Critical Junctures and Credible Commitments: The Emergence of State Capacity through Legal Hybridization

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Abstract

The Madisonian paradox of governance, that a government strong enough to protect property is also strong enough to confiscate those rights, has been resolved in practice in only one area of the world: Western Europe and the states still governed by their descendants. We argue that the solution to this paradox stumbled upon by European states derives from the particular way in which they resolved the tension between what we will call communitarian and rationalist legal orders. These correspond in Europe’s case to Germanic law, which enshrined a balance between the interests of feudal lords and the crown, and Roman law, which enabled the formation of a central state. The result is a tradition of strong but limited government in which cultural norms and institutions exist that dispose political leaders to respect and abide by limits on their power.

China’s philosophical and legal heritage is likewise driven by creative tension between two legal traditions, the Confucian and the Legalist. However, the tension was resolved without any effort toward establishing a social contract between the rulers and the ruled, which in turn diminished the ability of the state to make credible commitments.

Introduction

In the modern world, only two large-scale civilizations have managed to combine centuries of relative public order with economic dynamism: Western Europe and East Asia. Even so, the Western political tradition, the younger of the two, seems to stand apart in its success in maintaining both political order and a high degree of personal freedom—two goals that have long been considered in political philosophy to involve a tradeoff.

The West still benefits from having learned to reconcile two contradictory principles: the unity of the state, and constraints on the arbitrary discretion of the state. The core of this practical reconciliation, we argue, is a contractual approach to politics originating in a historically unique confluence of two very different types of law, what we call communitarian and rationalist. In the case of Western Europe, Germanic and Roman law came together in the medieval feudal order following the breakdown of the Roman political system. Since that time, Western politics has been
the arena of a constant struggle to balance rules and discretion, a struggle that succeeds because of highly effective syncretic institutions and the public ethos that safeguards them. Marc Bloch (1961: 475) concludes thus: “The originality of [feudalism] consisted in the emphasis it placed on the idea of an agreement capable of binding the rulers; and in this way . . . it has in truth bequeathed to our Western civilization something with which we still desire to live.”

Our account of the origins of Western political institutions suggests a “deepness” that derives from practice over the course of centuries, and not from deliberate efforts to construct a theory of legal custom in conformity with feudal law. The outcome – limited government – although highly celebrated, was not deliberate or engineered. This carries lessons for political-legal reform, and for efforts to transplant existing legal forms and theories to the rest of the world. An institution’s legitimacy depends more on the process over time by which it was formed than on the ends it served at any single point in time.

**Communitarian and Rationalist Law: An Overview**

The basic problem of governance is to avoid a state that is too weak to suppress forces of disorder, and a state too strong to be restrained from becoming a force of disorder itself. Either of these circumstances is sufficient to severely limit a nation’s capacity for growth and development. However, it is not a question of a state having *just enough* power to suppress forces of disorder while still feeling constraint. Indeed, much of the world faces both problems at once: a state that not only fails to protect against predation, but engages in significant predation itself. In such a situation, neither an increase nor a decrease in the state’s effective power is likely to expand the opportunities for commerce and economic growth.

Corresponding to these two problems are two basic ways of organizing a legal system, each of which addresses one problem or the other. We will call these “communitarian” and “rationalist” law, the former excelling at respecting the autonomy of its citizens at the expense of some public disorder, and the latter at suppressing private predation at the expense of an overbearing state. These are, of course, highly stylized generalities, but actual legal systems hew predominantly toward one side or the other.

Communitarian law, by far the older of the two, is legitimated from the bottom up, which enables congruence between law and actual practice. Since the customs evolve in response to particular conflicts, they are not readily transferable to others. In addition, because the law follows established practice, if practice differs in neighboring communities, the laws of one will not
necessarily harmonize with those of another. Different practices may cause conflict when such groups come into regular contact. Communitarian law therefore has limited capacity to unite or to encourage intercourse between far-flung groups.

The scale of political organization under communitarian law is also limited by a strict egalitarian ethos. Tribal societies are often organized around customs that restrict domination or predation by internal elites or factions, although the community may prey upon or be vulnerable to predation from outsiders (Acemoglu & Robinson 2016).¹ Enforcement under communitarian law tends to be relatively decentralized, consisting of social pressure in addition to formal punishment. Judges, for example, are chosen by the people, and have strong personal connections to them. This egalitarian ethos, often the source of legitimacy for communitarian law, restrains the possibility of utilizing hierarchy as an organizational tool. Communitarian legal orders, therefore, are inherently limited in the scale of their political organization.

Rationalist law, on the other hand, is associated with hierarchical political organization and the needs of administering such a polity. Legitimacy under rationalist law extends from the center outward. In contrast to communitarian law, this feature opens the possibility for incongruity between the content of the law and actual practice, especially the practice of people at the bottom of the hierarchy. Judges are appointed by the state, and represent its interests. The law must be systematically “imposed”. For practical reasons, therefore, the enforcement of rationalist law tends to be bureaucratic, lax, and more aspirational, especially in areas farther from the central administration.

The necessity of imposing law by means of an administrative state makes certain organizational advances necessary. First and most importantly, rationalist law is characterized by a written legal code, representing the power of the state over the people. The elite of a communitarian legal order may be illiterate; the elite of a rationalist legal order may not. Second, because the forcible imposition of law is costly, religion will tend to be far more organized and institutionalized in rationalist than in communitarian societies, and will specifically legitimate the rule of the sovereign over the people (Purzycki, et al. 2016), although recognition by religious authority does not constrain the sovereign to abide by limits on its power or to credibly commit to

¹Indeed, the Germanic tribes famously overran Rome on several occasions after having been dominated by them for a number of centuries.
protecting the rights of subjects. Third, the administration of rationalist law requires a concept of separation between office and officeholder. Functionaries of the state are permitted to execute certain tasks with the imprimatur of the state that they would not be permitted to do in their capacity as private individuals. Such a distinction is alien to the personalist organization of a communitarian legal order.

Both external threats (Turchin 2008) and intra-state competition (Zhao 2015) tend to drive political centralization and legal rationalization. Those states that were able to organize themselves in a more rationalist way were able to marshal more resources and prevail against less rationalistically ordered polities. The West developed a highly rationalist legal administration early in its history, in Rome, which faced both pressures intensely. The fall of the empire at the hands of the Germanic populations led to a resurgence of communitarian legal order. This endowed the West with dual legal traditions to address particular matters and resolve conflicting interests.

The advantages and disadvantages of rationalist law are the mirror image of those of communitarian law. Where communitarian law fails to scale, rationalist law excels at integrating diverse communities into a cohesive larger unity. The presence of a written code, consciously harmonized among all its parts, makes possible the commercial and political intercourse of far-flung and diverse communities. Empires, for this reason, find it necessary to develop some form of rationalist legal system, though not every rationalist legal system will be an empire.

Where communitarian law offered protection against political predation, rationalist law leaves its subjects vulnerable to it. Because rationalist law is based on top-down legitimacy, it can serve as a vehicle of revolutionary change in a way that communitarian law, which ensures the congruence of law with actual practice, cannot. In principle, the sovereign in a rationalist legal system can upend the entire legal order at once, though in practice, governance in the wake of such an action will be very difficult. For this reason, political leaders in rationalist legal orders find it particularly difficult to make credible commitments. This has an economic impact: if the sovereign cannot be effectively restrained from predation, it will not pay for his subjects to make long-term investments or engage in large-scale commerce, the benefits of which can be seized at the discretion of the sovereign.

**Synthesis of Rationalist and Communitarian Law**

Western Europe’s example of strong-but-limited states presiding over thriving independent groups of merchants and artisans derives from the confluence of rationalistic Roman law, and
communitarian Germanic law (Kelly 1992: 92), which began to cross-pollinate during the Feudal era. This synthesis features the advantages of both types of legal order, latitude for personal freedom combined with the capacity for sophisticated hierarchical organization. Political expropriation is limited and the risk of redistributing wealth according to an egalitarian ethos is likewise reduced. The West’s synthesis of rationalist and communitarian elements took shape through a long accumulation of tacit and experiential knowledge. Communitarian law was rationalized, but key compromises rather than farsighted design ensured that the strengthening of the central government did not give way to arbitrary exercises of power. This fusion that produced Western liberalism enabled commerce to flourish in early modern Europe.

In general, there are three possibilities for the rationalization of a communitarian legal order.

1. The formal law imposed alongside an existing communitarian order may be simply ignored as “dead letter” – as a Chinese proverb says, “the mountains are high and the emperor is far away”. Locals may pay lip service to the formal law, but for all intents and purposes their lives remain governed by the existing communitarian law. There is little disruption, but also little possibility of exploiting the scale advantages of rationalist law.

2. Alternatively, the formal law may be imposed at great cost, that cost rising with the variance between the formal law and existing practice. The first priority is often the eradication of the previously mentioned backward or irrational customs, which nevertheless often serve to prevent some pattern of conflict. The eradication of such customs, therefore, is likely to cause latent conflict to resurface. The privatization of land holdings by Europeans in certain African tribes, for example, cleared away many of the communitarian defenses against predation and empowered the headman to exercise a great deal of arbitrary authority that had not been previously possible (Van de Walle, Nicolas, 2001).

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2 In addition to these there were local sets of manorial and urban law, and Romanized canon law, which we leave out of this account.

3 Southern (1953) emphasizes that learning the law in schools like Bologna was more hands on than theoretical, aspirants were socialized into the law. They provided the underlying training and by their open recruitment policies ensured the cosmopolitan pan-European character of the debate and scholarship.
3. Finally, communitarian law may retain its general shape, but be *itself* rationalized rather than being replaced by an existing rationalist system. The law is written down, contradictions are ironed out, and particular customs are justified in light of prevailing values. This option causes only minimal normative disruption to the community, and offers the opportunity to take advantage of the large-scale political organization. The downside is that the community may have no interest in rationalizing, and even if they do, they will be starting more or less from scratch. The process may, for this reason, be slow or fitful. Yet, the more leaders try to speed the process by borrowing from existing rationalist systems, the more the transition begins to look like the second example.

Our argument is that Western liberalism was birthed from a process somewhere between (2) and (3). Feudal monarchs borrowed liberally from the Justinian code throughout the middle ages in order to enhance their capacity for political organization. Nevertheless, the contractual character of existing Germanic law was guarded by powerful and entrenched noble interests. The resulting compromises over the ensuing centuries resulted in a system that, while borrowing heavily from Roman law, was fundamentally a rationalization of Germanic custom. By the twelfth century, the notion that the law transcends politics and is binding on the state itself had come to be recognized, and with it the notion that the king may make law, but not arbitrarily; the law must be made lawfully, and the lawmaker is bound by it. The rights of citizens are grounded both in communal as well as state-based codes, and it is this confluence that has given the West its legacy of strong-but-limited government, where public order can be combined with a significant degree of personal freedom.

The following sections trace this process of rationalization, showing how key contractual Germanic traditions survived the rationalization of the Middle Ages.

**Feudalism and the Bond of Fealty: The First Reconciliation**

The decline of the Roman Empire took place over hundreds of years, from the third through fifth centuries, and brought with it a collapse of the imperium’s formal, state-based administration. Yet Roman legal principles made almost immediate inroads into the political order of the Germanic tribes who by the end of the fifth century occupied much of Italy and controlled parts of Spain, Gaul, and Britain. The notion of fealty, which drew its inspiration from the Germanic concept of homage owed by a knight to his lord, was the result of the first stage of this ingress. On the basis of the bond of fealty, elites were able to re-establish order and legitimacy and usher in
the system we now call feudalism.⁴

The organization of the traditional Germanic tribes – the Saxons, Franks, Vandals, and Goths – was predominantly based on custom and kinship, as was typical of communitarian legal systems. Families, rather than individuals, held land, and loyalty was owed to particular commanders, rather than to more abstract notions of law or state.

Had feudal bonds been defined only in terms of traditional Germanic law, the West could have never overcome the endemic disorder and continuous warfare of the post-Roman period. But Rome as an ideal survived, and memories of the splendor of Imperial Rome were often invoked among its dispossessed people during the early middle ages. German kings aspired to cloak themselves in symbols of legitimacy derived from remembrances of things Roman; for example, in the issuance of coins that were circulated to popularize their names and images (Duby 1978).

The result of this appropriation is that around the ninth century the Germanic bond of loyalty started to undergo a transformation from a kinship bond to a legal bond known as fealty.⁵ In this sense, though inspired by Roman practice, it was less an imposition of an existing rationalist order than a partial indigenous rationalization of the existing communitarian order. The resulting political order we now call feudalism.

By the eleventh century, feudalism had developed a “full-fledged contractual reciprocity

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⁴ Feudalism in its purest form was a social order linking all nobles into a unified command structure. The term itself was not frequent until the eighteenth century when ironically it was favored by those who wanted to purge the remaining vestiges of it.

⁵ A full-fledged feudal system had not yet developed during the reign of Charlemagne (768–814), but the practice of holding land in fealty, or in fee, was widely practiced. Vassals of the king became the core of Charlemagne’s army, with each vassal granted property in exchange for service. Vassals were expected to provision their own weapons, horses and equipment in times of war. In fact, the true system of vassalage of the Late Middle Ages is only found in regions with Carolingian roots (Fried 2016). Thus Charlemagne’s empire was the precursor of and laid the foundation for feudalism of the High Middle Ages. Charlemagne’s biographer Einhard affirms that throughout his reign he was keen “to reestablish the ancient authority of the city of Rome under his care and influence, and to defend and protect the Church of St. Peter” (chap 27). But because the institutional means at his disposal were rather meager, he had very limited surplus to train and pay legions of troops. During his lifetime, the unity of his empire was continuously at risk of a breakdown. His claim to be supreme ruler was therefore not independent, but depended on his special relationship with the Church. The spread of the clergy is perhaps his most enduring institutional legacy.
that began to be associated with the lord-vassal bond” (Berman 1983: 305). Fealty became a legally enforceable principle of personal loyalty, both between the king and the lords, and between lords and their vassals. It retained the communitarian principle, being based on personal identity, rather than more abstract categories. Yet unlike the kinship loyalty from which it derived, the fealty contract could end, with both sides free to seek the services of another. As Bloch (1961: 451) puts it, “vassal homage was a genuine contract and a bilateral one. If the lord failed to fulfil his engagements he lost his rights.” By the same token, if the vassal did not provide military services when called upon, or some value that commuted that obligation in terms of money, then that vassal’s land could be taken and the vassal removed.

The West’s debt to these legal developments is obvious. Berman (1983, 309) depicts the principle of reciprocity of rights between lords and vassals as the West’s first exposure to the notion of mutuality of legal obligations among persons of different rank. Bloch (1961, 197) notes that after the mid-eleventh century, the classic foundation of feudal liberty and privilege, i.e., the notion of equality in privilege, achieved recognition as law. On a more pedestrian level, the category of “felony” derived from a breach of faith owed by the king’s subjects, and that of “trespass” from a breach between masters and servants.

The contractual conception of political authority was unique to feudal law, and distinct from both the Roman and Germanic legal orders it drew on. Roman law had not concerned itself with constraining rulers. This element of the Western tradition of limited government, therefore, owes its genesis to the mutual character of the bond of fealty. Feudal law emphasized the endowment of autonomous persons as bearers of rights and obligations. And although the particular rights and obligations differed according to social and economic status, they attached to individuals in their capacity as individuals, regardless of rank.

The conception of sovereignty eventually came to be defined in terms of the rights and obligations of fealty that defined the relationship between the knightly aristocracy and the crown. Transferring the concept of mutual responsibility that governed the lord-vassal relationship to the political sphere enabled the Church to defend the right of resistance to a bad prince. This right of resistance was based upon “the universally recognized right of the vassal to abandon the bad lord”

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6 Japanese feudalism, by contrast, which shares many features with that of the West, differs in two ways: “the vassal’s submission was much more unilateral,” and “the divine power of the Emperor remained outside the structure of vassal engagements” (Bloch 1961, 452).
Feudalism was both the cause of and the solution to the problem of endemic social disorder throughout European society in the early middle ages. On the one hand, legally defined loyalty ties provided a hierarchical order in spite of the apparent fragmentation, and a thicker network than would have been possible under solely kinship bonds. It linked the feudal elite across territorial boundaries into a network of loyalty ties that transcended kinship networks and therefore could be the nucleus for the developing state organizations. Without such a network, the Roman Church would not have been able to exercise the coordinating power across Christendom that it later did. On the other hand, because the feudal lords were a warrior class, these linkages also kept Europe mired in constant petty war for centuries.

**Consolidation of Feudal Custom and its Rearticulation as Law**

At some point around 1050, students at the University of Bologna rediscovered the Justinian code, the multi-volume codex of Rome’s civil laws handed down from every emperor, including Justinian’s additions. Over the ensuing centuries, Roman law made a second, and more significant, ingress into the Feudal order.

At the time, property arrangements in early feudal Europe were still recognizably Germanic. The tribal system of Gewere, for example, governed land holding. Gewere failed to clearly distinguish between legal title and physical control. The Germanic tribes recognized various forms of limited ownership, but unlike movables such as cattle or sheep, land belonged to each family collectively. Family ownership had gradually developed into the private ownership of the family head, but for a long time that head could alienate land only with the consent of the nearest heirs. Such an arrangement stymied commerce not only in land, but also in the commodities that might be produced on the land if it were alienable. As trade and commerce began to pick up in the eleventh century, Gewere was felt to be increasingly restrictive. A modern economy required more formal systems of land transfer.

The usefulness of the Justinian code was immediately apparent. Germanic law was largely unwritten, varied from place to place, and assigned rights and obligations based on personal identity, all features that impeded commerce to a greater or lesser extent. Feudal law, to the extent that it differed from traditional Germanic organization, had been for the most part narrowly concerned with lord-vassal relations. The common people were left out and so too were commercial transactions. This gap in secular law was filled using the Justinian code, which
represented a unified and coherent whole. It distinguished, for example, between ownership and possession, and between the different obligations resulting from contracts and torts – distinctions that become increasingly necessary as the volume of commerce increases.

By 1130, the Justinian code had again spread across Europe in the curricula used by the newly forming law schools. At this point a unified legal code served the interests of a great number of groups. Merchants and city-dwellers were eager to adopt it because of its predictability and uniformity, and indeed the code’s first post-Roman usage is reputed to be its voluntary adoption by Spanish merchant fairs. By codifying the necessary and sufficient conditions under which a property owner was entitled to redress, Roman influences enabled individuals to extricate their property from communal control. This liberty, which had previously been enjoyed by all Roman citizens, was reclaimed first by urban dwellers across Europe, but was later extended to all inhabitants and subjects of kings as Roman law enabled jurists to override communal practices such as Gewere.

The kings of Europe, however, had grander plans. A ready-made rationalist law held out the possibility, previously remote, of a centralized state whose legitimacy consisted in law rather than custom. On the bedrock of communitarian-style Germanic public order, therefore, political leaders – especially French kings – adopted elements of Roman law during the late medieval and early modern periods to promote universalism, to codify the spheres of the law, and to inculcate universal obedience to the state. Kings employed jurists from as early as the 1200s to augment their own legitimacy, and to codify and harmonize previously unwritten elements of the legal

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7 North of the Alps, literacy and knowledge of Latin among the elites had made great progress during the reign of Charlemagne, thanks in large part to the spread of schools established by the churches. These schools became essential to the exercise of royal power: they trained scribes, chaplains and administrators. South of the Alps and in Italy in particular a system of lay education with an emphasis on teaching the law existed since classical antiquity. Accordingly, during the Carolingian epoch, Roman law operated only in the South of France and Italy. Elsewhere the enforcement and promulgation of law was unstable and depended on local custom and oral dissemination. Frankish law was unwritten, relying upon oral tradition and ad hoc verdicts that treated every decision as a new instance (Fried 2016). Although one of Charlemagne’s central aims was to establish order throughout the realm in an even-handed way, his influence can be found in Frankish, Bavarian, and Alemannic regions despite the prevalence of oral legal traditions. But among the Saxons, Thuringians, Frisians, and Angles, few enduring signs of Charlemagne’s influence are perceptible.
order. These jurists compiled and revived Roman law, aided by canon law, to assert royal prerogatives in diplomacy, defense, legislation, taxation and justice.

The diffusion of Roman law into feudal structures also provided protection for the politically weak. Serfs under the manorial system were not protected by Feudal law; that responsibility fell to the king. To exercise it effectively, kings employed jurists that enabled royal courts to address many activities particularly commercial ones that were not addressed under Germanic law or feudal custom – in a consistent way. As early as the eleventh century, the Church started to articulate the notion that the relationship between the king and his subjects was also governed by the duty of fealty. The contractual basis of political sovereignty, inherited from Germanic custom, thus gained a dual character: in addition to the ties of mutual obligation between the nobles and the king, Roman law also provided the scaffolding for a similar mutual obligation between the king and his people.

One aspect of this duty was the establishment of kings’ courts to hear the grievances of the common people and adjudicate these on the basis of the law developed along Roman lines by the medieval jurists. In principle every subject, no matter how humble, was entitled to his or her day in court to defend their honor, their person and their property. From this notion came the right of the king to extend his power by expanding the sway of his own judicial institutions, often at the expense of the rights formally exercised by local lords.

At the same time, Roman law was hardly an unalloyed instrument of emancipation. In addition to its effects on property law, Roman law was also used to protect the property and rights of privileged orders, such as the urban guilds, and the landed nobility to whom peasants owed dues. By enabling corporate groups such as these to define their liberties as distinct from those of other social groups, it engendered an adversarial political situation that came to look like class conflict in the early modern states. In addition, Roman law’s more developed notions of property were useful for commodifying these privileges, which were often capitalized and offered for sale. Not until after the French Revolution and Napoleon’s rise as the new Justinian did the law of the

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8 In this sense, applying notions of class conflict to feudal and pre-feudal systems such as the Germanic order is anachronistic. Domestic political interests in Europe fractured along the lines of economic class largely due to this Roman legal heritage.
nation eliminate the sale of state prerogatives to individuals as private privileges.\(^9\)

This process of Romanization and rationalization continued through the seventeenth and eighteenth centuries, as French kings actively appropriated the public rights and functions of the seigneurs, strengthening the bureaucracy, the tax systems, and civil courts. The liberties once enjoyed by the hereditary nobility were codified into public rights. State authority—the strengthening of royal justice and taxation that supplanted the private authority of the local nobility—was facilitated by the logic of Roman law that presumed a unified state (Root 1985).\(^{10}\)

Roman ideas were integral to the development of a general European legal tradition. It offered a store of legal principles and rules invested with the authority of ancient Rome and

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\(^9\) It is difficult to disentangle the effects of Christianity and that of Roman law because the Church articulated and promulgated its rule using the protocol of Roman law (Berman 1983). By the later middle ages “the Germanic peoples adopted the theory inherent in Christian doctrine—which was almost wholly of a Latin-Roman complexion—and the ascending theme [i.e. bottom-up legitimacy] was, so to speak, driven underground” (Kelly 1992). The Justinian compilation of Roman law was rediscovered and made the basis for legal instruction in eleventh-century Italy, and in the sixteenth century came to be known as *corpus juris civilis*. Succeeding generations of legal scholars throughout Europe adapted its ancient principales to contemporary needs. Medieval scholars of Roman Catholic church law, or Canon law, were also influenced by Roman law scholarship as they compiled existing religious legal sources into their own comprehensive system of law and governance for the Church. The clergy were central to medieval culture, politics, and higher learning. By the late Middle Ages, these two systems of law – civil and canon, both derived from Roman law – were taught at most universities and formed the basis of a shared body of legal thought common to most of Europe.

\(^{10}\) The French Revolution extended the work initiated by the Bourbon Monarchy and exemplifies the role of law as a preference coordinator. The administrative reorganization of France during the revolutionary period was guided by legal principles used by several generations of royal officials operating within the legal framework being built by the centralizing state. The monarchy took over many of the administrative functions of the feudal lords and supplanted seigneurial with royal jurisdiction. It protected peasant rights against the nobility, and over time this jurisdiction came to dominate peasant ties to their lord. This process begun by Francoise I and continued during the centralizing Bourbon monarchies of Louis XIII-XVI, gave rise to the sentiment of equality before the law. When the Constituent Assembly abolished feudal dues at the beginning of the French Revolution in 1789, it used terms and raised issues from pre-Revolution court cases in which peasant communities contested seigneurial authority and dues. Over time the rhetoric became more aggressive, until peasants finally claimed that there was not a single seigneurial right that could not be contested. The language developed by lawyers operating within the formal legal system of the monarchy developed new ways of viewing seigneurial rights and forming the vocabulary to discuss more effectively the grievances of their clients in the countryside. Eventually, lordship as a system of local governance became superfluous, and the dues owed to the lords, residual, their elimination was finally accomplished during the Revolution (Root, 1985).
centuries of distinguished jurists, and it held out the possibility of a comprehensive legal code providing substantive and procedural law for all situations.

Parliaments as Commitment Devices

Alexis De Tocqueville (1955) argued that without the nobility there would be no true constraint on the ruler, and thus no real freedom. De Tocqueville seems to have appreciated the Germanic (communitarian) origins of Western liberty, but not the Roman (rationalist) origins, which is what eventually extended to non-nobles the same right to a trial by one’s equals that originally only belonged to the feudal class.

To the nobility, the monarch was *primus inter pares* and his status was legally constrained. But to the people, his status was steeped in magic and extraordinary power. Since the 8th century Frankish kings were with anointed with sacred oils that gave their spirit a sacred quality that they shared only with the bishops. Bloch (1961) writes that “religious or magical ideas of kingship were only the expression, on the pane of the supernatural, of the political mission recognized as belonging peculiarly to kings—the king as ‘head of the people’.” Although this implied certain spiritual and secular responsibilities of the king to his people rather than simply a unilateral relationship of domination, the people had little recourse to punish a king for malfeasance. On the basis of popular legitimacy, he could rule as an absolutist because the people would face large collective action barriers if they tried to constrain him. The kings’ use of Roman law to establish their power on the basis of a direct connection with the people, therefore, carried with it the danger, inherent to rationalist law, of an unconstrained sovereign, unable to credibly bind itself and make commitments.

The nobles, by contrast, had organizational mechanisms and shared social capital to punish the king for expropriating the rights of his subjects. After a period of consolidation of political power around the king, the nobles began to reassert their own rights and privileges through the creation of parliaments in the eleventh and twelfth centuries, and in this development, we can see the genesis of the unique capacity of Western sovereigns to make credible commitments.

The institution of parliament appeared first in Spain, and spread across the Iberian Peninsula: Meetings that resembled parliament occurred in Catalonia in 1027, formalized in 1192, Castile 1216, Navarre 1253, Aragon 1218-1236, and Valencia 1261. The French Estates General came later, with its first meeting in 1302. The legal precedent of parliamentary pacts resides in the nature of the feudal contract. Parliaments embodied and gave “teeth” to the contractual notion
of government. They allowed lords to observe violations of customs and constraints, and to reduce the leader’s temptation to deny past promises to the supporters.

Ironically however, by binding the sovereign to fulfil his promises and avoid violations of customary privileges, parliaments allowed the king to more effectively pursue his own goals over a longer timeframe.

Ironically, however, by preventing the sovereign from breaking his contracts and violating the rights of his subjects, parliaments strengthened the monarchy over the long term. Without a parliament to prevent these abuses, a king stood to lose the trust of the nobility, and lose his ability to exercise power. When monarchs stayed within the limits set by parliament, they gained the cooperation of the aristocracy, and were able to institute their ideas reliably.\footnote{Kings who tampered with noble privileges, whether those of an individual or the entire group, stood to lose the esteem of the entire nobility. A king could try to bypass the nobles by recruiting new members but the new supporters, of course, would have little reason to trust the king, and the king likewise could expect little loyalty (Myerson 2008). This was the essence of the king’s time-inconsistency problem. The problem of time-inconsistency occurs when a decision maker states a preference for one position but acts according to a different preference once the time for implementation arrives (Kydland and Prescott 1977).}

In addition, just as kings had previously found codification useful for expanding their prerogatives, parliaments found codification useful for safeguarding their privileges. The English nobility’s Magna Carta is not unique: tradition-preserving conventions and formal constitutions spread throughout Europe around this time, and nobles throughout Europe were able to gain codified rights from the kings.\footnote{Whereas English language literature tends to highlight the Great Charter of 1215, Bloch (1961, 843) traces the germ of that document further back to the Oaths of Strasbourg, and the pact between Charles the Bold and his vassals of 856.} In this sense, the nobles were able to cut short the process of Romanization that would have left Europe again with an entirely rationalistic and unconstrained political order.

A formal written constitution served as a focal point that prevented the ruler from arbitrarily displacing supporters who provided past service. Paradoxically, by limiting the discretion of the king, it built collective confidence and helped the leader gain support. A trustworthy leader allows himself to do less, but is allowed to do more. This contributes to positive expectations about rights being protected in the future, which makes planning over longer timespans feasible. If not for this institutionalization of trust it would be more difficult for the
leader to gain support when challengers emerge. Lack of commitment power presents an opportunity for a challenger, who could unite factions that do not expect equal treatment. With a constitution, on the other hand, any legal innovations that disrupted longstanding relationships would be unenforceable. This synthesis provided Europe with a kind of stability built on limited but strong government.

The Contrast to China

The example of China provides an instructive contrast. The long periods of stability of Chinese dynasties are closely linked to the institutionalization of rationalistic political Confucianism as an official ideology that legitimated the governance functions of the imperial state, and established a common Confucian curriculum to steer the exercise of political authority. It enabled China, like Western Europe, to accomplish what few nations ever have: political stability over long periods, a strong state tradition, civilian rule, an economy capable of supporting large metropolitan centers, a flourishing of philosophies and beliefs and the creation of a state meritocracy. These strengths in Chinese history match the developmental requirements of many of today’s developing regions.

Nevertheless, although the notion of meritocracy embodied in China’s administrative ethos prevented more extreme acts of political predation, China has no communitarian tradition akin to Germanic law that would systematically protect individuals and local communities from an overbearing state. Recent scholarship on the history of China claims that absorbing or eliminating competitors and becoming an all-encompassing source of political and moral order is what animates the underlying unity of Chinese culture, and that again it can be the key to the political reconstruction of a great power in the East (Pines, 2012).

Internal conflict peaked during the Warring States period (453–221 BCE) that laid the institutional foundations for the unification of China under a single empire. The victors in intra-state competition embraced highly rationalist means of imposing central authority, stifling dissent and imposing strict discipline. Thus China possesses two distinct traditions. On the one hand, it

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13 The Qin state in the third century B.C. created economic foundations for a universal empire: mobilizing the entire society for warfare, Qin rulers modeled the society on military lines, registering the entire population into household units responsible for taxes, military service and public works. Local officials that did not meet quotas were harshly punished. Scrupulous records were kept according to the ethos of “register households in order to make the people equal” (von Glahn 2016).
has a legalist tradition of comprehensive administrative and criminal law that enables the state to mobilize men and resources. Legalism enabled the monarchs of the Warring States period to expand revenues, repress dissent, and enlarge their armies. At the same time, a Confucian tradition of meritocratic administration seeks harmony via obedience to tradition and usually follows legalist intervals to create a broader base for regime legitimacy. Both traditions are highly rationalistic and supportive of a strong centralized state.

In China, the emperor was able to achieve his ideal scenario: the demolition of the power base of the aristocracy, and the establishment of a permanent bureaucracy under the direct control of the administration.\textsuperscript{14} Already by the fourth century BCE Chinese rulers exercised extensive authority over economic resources in the name of the commonwealth, and this was counterbalanced by responsibility to use the power of the state to ensure the basic needs of the population. They possessed a capacity for meticulous record keeping that European states could not match until modern times. The responsibilities of Chinese Emperors were more comprehensive and inclusive, and were experienced by the people in a more daily way. The ideal elaborated by Confucian tradition is that the political rule of government is established by heaven for the benefit of the people, and that rulers should aim to attain support by exhibiting morally exemplary conduct and by protecting the livelihoods of the population from adversity.\textsuperscript{15}

As a practical matter, kings in Europe did not have this option. The powers and responsibilities of European kings evolved from magical to contractual, but they never took on the all-encompassing character of Chinese monarchs. European monarchs did not have the administrative machinery to either collect sufficient revenues or to undertake extensive every-day management of the polity. The governance of commerce belonged to the towns, irrigation was under the jurisdiction of the lord’s court, and education fell within the jurisdiction of Church

\textsuperscript{14} The birth of China’s autocratic civic traditions is associated with the extermination of its aristocracy at a very early stage in Chinese history, when mobilization for warfare was undertaken via bureaucratic institutions that replaced patrimonial governance by a hereditary elite with a fiscal state, run by officials. The aristocracy was stripped of intermediary role between the monarchy and the people. In establishing a direct relationship with its subjects the legitimacy of the ruler in China came to depend on far greater extent than in Europe on the economic well-being of the population.

\textsuperscript{15} Compared to China’s Emperor, the public administration of European Kings was limited in scope. European towns as autonomous communities managed schools, hospitals, and markets.
leaders. Because they lacked this overawing power, European kings found it necessary to bind themselves, to make credible commitments to the nobles in order to shore up their own power via leadership of a coalition of nobles. To have durable power, European kings had to credibly motivate the nobility as captains of society to cooperate with the directives of leadership.

This form of credible commitment, derived from coalitional limits on the king’s power, was impossible in China. No group in Chinese society had sufficient military, political, or ideological strength to undercut the Confucian framework of centralized authority and to demand rights that could institutionally constrain the center.

Critical Junctures in the Formation of Western Liberalism

Historians have had a penchant for seeking the institutional basis of the rise of the West in a series of critical junctures. This approach is most recently adapted by North, Wallis, and Weingast (2009) and Acemoğlu and Robinson (2012). Both attribute credible commitment to early modern parliaments, ignoring the feudal origin of parliamentary pacts. Acemoğlu and Robinson (2012) claim that critical junctures launch nations down different paths because of different points of origins. For both authors, the Glorious Revolution of 1688 and the rise of parliament that ensued are viewed as critical junctures that led to a “fundamental redesign of the fiscal and governmental institutions” initiating Britain’s trajectory toward the industrial revolution (North and Weingast 1989, 804).

However, it is reasonable in light of the evidence to push back the causal chains. North and Weingast (1989) take the Glorious Revolution as their exogenous shock, out of which arose the capacity of early modern British exchequer to make credible commitments. Nevertheless, an event like the Glorious Revolution belies a deeper continuity. The capacity of early modern European states derives from the particular way in which feudal society reconstituted itself following the fall of Rome. The emphasis on credible commitment as a means to strengthen the king’s finances associated with the parliamentary pact and Glorious Revolution of 1688 can be traced to the Dialogue of the Exchequer of 1187 (Henry II), which states that the crown could not be prevented from usurping power beyond the limits set for it by custom, but if he were to do so this would weaken public confidence and therefore increase the likelihood that the king would have to resort to force, thus weakening his legitimacy. The king’s authority had a dual nature that required proper balance: the need for arms to confront rebels and foreign enemies, and the need for just laws to govern peaceful subjects. In this sense, the link between parliamentary institutions and financial
development had legal foundations in the medieval origins of the English state. Recognizing the medieval legal foundations of parliamentary constraint forms a bridge between the literature on the causes of the Great Enrichment e.g. (Mokyr 1990b; Mokyr 1991; Mokyr 1990a; D. C. North, Wallis, and Weingast 2009) and the literature on the origins of legal traditions out of the Neolithic revolution (e.g. Temin).\(^{16}\)

The political expression of these evolutionary processes may have been sudden, but the legal underpinnings formed gradually. The Glorious Revolution of 1689 was the end result of a process whose antecedents predated it by at least 500 years, punctuated by Magna Carta in 1215, which itself reflected the fundamentally contractual nature of vassalage and fealty that slowly took institutional form in the context of parliamentary rights. It was a revolutionary change, yet remained within British legal tradition, and as a framework for an ongoing bargaining process between various social groups it was a continuation of tradition. Pacts that favor a dominant group in one period, in the ongoing character of that tradition, can be the basis for the next round of citizen engagement. For example, the rights won by nobles to participate in lawmaking and or to trial by peer were eventually demanded by other corporate groups such as merchant and craft guilds in early European society. These rights became more inclusive over time in ways that were consistent with the underlying philosophical premises of the social contract and can be viewed as a reinterpretation of the past to meet current and future conditions.

**Lessons for Comparative Legal Studies: Preference Formation and Post-Conflict Peacebuilding**

We have linked the trajectory of European liberalism to the unique confluence of two early legal systems, Roman law and Germanic law, from the fall of Rome, through feudal institutions to the establishment of parliaments and, finally, the establishment of the early modern state that institutionalized credible commitment into a legal foundation for the protection of private property from the sovereign’s grasp.

China’s legal trajectory through dynasties and nomadic invasions features a salient difference: whereas the Germanic hordes brought with them a resurgence of communitarian law in Europe, none of the central Asian steppe invaders imposed their customs on the Chinese; instead

\(^{16}\) The document also asserts that if the king behaves unlawfully towards the property of the subjects, they will hide their treasure and treasure that is hidden is of no value to anyone.
they adopted the existing Confucian administration of Chinese society. This left China without a
tradition of communitarian law that might temper or mitigate its rationalist legal traditions and
prevent the overwhelming predatory dominance of the central state (Zhao 2015). For this reason,
China’s political leaders have never been able to credibly commit to protect the rights of their
subjects in the way that European states have been able to do since the early modern era. This has
inevitably resulted in a different set of incentives that affect the potential for economic dynamism.

Legal institutions played a critical role in growth of the West’s economic dynamism from
the commercial revolution of the eleventh and twelfth centuries onward. At its best, law provides
constituents with the confidence to forgo their differing short-term personal interests in order to
engage in contracts that secure their longer-term interests. At its worst, when there is no legal
framework to protect rights from predation, all rents must be seized immediately, even if they are
not particularly profitable, and the costs to maintain them are high.

Building a legal order is critical to the success of economic policy. If a government has
only weak to incentives to commit to promises of a certain action or course of actions, such as
keeping the value of the currency stable, economic actors who recognize this will respond
opportunistically, selecting short-term payoffs over longer-term investments. This behavior
produces lower levels of investment across society.

Simple as it may sound, the practical implications are far from straightforward. Still, the
evolution of the Western legal tradition provides some clues about how to engage with the
complexity of governance in fragile zones, where an organized state framework is either absent or
has dissolved. Institutional and legal frameworks must not be introduced as a parallel process
conducted by experts but must take into account “tacit” knowledge – the knowledge embedded in
practice (Polanyi 1958) – in an iterative and empirical process. The method of institutionalizing
law, whether top-down or bottom-up, must be balanced to accommodate an interplay of formal
and informal rules.17 The Roman Law of Justinian treated law as distinct from morality and

17 “If changes in formal rules are in harmony with the prevailing informal rules, the interaction of their
incentives will tend to reduce transaction costs in the community (that is, the cost of making an exchange
and the cost of maintaining and protecting the institutional structure) and clear up resources for the
production of wealth,” writes Svetozar Pejovich in “The Effects of the Interaction of Formal and Informal
the prevailing informal rules, the interaction of their incentives will tend to raise transaction costs and
reduce the production of wealth in the community.”
custom. It would have required Roman legions to impose it uniformly across Europe. Berman tells us that instead “It was the twelfth-century scholastic technique of reconciling contradictions and deriving general concepts from rules and cases that first made it possible to coordinate and integrate the Roman law of Justinian” (9).

A functioning rationalist legal system must coordinate the norms and beliefs that people have internalized with formal rules. If custom is at too great a variance with formal law, the result will be that, at best, the law is highly costly to administer, or, at worst, old patterns of conflict revive in the absence of those protective customs. The Western tradition arose as contact with Roman law induced the rationalization of Germanic custom. This process proved robust because the gradual imposition of the former was done with an eye to existing practice, even when that meant forbearance of behavior outside the spirit of formal law.

Concluding Remarks

There is a growing sense that the West’s legal inheritance of liberalism is at risk in the contemporary political situation. During the past few years, numerous books and articles have highlighted the dangers to the Western conception of liberalism, both from within and without that tradition. They generally agree that the uniqueness of the Western tradition is attributed to democratic ideals tracing back to the ancient Greeks. But this misses an essential point about the connections between law and culture understood since the time of the Greeks: Democracy can easily slide into plebian dictatorship, and destroy personal freedom. Hayek (1944, 71) points out, “It is not the source, but the limitation of power, which prevents it from being arbitrary.” Democracy will not guarantee individual freedom unless it is combined with the institutional capacity to ensure credible commitment. Without this limitation, established by fixed rules and undergirded by a shared ethos on the arbitrary use of power, democratic control can easily transition into arbitrary power. If a democratic polity is not abetted by an institutional structure that limits it and enables it to make credible commitments, a collectivist creed may result that snuffs out individual rights.18

18 Coyne and Hall (forthcoming) describe a channel by which rights within an imperial power can be snuffed out: the practices for subduing and surveilling populations during overseas interventions are very often imported back to the home country and applied to monitor the originating population.
In the West limited government has a long historical pedigree that even when monarchies claimed absolute power, the law transcended politics. This was the basis of American constitutionalism: that the lawmakers are themselves bound by the law. The separation of law from political power can be traced to legal sentiment expressed as early as the thirteenth century, that “the king must be a subject of the law, because it is the law that makes the king” (de Bracton and Thorne 1976).

Those concerned about preserving the West’s unique political legacy should remember that constitutional controls over political power separate Western law from the laws of China and the rest of the world. Democracy is not by itself the benchmark of the West’s liberal heritage. Rather, its unique character derives from those political and judicial institutions, supported by a body of legal scholarship that reconciled Germanic and Roman law, that emerged from feudalism to constrain kingly discretion and “tie the King’s hands”. Its legitimacy resides in binding those who govern to the same laws as other citizens, and this legitimacy is the bedrock of the liberalism that has enabled the Western legal tradition to solve the “Madisonian paradox” of power.19

References

19 How to prevent the abuse of governmental power while protecting individual property was a fundamental question for Madison, and other framers of the U.S. Constitution.


