue and administrative power was, of course, the decline in the revenue and prestige of the competing courts frequently headed by aristocratic opponents to the state. Finally,

standing at the head of the new rational legal system, the monarch and his state enjoyed a decided infusion of legitimacy that came at a critical period in the early stages of the state-formation process.<sup>26</sup>

In summary, the reemergence of Roman Law in the middle ages led to a marked power shift from the localities to the state. However, Roman Law could not be wielded in an arbitrary and self-serving manner, at least not at this point in which the state remained relatively modest, owing to the presence of constitutional checks and to some characteristics of the law itself. First, the monarchical state lacked the power to rise above the law as it would in many states during the wars of the following centuries. The crown still relied heavily on the towns for vital revenue, military equipment, and administrative expertise. Second, Roman Law was an essentially alien legal system brought into the middle ages in toto from a distant past. It was not an indigenously developed system produced by contemporary statesmen and ministers. Thus, it was not simply a device for implementing policy; its principles had been set for centuries and tampering with them or expeditiously bending them would have the effect of undermining the advantages Roman Law had given the state.

Third, Roman Law was jealously guarded from manipulation and corruption by an administrative/academic elite whose corporate status was bound with the sanctity of law. Legal experts in the judiciary and in the medieval universities protected the law from meddling, and guaranteed that its own cumulative, internal dynamic, not royal fiat, was the agent of change.<sup>27</sup> Even the legalist experts of the centralized English Common Law courts, whose roots in Roman Law were less firm than those on the continent, maintained their independence throughout the Tudor and Stuart periods: "In the sixteenth and seventeenth centuries the judiciary stood between the public and the crown. It protected the individual from the state when he required that protection."<sup>28</sup>

The crown itself had an interest in maintaining the rule of law. As we have seen, the monarchy benefited from the legitimacy that came from administering an equitable system of law. That legitimacy was crucial to building a nation and a coherent state out of the feudal system. Tampering with the law would perhaps acquire a few manors and excises, but it would endanger both the state's legitimacy as well as its state-building program. Short-term expediency would come only at the cost of stalling or destroying long-term dynastic goals.



To say that there was rule of law in the late medieval, early modern period is not to say that law hovered menacingly above the state and prevented any transgression. Opponents of the state were imprisoned or had property seized without due process. In speaking of the objectivity of law in this time, we make only the general observation that such transgressions entailed risks and costs to the state from which monarchs and emperors of the middle east and orient had little to fear. The edifice of law was in effect an objective, structural restraint on state behavior, at least during this time when its power vis-à-vis civil society was far from overwhelming.

By discussing only the constitutional qualities of medieval Europe, we run the risk of leaving the impression that political and social life was all procedural correctness and fair play. Repression, exploitation, and other abuses were neither rare nor confined to small regions. But medieval constitutionalism ensured that extensive and protracted abuses would coalesce diffuse forces and form a powerful, *legitimate* opposition to arbitrariness. Constitutionalism was not a solidly entrenched political arrangement that had but to await its eventual denouement in liberal democracy. A number of critical events that lie outside the scope of the present study (viz. an expanding economy, the luxury of a *gradually* expanding franchise, and the safety-valve of emigration) would be necessary to permit the rise of modern democracy from its foundations in the medieval world.

Nor was it clearly defined in all areas. Constitutionalism in Western Europe was an *amorphous* arrangement. There were neither precise boundaries between royal prerogative and usurpation nor any routinization of parliamentary procedure. In England, Ship Money and "Benevolences" were tolerated in the early seventeenth century, but fiercely opposed scarcely a generation later. Rulers alternately gained and lost the upper hand in dealings with parliaments, tested the limits of the rule of law by invoking "prerogative," and tried to circumvent taxation limits by the most ingenious methods, all the while operating within the ill-defined bounds of constitutional propriety. Nor were the constitutional counterbalances to the crown without divisions. Nobles and burghers were hardly at one on matters of state, or even on the appropriate role of the other on the floor of the estates. Constitutionalism, then, was a modest, frail achievement, the importance of which is probably best demonstrated by contrasting it with the contemporary histories of several other civilizations whose political outcomes were

not ultimately decided by outside forces in the course of the age of imperialism.

## Russia

Geographically, Russia, or at least the core of the Russian nation, lies in Europe. In terms of political history, however, it has little in common with the West. Indeed Russia's contact with the West remained relatively light until the early eighteenth century under Peter the Great. Almost none of the sources and components of medieval constitutionalism is found in the old Muscovite principality.

There was no rough balance between crown and nobility owing to the *complete* collapse of authority at the close of the Kievan epoch, which contrasts with the *partial* collapse of the imperial systems that laid the foundation for the constitutional balance in the West. The brutal Mongol conquest of the early thirteenth century shattered princely authority in southern Russia and converted the northern principalities, including Muscovy, into subservient tributary states. Though subordination to a distant overlord might initially seem an inauspicious beginning for national greatness, it did afford the Muscovite princes the opportunity to build a strong central state and army with which to collect the enormous exactions of the khan and mercilessly crush tax revolts. The khans myopically rewarded their ambitious underlings by allotting them more lands to tax, which, in turn gave the Muscovite prince more revenue with which to purchase or conquer additional territories. The upshot of this was a solid central state and army that would break Mongol suzerainty on the Kulikovo plains in 1385. Thus, during the thirteenth and fourteenth centuries, Russian political history was placed firmly on an autocratic track that precluded the balance found in the West. The decisiveness of the Mongol period was expressed in a moment of theoretic flexibility by Karl Marx: "The bloody mire of Mongolian slavery, not the rude glory of the Norman [i.e., Kievan] epoch, forms the cradle of Muscovy, and modern Russia is but the metamorphosis of Muscovy."<sup>29</sup>

Whereas the aristocracy of most of Europe had broken from its narrow military-administrative roles within imperial orders and had assumed independent local authority, the Russian aristocracy, from the *boyari* magnate to the humblest *pomeshchik*, was firmly fused with the

Muscovite state. The *boyarii* filled the highest-ranking military and administrative positions of the state and were rewarded with hereditary land grants of *votchina*, which fell just short of property status. *Pomeshchiki* were granted conditional benefices for state service, usually of a military nature. The *pomestie* system of organizing its oft-used armies brings us to the more centralized military structure of Russia.

The military organization of post-Mongol Russia superficially resembles that of the West. In exchange for military service a knight or *pomeshchik* was granted an estate from which he would draw resources to equip himself with horses, armor, and retinue. But whereas the Frankish monarchy was quite weak and hence had to bestow rights, immunities, and other contractual benefits upon chivalrous servitors, the Muscovite prince dealt from strength. The Russian state was already sufficiently developed that coercion could enter its relations with the social classes in a way unthinkable in the West. We find in the prince-*pomeshchik* relation none of the contractual amenities and reciprocal obligations of the West. The relation, Szeftel notes, was not one between lord and vassal; it was between master and servant.

There is a connection between military service and possession of land, even though the *pomest'e* is not hereditary. It is not, however, based on a feudal contract which involves *mutual* fealty between a suzerain and a vassal. Its source is the absolute sovereignty of the Tsar *requiring* service from his subject and *granting* a *pomest'e* in return for service. There is compulsion in this service, first of all, in the interest of the community, and Peter Struve defines it as ... "a kind of state feudalism, but in its legal aspect ... in some ways the direct opposite of classical Western feudalism."<sup>30</sup>

The *pomestie* system was also the instrument of liquidating land-holdings on the principality's periphery where free ownership or western-style feudalism existed. Independent *boyarii*, towns, and princes from the Kievan period (*kniazhata*) were forced by military threat to surrender their property to the tsar who might then return it in the form of *pomestie*. Some lands were simply confiscated, their owners exiled or put to death. On the relation between the *pomestie* system and surviving non-serving landowners Pipes states: "Conditional land tenure, when it came to Russia in the 1470s was not a feudal but an anti-feudal institution, introduced by the absolute monarch for the purpose of destroying the class of feudal princes and boyars."<sup>31</sup>

The reciprocal rights and duties between lord and peasant in the West have no counterparts on Russian soil, at least not in Muscovite Russia. In the period prior to Moscow's preeminence and the Mongol conquest, however, aristocrats rarely resided outside the river towns, and peasants were among the most free in Europe. Nobles had relied for their incomes not on agrarian surplus but on booty, tribute, and commerce with the Byzantine empire, which lay to the south of the river systems. It is only when the retinues of the numerous princes became too large for courtly revenues that the princes granted their followers land with light control over the peasants, who then became tenants or hired hands but, at this point, not yet serfs. Most peasants retained de facto property rights as well as the right to quit their lord's service and move to the black earth regions to the south, which tsarist conquest and the collapse of the khanates had opened for settlement. Migration to the south (brought on in part by the social chaos from the tyrannical excesses of Ivan the Terrible in the mid-sixteenth century), as well as the labor requirements of the expanding *pomestie* lands, led to gradual restrictions on peasant mobility and ultimately to the reduction of peasants to chattel in 1649.<sup>32</sup> Blum captures the legal status of the serf: "To all intents and purposes, the only rights that had been left to him were those that his lord was willing to allow him; the only recourse he had against the exactions and oppressions of his seigneur were the illegal expedients of flight and violence."<sup>33</sup>

This heretofore unrelentingly dismal depiction of Russian political history is only slightly attenuated by the existence of ancient forms of popular government that persisted into the early modern period and perhaps until Stolypin's policies of 1906. Communes had their own local governments that were elected by male heads of household. Communal government controlled local taxation, managed communal lands, apiaries, and streams, and also oversaw or codetermined local police and judiciaries. The rise of the *pomestie* system reduced the political and judicial autonomy of the communes but left much in the way of local government intact. Insofar as communal government was an efficient method of organizing labor owed the seigneur, collecting national imposts, and transmitting national policy requirements, neither *pomeshchik* nor tsar wanted completely to dismantle it. Although local government remained in the communes, its impact on national government was nil. It had no capacity to transmit interests and demands up the channels of the sprawling state apparatus. The communes only served as separate sticks of dynamite that would blow up that apparatus during the social revolution of the twentieth century.

As we have seen, there was no balance of power between tsar and aristocracy in which towns could wrest autonomy from traditional authorities. The pre-Mongol history of Russian towns suggests a further obstacle to municipal developments like those of the West. Kievan Russia's trade with Byzantium was conducted by numerous river towns ruled by appanage princes, not by middle classes operating within the interstices of feudal rule. Muscovite princes and tsars were cautious about preventing the rise of powerful economic elites. As soon as most commodities became lucrative, they were declared state monopolies thereby forcing all sales to the state at fixed prices that enriched the patrimonial state. Throughout the fifteenth century, the state endeavored to preserve the preeminence of Moscow and keep close tabs on potential groups by forcing artisans and merchants to reside in Moscow. Prosperous, independent merchants were coerced into quitting their businesses and becoming managers (*gosti*) of state monopolies and enterprises."<sup>34</sup> Towns, with one major exception, remained either subservient economic centers or administrative/military outposts of tsarist officials.

Novgorod proved to be an exception to this rule, at least temporarily. Distant from the Mongols and the ever-expanding Muscovite heartland, Lord Novgorod developed commercial ties with the West and indeed became a Hansa town. Here government was in the hands of the popularly elected assembly or *veche*, which elected a princely administrator and developed a written constitution in the mid-thirteenth century. Covetous of Novgorod's wealth and irritated by its political autonomy, Ivan III crushed the town and dissolved the *veche*. Seven thousand citizens exiled or executed, their lands seized and utilized to begin the *pomestie* system.<sup>35</sup>

The *veche* was not unknown in Kievan Russia but where it existed it never attained the formal structure and procedural rigor of Novgorod. They were, for the most part, informal gatherings with no control over policy, taxation, or the judiciary. Most were destroyed by the Mongols or their Muscovite vassals.<sup>36</sup> We are confronted with the puzzling fact that Assemblies of the Land (*zemskii sobor*) were convoked in the sixteenth century at a time when the state was already highly centralized, it had its own taxation systems, and the social classes were either extremely weak, intimidated, or fused to the state. The resolution to this puzzle inside a mystery lies in the composition and function of the *zemskii sobor* of Ivan IV. The "elections" of representatives to the assemblies were directed not by local gentry or village communes but

by the central military administration (*Razriadnyi Prikaz*). The election of *pomeshchiki*, *gosti*, and other state servants ought to surprise no one. The merchants chosen were disproportionately from the Moscow region where they were typically more beholden to the state and more subject to scrutiny.<sup>37</sup> The *zemskii sobor* was never intended to be the sounding board and instrument of consensus that the estates were in the West; it never exercised control over taxation or matters of war and peace. Its purposes were to garner semblances of legitimacy for the tsar and to intimidate independent-minded *boyarii* prior to Ivan IV's embarkation on complete subjugation of the aristocracy in the course of the bloody *Oprichnina*.<sup>38</sup>

Needless to say in this land of chattel slavery, patrimonialism, and arbitrary autocracy, we can hardly speak of the rule of law, only the rule of tsars. The state's origin as enforcing agency of the Mongols gave it overwhelming power in relation to the social classes. Even after Mongol suzerainty was broken, Russia was continuously at war, which furthered centralization and required latitude of action that strict legal propriety would have inhibited. There were no legal rights or guarantees for the subjects of old Muscovy, only conditional extensions of privilege to subservient clients. Law, as it developed in Muscovite Russia, concerned itself with national security and anti-state activity, leaving the more day-to-day aspects of civil and criminal law to the nobles.<sup>39</sup> Russia remained a land in which property, almost all of which was claimed at least in theory by the state, could be seized or transferred arbitrarily. The executions, exiles, and destruction of liberties of Ivan IV's reign of terror (*Oprichnina*) were but the most intense and violent expressions of the tsar's position above and outside the law.

## Japan

Prior to the establishment of the Tokugawa shogunate in 1603, Japan endured cycles of short-lived ascendancies of baronial factions followed by breakdowns and protracted civil wars. The Taiho (eighth century), Kamakura (twelfth century), and Ashikaga periods (thirteenth century), all failed to construct enduring political institutions and they deteriorated into civil war and anarchy. The Onin War (1467–77) and the ensuing century known simply as the "Age of the Country at War" were typical of the conflicts. These wars involved no broad national issues such as fundamental constitutional matters or religion: they only decided which competing faction would rule that highly feudalized ter-

ritory. It was not uncommon for most competing houses to be completely destroyed in the course of pursuing their dynastic ambitions. During this period we find no balance of power between shogun and warlords, only short-lived suppressions of feudal warfare and eventual breakdown.<sup>40</sup>

The long process of imposing stability and building central institutions was begun in the mid-sixteenth century by Nobunaga's construction of increasing numbers of loyal warriors and expanding his demesnes, a process continued by Hideyoshi and Tokugawa Ieyasu in the next half century until the latter decisively defeated a confederation of *daimyo* at Sekigahara in 1600. Ieyasu's state or *bakufu* was rather amorphous; it ruled in a largely ad hoc manner with its loyal *fudai daimyo* and left most local administrative powers in the hands of the vanquished *tozama daimyo*.<sup>41</sup>

Despite the relative tranquility during the two and a half centuries of the Tokugawa Shogunate, there was no balance of power situation analogous to the situation in the West. The balance of power between shogun and *daimyo* resembled more the balance between antagonistic states in which there was stability, even peace, but no coming to terms and building mutual trust through cooperation and exchange. Tokugawa revenue was based on rice collected at the local levels by shogunate agents, not by negotiation with fiscally-indispensable burghers and landowners as in the West. *Thus a critical nexus for constitutional development that led to the rise of the estates in Europe was absent.* Owing to the regime's predilection with maintaining stability and avoiding any risk of inciting another baronial war, the Tokugawa rulers left most *tozama daimyo* wide latitude in governing their *han*, and hence they had little interest in developing representatives in the *bakufu*.

The Tokugawa shogunate was a watchdog state that did not endeavor to build a national system but, rather, only served to prevent conspiracy and rebellion from the ranks of the *tozama daimyo* and increasing numbers of masterless samurai (*ronin*). To this static end it employed networks of watchful officials and spies, forced all *daimyo* – *fudai* and *tozama* alike – to reside or leave familial hostages under the shadow of Chiyoda castle, and demonstrated the costs of resisting authority with grisly displays of brute force from village to village. It is, then, not surprising that when the Tokugawa shogunate was overthrown in 1868, its

demise resembled not a broad social revolution or dynastic change, but a revolt from peripheral provinces, a successful Fronde.

The shogun could boast of standing at the head of over 400,000 troops but this number included the samurai and bannermen of not only his loyal *fudai*, but also those of the *tozama*, whose reliability was questionable at best. Despite the shogun's nominal right to levy troops and marshal supplies from the daimyo lands, his forces were only a fraction of that number.<sup>42</sup> The Tokugawa military was based on the system of granting benefices and rice revenues in exchange for military service and personal loyalty. The shogun's vassals, like the Russian *pomeshchiki*, did not enjoy a range of privileges and immunities. Though the *tozama* did have administrative control of their *han*, this stemmed from the reluctance of the shogun to risk further war, not from feudal contract or largesse. Modest citizenship rights had been enjoyed by soldier-farmers prior to the centralization of the sixteenth century. But the pax Tokugawa brought on their obsolescence and disarmament in the course of Hideyoshi's "Sword Hunt" (*Taiko no Katanagari*). The daimyo's and samurai's exclusive right to bear arms entailed the general levelling of citizenship rights among the peasantry.

Village self-government was quite strong in Tokugawa Japan but lacked the critical dimensions of independence and a popular basis. The headman and elders constituted the nucleus of village government. These positions were normally hereditary, though they were sometimes informally selected by the propertied persons of the village.<sup>43</sup> Their work entailed collecting taxes for the *bakufu*, organizing public works, and maintaining the *idée fixe* of Tokugawa rule, law and order. Shogunate officials either ordered or closely supervised the execution of these tasks.

Outside forces also made their presence felt in the policy of collective responsibility whereby the village leaders or the village as a whole were held accountable for the transgressions of individuals. This group responsibility existed at an even more microsocial level with the *Gonin-gumi* system, which divided villagers into five household units that were collectively accountable for taxes, enforcing contracts, and ensuring that individual behavior conformed with Tokugawa senses of propriety. Sansom notes this system's protototalitarian nature:

The *Gonin-gumi* was ... an agency of self-government not arising from



popular initiative but imposed upon communities by the governing class. Its chief purpose was to preserve order and to keep authorities informed of conditions in both town and village. It was in fact a police organ for spying and delation, characteristic of the official attitude towards problems of administration.<sup>44</sup>

Hideyoshi's cadastral survey and attendant decrees of the late sixteenth century tied peasants to the soil and effectively froze their social status as he would try to freeze all Japan in the next century. Hideyoshi's decrees were not without rationalizing effects that benefited the peasantry. The number of persons to whom the peasant owed taxes was greatly reduced; their social position had been fixed but they were given hereditary tenant status. In the absence of shogunate judiciaries at the village level, custom law prevailed and provided a basis for routinizing lord-peasant relations.<sup>45</sup>

Though tied to the soil and limited in his vertical mobility, the Japanese peasant was not chattel as were his unfortunate Russian and Polish counterparts. He was squeezed by his samurai lord in the course of the eighteenth and nineteenth centuries, and occasionally made into a hideous example by shogunate and daimiate authority. But Japanese rural life does not fit easily into simplistic views of rural life under oriental despotism. Still, it could hardly serve as a source of constitutional development.

The early years of Nobunaga saw that great warlord's extension of some corporate status and rights to the towns under his then limited domain. Tax immunities were granted, town dwellers were exempted from *corvée*, and debt moratoriums (which had been decreed by many warlords to the consternation of merchants) were prohibited. Towns never became chartered or fully autonomous. But Hideyoshi and Ieyasu reversed this course and established firm control over the towns.<sup>46</sup> The Tokugawa shogun constructed numerous "castle-towns" (*jokomachi*) throughout Japan as administrative posts and garrisons to guard the *tozama* and attend to his interests. Merchants were attracted to the new castle-towns by the presence of paid officials or were coerced into residence there by the more visible hand of the *bakufu*. *Daimyo* and shogun alike established monopolies, took merchants as protected clients, and made some prosperous merchants into Muscovite-like *gosti*. Although the merchant elite had formed a town government, its policy formation was conducted under the watchful eyes of the shogun's *machi-bugyo*. The merchants of early Tokugawa Japan

had neither the autonomous municipal sanctuaries from which they could challenge feudal authority nor even any semblance of independence from the *daimyo* or shogun. Hall conveys the close working relationship the bourgeoisie had with the ancien regime: "The leading merchants became, as time went on, more strongly allied with the feudal order, more dependent upon feudal privileges, and hence less inclined to oppose the dominant political order."<sup>47</sup>

The Tokugawa judicial system, limited though it was, never attained any level of separation from the administrative apparatus. Indeed, court chambers were often the very offices of the administrative functionaries. The shogun never attempted to develop an extensive judiciary in the localities, preferring instead to let village headmen settle most civil and even many criminal cases through informal measures known as "conciliation."<sup>48</sup> A student of Japanese legal history expresses well the legal system's relation to the *bakufu*, and the regime's reliance on village customs: "[Law] was an art of power maintenance for the expert manipulation of self-interested rulers in a society which was in the private relations of the subjects largely self-regulated. Law was an instrument to be used by rulers but not to limit their actions."<sup>49</sup>

But the law of the shogun was not a congeries of atomistic, unrelated decrees; it attained a modest level of philosophical coherence (which fell far short of that of Roman Law's *ius*) by its relationship to Confucian political philosophy and ethics. Although Confucian thought was rich in eloquence and insight, it lacked the aspects of causation, free will, responsibility, and logical inference that informed Roman Law. It was a system that grew out of another sharply stratified society, and which in turn legitimized, harmonized, and ultimately helped to reproduce those social cleavages. Once again, Henderson makes the point well: "Nothing was of more constitutional import to the Tokugawa law than the rigid, hereditary hierarchy of statuses established to classify the entire Tokugawa populace. The barriers were maintained between these statuses by Edo decrees and the Confucian thought patterns."<sup>50</sup> It is only appropriate that we now shift our attention to Confucianism's homeland.

## China

The rise and fall of dynasties in the Middle Kingdom resemble in some ways the numerous shōgunates of pre-Meiji Japan. But whereas the

shoguns failed to build a strong central apparatus, China had a strong state since the Han period (202 BC–220 AD) that was periodically conquered by alien armies or overthrown by internal movements reacting to misrule or weakness but that nonetheless persisted. Dynastic change either entailed swift assumption of state-control or was followed by a rapid reconstruction of the state. To find a situation analogous to medieval Europe we must go back to the Chou dynasty (1122 BC–771 BC), where we find over a thousand fiefs with written charters. But Chou feudalism was nugatory; it disintegrated into a chaos of warring city-states in the eighth century BC.<sup>51</sup>

The collapse of the Yuan dynasty in the fourteenth century was followed by the rise of the M'ing dynasty (1368–1643) and the reinstitutionalization of the gentry civil service that had fallen into desuetude. The relative independence enjoyed by the provinces under Mongol rule was replaced by a strong hierarchical state. In the century after the Mongol defeat the M'ings articulated their control by building overwhelmingly powerful state organs at the province, prefecture, department, and district levels, which controlled administration, the judiciary, the police, and an elaborate system of revenue collection.<sup>52</sup>

It is easy to exaggerate the degree of control enjoyed by M'ing and early Ch'ing rulers. Bribery, peculation, and the mandarin's pursuit of its own corporate interests were rampant and acted as some limit on state power though obviously not in the direction of constitutional government. Further, during periods of crisis (e.g., the Taiping and Boxer rebellions) provincial authorities attempted to break free from Beijing's control. The upshot of these was not the extension of a charter from a weakened state, only short-lived autonomy or the warlordism of the late Ch'ing period. Nonetheless, the term "oriental despotism," tainted as it is by suspect sociology and abstruse philosophy, is not altogether misplaced in describing Imperial China. Challenges to state or mandarin power from emerging commercial enterprises were met by stifling taxation, price-controls, or demands for bribes, all of which combined to thwart potential rivals.<sup>53</sup> Secure in their revenue sources, state officials did not have to curry favor with a nascent bourgeoisie.

Along with the construction of the M'ing state, the development of a central army replaced the rag-tag forces of Chu-Yuan-chang that had defeated the decrepit military of the Mongols. The new M'ing army defeated warlordism and crystallized into a key institution of the emerging dynasty. Begun in the 1370s, the *Wei-so* system was com-

posed of a series of military garrisons strategically stationed throughout the land, mainly for purposes of internal security. Garrisons were self-sufficient military colonies based on *state* property and manned by different ethnic groups from the ones they were “protecting.” It was typical for 70 percent of the troops to work the land while the rest performed garrison duties. Officers were granted hereditary status, thereby providing status and opportunity for their sons, but they had none of the immunities and other contractual amenities of western feudalism. Originally developed by the Han dynasty (202 BC–220AD) for frontier defense, the *Wei-so* military organization became predominant in the M'ing period, supporting 1.2 million troops on approximately 5 percent of the arable land of China.<sup>54</sup> The *Wei-so* system was doubly anticonstitutional: first, in that it was highly centralized and loyal to the state; second, in that its reason d'être was principally to suppress peasant unrest, not to defend the nation from outside enemies.

Other forms of military organization emerged during the M'ing and Ch'ing period. The Taiping and Boxer movements, as noted earlier, triggered state crises and moves for autonomy on the part of provincial governors. Accompanying this was the emergence of warlord armies at the local levels whose duties were to provide for local defense in the absence of effectual imperial forces, and also to aid in the movement for autonomy. Furthermore, at the village levels, local militias were formed to protect the community from brigandage and White Lotus revolts whose mobile, guerilla-like forces were invulnerable to the cumbersome army units.<sup>55</sup> Owing to their transitory and anti-state qualities, neither the warlord forces nor the village militias were of constitutional import. They were ad hoc reactions to disorder brought on by state weakness, which itself was more often than not only transitory. These forces sought no charter from imperial authority, seeking instead either merely to protect the village or region, or to make a bold, usually unsuccessful bid for independence.

Village government in China closely resembles that of Japan and Russia in that we find elected officials and other forms of primitive democracy, but once again overshadowed by the imperial apparatus just outside the village gates. Another resemblance is the *pao-chia* organization, which parallels the *Gonin-gumi* of Tokugawa Japan. Both were mutual responsibility systems that linked the villagers to outside authority. *Pao-chia* was instituted as early as the T'ang period (618–906) though its origins are in the obscure past and seems to be based

on ancient Legalist thought. Used as a mechanism of tax collection and conscription, *pao-chia* by its principle of group responsibility for individual deviance provided a largely invisible but nevertheless omnipresent device for channeling behavior into acceptable, Confucian patterns.<sup>56</sup>

Tenantry and bonded servitude began in the Chinese countryside during the T'ang period, not out of political or military considerations, but because of crushing debts incurred by the free peasantry. By the early thirteenth century, estate economy prevailed. Peasant unrest during the Mongol period led to a closing of ranks between the rural gentry and imperial authority, and eventually to only more unrest, which undermined Mongol rule and aided in the rise of the M'ing dynasty in 1368. The M'ing restoration of the civil service engendered a corrupt new bureaucratic class whose exactions and peculation led to further exploitative pressures on the peasantry.

This unfortunate lord-peasant relationship generally persisted until the wars and famines of the early seventeenth century brought on demographic changes that shifted bargaining position into the hands of peasantry. Hereditary bondsmen took advantage of this by demanding and attaining tenant status; former tenants obtained more favorable lease terms and in many cases got control of their lands similar to that of the English copyholder; hired laborers won better pay, working arrangements, and benefits such as festivals and gifts at the lord's expense. Written charters developed that regulated lord-peasant relations regarding terms of leases (which included mandatory changes in event of famine), landlord obligations to widows and orphans, terms of quittal, and terms of abrogating the lease.<sup>57</sup>

Though far behind his fellow tillers in much of Europe, the Chinese peasant had made substantial progress in the course of the early Ch'ing years. But the progress was primarily of a purely economic nature (although the elevation from bondsman to tenant entailed improved legal status). The leverage he gained in the years following the catastrophic wars and famine did not yield state-sanctioned charters or rights upon which citizenship could be built. Village government remained narrowly proscribed, and the peasantry's voice in imperial affairs remained unheard.

Chinese towns were first and foremost centers of imperial administration or military garrisons. They were what Marx called "appendages of

princely courts,” what Weber called “consumer cities.” Towns were administrative commanding heights from which the mandariate could dominate the surrounding countryside. So crucial were these centers to the functioning of the region that during periods of war, generals devoted their resources to vanquishing the towns, secure in the knowledge that the environs would ipso facto come under their control.

The imperial bureaucracy’s control in the towns was overwhelming. Whereas Western towns became divided along functional lines (e.g. bastion, market, faubourg) in the course of their development, imperial officials imposed an artificial system of walled subdivisions (*feng*), which greatly facilitated administrators and police in pursuing their social control mission. Balazs contrasts the cities of the West and their relationship to the villages with the imperial outposts of China:

The town was dominated by officials who represented the imperial government, particularly insofar as judicial and fiscal matters were concerned, and since ... it did not embody the idea of emancipation and of liberty, neither did it act as a magnet to the people of the countryside. On the contrary, all those who rebelled against the oppressive powers of the official hierarchy took refuge in the villages so as to escape from the clutches of bureaucracy.<sup>58</sup>

The M’ing and Ch’ing imperial courts ruled China without restraints from an estates or from local government. Nor was the court effectively subordinated to the rule of law. It was, however, at least partially limited by the civil service and by the dictates of Confucian political and judicial principles. Early M’ing emperors ruled despotically and though they restored the civil service system, they aimed to preclude the bureaucracy’s coalescence into a coherent organization that could thwart court decrees. By the mid-fifteenth century, however, direct rule by the emperor had been replaced by a clique of professional officials who governed China in a less arbitrary manner, largely free from the emperor’s day-to-day meddling. Judicial administration was in the hands of a network of imperial magistrates who, although not specifically trained in law, were nonetheless neither incompetent nor wholly arbitrary. Imperial China developed comprehensive legal codifications and guidelines, which though reformed numerous times remained essentially intact until the Republican era.<sup>59</sup>

Confucianism provided, to some extent, a philosophical grounding that gave a measure of coherence to legal codifications. But once again Confucianism’s predilection was mainly with maintaining the social order not with maintaining procedural and substantive norms that

would limit authority. On the contrary, it in effect legitimized prevention of an independent legal profession, seizure or control of private property that could upset the status quo, and the application of different legal norms to officials, peasants, and soldiers. Thus, Chinese legal thought always retained a strong measure of Legalist authoritarianism even though Legalism was largely eclipsed by Confucianism during the Han period.

## Conclusions

This survey of the political history of nonwestern countries has shown that Russia, Japan, and China never developed the levels of constitutional government found in late medieval Europe. Three of the four social origins of constitutionalism in the West, rough balance between crown and noble, contractual-feudal military organization, and lord-peasant dynamics have been largely absent from these countries. Nor has any other substantial source (such as religion or economic organization) been uncovered that compensated for these absences or which otherwise fostered constitutionalism. Consequently, the major institutes of medieval constitutionalism, rural local government, autonomous towns, estates, and the rule of law, have also been largely absent.

Village government, on the other hand, which was fostered in the West by the continuance of Germanic peasant organization and by the commune movement of the medieval period, has been found to be quite ubiquitous outside Europe. Village government existed – and in vital forms – in all three nonwestern regions, but always dwarfed by the power of authoritarian organs of the surrounding state structures. *Thus, village government in and of itself lacked constitutional significance unless it was able to fuse with other, stronger constitutional institutions as it did in the West.*

To avoid the charge that the present study is only another sentimentalization of remote, mythic past, the modern significance of medieval constitutionalism for liberal democracy must be established. Each component carried forth – *and with essential continuity* – one or more of the pivotal aspects of modern representative government, at least in those countries in which medieval constitutionalism was not destroyed by military-bureaucratic absolutism or by a labor-repressive commercialization of agriculture. Among those aspects of liberal democracy

are citizenship rights, representative institutions, checks and balances on central authority, and the rule of law.

Rural local government contained representative government, from tribal popular assemblies to gentry cliques, which persisted in one form or another. Citizenship found its expression in participatory government and in the chartered liberties of village communes and frontier settlements. Local government in itself could not act as a check on central power; it could, however, provide a scattered but collectively almost insurmountable obstacle to state penetration of the localities. Towns provided various levels of citizenship and representation, from narrow oligarchy to representation of the guilds and plebeian classes. The progressiveness of “negative freedom” (freedom from feudal authority) enjoyed by lower classes is easily missed by focusing too narrowly on the oligarchic nature of many municipalities. To be rid of seigneurial controls and to have access to a more rational judiciary were benefits that were not lost on the urban masses streaming in from the countryside. Royal dependence on revenue from the towns served as a *de facto* check on central power inasmuch as infringing the rights of one endangered and unified the others.

The representative nature of the estates as well as their serving as checks and balances on the monarchy are very straightforward. The estates became the central arena of politics in successive centuries, and the struggle for citizenship rights was fought here in two senses. A main battle of liberalization was fought over the franchise, the right to vote and send representatives to the national assembly. Second, politics within the representative assembly often centered on extending freedoms and liberties by acts of legislation. The rule of law was a crown ornamenting and protecting medieval constitutionalism as well as liberal democracy. Law, that “brooding omnipresence in the sky” as Oliver Wendell Holmes called it, served to guarantee citizenship rights, ensure proper consultation with the estates, and provide a normative and procedural grid in which the monarchical state had to act.

It is important to note once more that medieval constitutionalism was not almost democracy, nor was it sufficient cause of liberal democracy. It did, however, provide many of the critical components including representation, citizenship, checks and balances, and the rule of law, that were absent in other parts of the world. Nor was constitutional government always accompanied by trust, cooperation, and acceptance



of the political status quo. Tension, conflict, and often open hostility were more the norm as monarchs endeavored to rid themselves of meddlesome pests. But their animosities were held in check by constitutional protections and the strength of the opposition. Monarchs could only bide their time, abide by the governing rules and practices, and await the opportunity to shed what they viewed as the fetters of antiquated politics.

The constitutional achievement, then, was a modest and frail one that had inherent instabilities owing to monarchical/state ambitions. It would be undermined in many countries where the commercialization of agriculture and the exigencies of modern warfare combined to bring about authoritarian relations and institutions.<sup>60</sup> Elsewhere, where the impact of war and commercialization were less pronounced, medieval constitutionalism would serve as a basis for liberal democracy.

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### Notes

1. The area of analysis here includes the lands stretching from England and Scandinavia in the north to the Spanish marchlands and Italian city-states in the south, across Burgundy, the Swiss Confederation, and the Holy Roman Empire up to but not including Muscovy or Kievan Russia. I emphasize contrasting this area with other regions rather than on accounting for variations within it.
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12. *General Economic History*, 324–325. See also Gina Fasoli, “Gouvernés et Gouvernants dans les Communes Italiennes du XIe au XIIIe Siècle,” *Gouvernés et Gouvernants* vol. 4 1984, 47–86.
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14. Vinogradoff, “Feudalism” in *The Cambridge Medieval History III*, 481–482.
15. Weber, *General Economic History*, 70. On the rise of manorial law see Berman, 316–332; and Gerald Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany* (Princeton: Princeton University Press, 1986), 116–117.
16. Immink, 350–363; Strauss, 120–121; Karl Bosl, “Zu einer Geschichte der bürgerlichen Repräsentation in der deutschen Landgemeinde,” *Studies Presented to the International Commission for the History of Representative and Parliamentary Institutions* vol. 26 (1963) 1–17.
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31. Blum, 139–151; Pipes, 52.
32. Blum, 30–48, 96–97, 220–245.
33. Blum, 276.
34. Pipes, 191–196; Blum, 124.
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39. Pipes, 109.
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43. Harumi Befu, "Village Autonomy and Articulation with the State" in Hall and Jansen, *Studies* 303–303; Thomas C. Smith, "The Japanese Village of the Seventeenth Century," 270.
44. Sansom. Vol. 3, 102.
45. Sansom, vol. 3, 98; vol. 2, 317–319; Dan Fenno Henderson, "The Evolution of Tokugawa Law," in Hall and Jansen, *Studies*, 228.
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55. Kuhn, 40–55; Dreyer, 20–25.
56. Eberhard, 176–178; Kuhn, 24–25.
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