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WHAT MAKES PRIVATE LAW TRANSITIONS SUCCEED:  
LESSONS FROM JAPAN AND FROM AROUND THE WORLD

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## **WHAT MAKES PRIVATE LAW TRANSITIONS SUCCEED: LESSONS FROM JAPAN AND FROM AROUND THE WORLD**

By C. Alexander Evans & J. Mark Ramseyer\*

### ***Abstract***

At some point in the growth of successful economies, informal customary rules of contract, tort, and property are replaced by or supplemented by formal private laws. These transitions sometimes succeed and sometimes fail. Yet little research has examined why. What scholarship exists often asserts that success requires new formal private law rules to have evolved organically and incrementally from within a society.

Japan's successful private law transition at the end of the 19th century suggests otherwise. Japan's transition was sudden and derived from exogenous legal traditions, but it was highly successful. Japan's example suggests that what matters most to the success of a private law transition is how well the new private law rules integrate with preexisting business customs.

True—organic, incremental change is more likely to integrate well, and so is more likely to succeed. But it is the harmony of integration that matters, not the source of the new rules. Figuring out these ingredients for success matters, because getting private law transitions right enormously impacts the well-being of persons throughout society.

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## Introduction

A great deal of legal scholarship examines public law transitions.<sup>1</sup> These dramatic shifts in public law often involve constitutional change,<sup>2</sup> and often coincide with major political changes.<sup>3</sup> Scholars have extensively debated the character and structure of these transitions, identifying which changes are likely to succeed and which are likely to fail.<sup>4</sup> This research is critically important, because public law transitions affect governments around the world.

By contrast, very little legal scholarship has examined private law transitions. Yet private law profoundly affects the lives of ordinary persons.<sup>5</sup> A smooth, efficient, well-functioning system of private law promotes prosperity, distributive justice and human development. A corrupt, backward or otherwise ineffective system of private law strangles productivity and leads to widespread misery.<sup>6</sup>

Given the importance of the subject, what explains this apparent lack of scholarly interest? Perhaps private law transitions are easy. Scholars, then, would pay them little mind because the success of private law transitions would be inevitable and uncomplicated. Alas, a brief history reveals this optimistic picture is grossly inaccurate. Private law transitions *often* fail—sometimes with disastrous consequences.

Why, then, the limited literature? Another explanation could be that private law change is necessarily incremental. And indeed, some of the most successful private law transitions *have* evolved incrementally, one case at a time. This organic, step-by-step formalization describes well the successful private law transitions in England and Holland—two model transitions with an outsized influence on how English-language legal scholars view legal systems around the world.

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<sup>1</sup> See, e.g., AKHIL AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE LJ 453 (1989); DONALD HOROWITZ, *CONSTITUTIONAL CHANGE AND DEMOCRACY IN INDONESIA* (2013).

<sup>2</sup> *Id.* See also BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS* (2000); Franco Bassanini, *Federalizing a Regionalised State: Constitutional Change in Italy* in ARTHUR BENZ AND FELIX KNUPLING (EDS.), *CHANGING FEDERAL CONSTITUTIONS: LESSONS FROM INTERNATIONAL COMPARISON* (2012) at 229-248.

<sup>3</sup> *Id.* (Ackerman 2000). These major political changes are not always declarations of revolution, and not always violent—though, sadly, they often are. For a recent treatment, see GARY JACOBSON, GARY JEFFREY AND YANIV ROZNAI, *CONSTITUTIONAL REVOLUTION* (2020).

<sup>4</sup> See, e.g., Anne Meuwese and Mila Versteeg, *Quantitative Methods for Comparative Constitutional Law*, 230 PRACTICE & TH. COMP. L. 233 (2012) (describing a quantitative model for determining when public law transformations succeed and when they fail).

<sup>5</sup> Private law includes statutes and regulations. See OLIVER WENDELL HOLMES, JR., *THE PATH OF THE LAW* (1881) (describing at length the many sources through which private and public law develops); H. L. A. HART, *THE CONCEPT OF LAW* 72-84 (1961) (describing primary legal rules, the category to which Hart assigns formal statutes and explicit administrative regulations). It includes judicial precedents. See generally Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2007) (identifying judicial precedents as a source of private law in common-law systems). It includes the more general legal principles for which those precedents stand. See RONALD DWORKIN, *LAW'S EMPIRE* (1986) (arguing that legal principles, like the principle that perpetrators should not be rewarded for their misdeeds, are real parts of law). It also includes a wide range of informal and customary practices. J. MARK RAMSEYER, *SECOND-BEST JUSTICE: THE VIRTUES OF JAPANESE PRIVATE LAW* (2015); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001).

<sup>6</sup> For a recent summary of the literature, see Stephan Haggard and Lydia Tiede, *The Rule of Law and Economic Growth: Where Are We?*, 39 WORLD DEVELOP. 673 (2011). See also KENNETH DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2007).

But this explanation, too, fails to capture the whole story. While many successful private law transitions have developed incrementally, some transitions have been quite radical. And, unlike in England and Holland—where the new formal rules were organic and based in English and Dutch culture—many of history’s radical transitions were imposed from the outside, by the authority of some external power.

The literature that studies these radical changes has tended to focus on specific aspects of private law change. So, for example, a body of literature studies legal transplants, where a modern legal system that developed organically is grafted onto another society, displacing that society’s existing laws. The frequent failure of these transplants has led many scholars to conclude that externally imposed radical legal transitions are doomed to failure. According to these authors, only incremental, organic legal change can succeed at improving private law.<sup>7</sup>

This article challenges that received wisdom. We consider a variety of examples from legal systems throughout history and across the world, with a particular emphasis on Japan. Japan at the close of the 19th Century imposed a sweeping, radical legal transition that was explicitly based on foreign laws. Yet defying skeptics, this new legal order was a roaring success, revolutionizing Japanese commerce and vastly improving the lives of millions of Japanese citizens.

The success of Japan at imposing a radical, externally developed private legal order suggests that a defeatist view of every similar project is too simplistic. Instead, our research suggests that many different factors affect the success and failure of private law transitions. The quality of the new laws is a factor, as is the effectiveness of the customary regime those laws replace. But most important of all is the way that the new and the old rules harmonize—in other words, the way that they fit together.

Getting these ingredients wrong—either because the new laws don’t work (e.g., attempts to ban usury), the old customs don’t work (e.g., Renaissance Romagna), the new and old rules don’t harmonize (e.g., post-Soviet Georgia) or all of these at once (e.g., post-2001 Afghanistan)—leads to economic disaster and often causes deep legitimacy problems for the state.

On the other hand, getting these ingredients right—either organically through incremental change (e.g., Florence, England and Holland) or by careful selection of a new external legal regime that nevertheless well-integrates into society (e.g., Japan)—builds prosperity, strengthens the legitimacy of the state and leads to a fairer, more flourishing society.

## **I. Private Law Transitions**

Private law transitions are sudden changes in the rules that govern private law—law where the State acts as an arbiter of private disputes, generally over contract, tort, and property. Private law provides an alternative to self-help and to other forms of dispute resolution that come along with severe negative externalities. In a private law transition, the rules governing private law suddenly shift—generally from informal customs to formal written laws.

### **A. The Economics of Private Law**

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<sup>7</sup> See, e.g., Alan Watson, *From Legal Transplants to Legal Formants*, 43 AM. J. COMP. L. 469 (1995) (arguing that effective law is created incrementally by legal elites within a society separated from that society’s culture); Jonathan Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 ECOLOGY LQ 1295 (2000) (skeptically analyzing the Kyoto Protocol and other vertical legal transplants).

Economies grow only when people devote time and resources to exploiting valuable assets and opportunities.<sup>8</sup> To do this, they must be able to identify and enforce their claims to scarce resources; they must be able to capture the returns to any risks they take; and they must be able to trade their time and assets with other people.<sup>9</sup>

Put conversely, when people do hold clear and enforceable rights to labor and resources, they will hold a right to the returns from their work and investments.<sup>10</sup> When returns are suitably high, these rights provide an incentive to exert effort and to invest.<sup>11</sup> That effort and those investments will tend to move to the projects that produce the largest social gains.<sup>12</sup>

A legal system that partitions and enforces claims to scarce resources is generally a prerequisite to stable growth.<sup>13</sup> Since the 1960s, recognition of this necessity has transformed economic history. If Robert Fogel attracted the most hostility,<sup>14</sup> Douglass North best articulated the new approach.<sup>15</sup> As he put it in a 1970 essay, modern growth flowed from "changes in relative product and factor prices ... and changes in the size of markets induced a set of fundamental institutional changes." These institutional changes -- among which private law was basic -- then "channeled incentives towards productivity-raising types of economic activity."<sup>16</sup>

### B. Formal and Informal Enforcement

Communities can enforce private claims to labor and scarce resources through formal or informal mechanisms.<sup>17</sup> In wealthy modern societies, they tend to enforce them through both.<sup>18</sup>

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<sup>8</sup> See ADAM SMITH, *THE WEALTH OF NATIONS* (1776); Jakob De Haan, Susanna Lundström, and Jan-Egbert Sturm, *Market-Oriented Institutions and Policies and Economic Growth: A Critical Survey*, 20 J. ECON. SURV. 157 (2006) (critically evaluating market-oriented economic growth literature, but nevertheless finding that secure property rights and other liberal market reforms strongly correlate to economic growth).

<sup>9</sup> See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000); See also Robert Ellickson, *Property in Land*, 102 YALE LJ 1315 (1992).

<sup>10</sup> NORMAL LOAYZA AND RAIMUNDO SOTO, *THE SOURCES OF ECONOMIC GROWTH: AN OVERVIEW*, Series on Central Banking, Analysis, and Economic Policies, no. 6 (2002).

<sup>11</sup> Linghui Tang and Peter E. Koveos, *Venture Entrepreneurship, Innovation Entrepreneurship, and Economic Growth*, 9 J. DEV. ENTRPRNR. 161 (2004).

<sup>12</sup> Absent other market interventions, of course. Cf. J. Mark Ramseyer, *Letting Obsolete Firms Die: Trade Adjustment Assistance in the United States and Japan*, 22 Harv. Int'l L.J. 595 (1981).

<sup>13</sup> Frank Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737 (2001).

<sup>14</sup> See ROBERT FOGEL AND STANLEY ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1995).

<sup>15</sup> See, e.g., DOUGLASS NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990); Douglass North, *Government and the Cost of Exchange in History*, 44 J. Econ. Hist. 255 (1984).

<sup>16</sup> *Id.*

<sup>17</sup> See ROBERT ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

<sup>18</sup> Ronald Gilson, Charles Sabel, and Robert Scott, *Braiding: the Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 Colum. L. Rev. 1377 (2010).

Modern communities enforce the most important of their shared behavioral expectations through the courts.<sup>19</sup> Most of the rest they enforce through a graduated set of informal sanctions.<sup>20</sup>

In some geographically remote communities, people may find the formal legal system too distant (and hence too costly) to be of much use.<sup>21</sup> In such cases, they will still maintain a set of expected behavioral norms.<sup>22</sup> If tightly knit, they will then enforce those norms on each other through a range of informal sanctions.<sup>23</sup> Typically, ostracism functions as the most severe.<sup>24</sup>

Even the wealthiest, most modern communities still enforce norms informally.<sup>25</sup> For example, Wall Street traders are notoriously strict when policing re-trading, the practice of asking for a lower price than previously agreed upon when purchasing a fast-moving security.<sup>26</sup> Re-trading is generally legal.<sup>27</sup> Traders consider it improper, however, and enforce strong incentives not to indulge in it.<sup>28</sup>

There are also quasi-legal systems, which work through entirely private fora.<sup>29</sup> Despite maintaining a law-like structure, these regimes lie outside the scope of the law proper.<sup>30</sup> Social arbitration through tribal elders—a common method of dispute resolution throughout much of the world—is an example of quasi-law.<sup>31</sup>

Some communities even maintain entirely distinct sets of parallel legal systems to enforce private norms.<sup>32</sup> In these systems, the arbiter of the disputes (and, usually, the enforcer of

<sup>19</sup> See, e.g., David Trubek, *Studying Courts in Context*, 15 LAW & SOC'Y REV. 485 (1980); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004).

<sup>20</sup> See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEG. STUD. 115 (1992).

<sup>21</sup> See, e.g., Lester Ross, *The Changing Profile of Dispute Resolution in Rural China: The Case of Zouping County, Shandong*, 15 STAN. J. INT'L L. 15 (1989).

<sup>22</sup> Robert Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEG. STUD. 537 (1998).

<sup>23</sup> ERIC POSNER, LAW AND SOCIAL NORMS (2009).

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., Ellickson, *supra* note 17 (explaining how cattle-farmers engage in complicated norm-guided behavior that helps shape nearly every aspect of the cattle industry); Bernstein, *supra* note 20; Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U. PENN L. REV. 1697 (1996); Richard Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365 (1997); Richard McAdams and Eric Rasmusen, *Norms and the Law*, 2 HANDBOOK L. & ECON. 1573 (2007); Tracey Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391 (2000).

<sup>26</sup> Personal Conversation with Daniel Solomon, Vice President of Fixed-Income Trading, J. P. Morgan, November 23rd, 2021 (New York, NY).

<sup>27</sup> The prior agreed price generally has caveats that would be understood in context but are too specific to enforce. Also, transaction costs for enforcement are generally prohibitive. *Id.*

<sup>28</sup> *Id.* Mr. Solomon assures us that anyone guilty of this behavior would never again be hired in the securities industry.

<sup>29</sup> See, e.g., Jon'A Meyer, *"It is a Gift from the Creator to Keep Us in Harmony:" Original (vs. Alternative) Dispute Resolution on the Navajo Nation*, 25 INT'L J. PUB. ADMIN. 1379 (2002); Bernstein, *supra* note 20.

<sup>30</sup> Ellickson, *supra* note 17. See also MICHAEL BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST (2017).

<sup>31</sup> See Elin Henrysson and Sandra Joireman, *On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya*, 43 L. & SOC. REV. 39 (2009): 39-60; Noah Coburn and John Dempsey, *Informal Dispute Resolution in Afghanistan*, Bennington College Reports (2010), <https://crossetlibrary.dspacedirect.org/handle/11209/10481>

<sup>32</sup> Ihsan Yilmaz, *Muslim Alternative Dispute Resolution and Neo-Ijtihad in England*, 2 TURKISH J. INT'L REL. 1 (2003).

opinions) is an authority other than the state.<sup>33</sup> Jewish law has a lengthy and developed history, and Jewish religious courts are sophisticated judicial actors.<sup>34</sup> But Jewish law is often enforced by the community, rather than the state.<sup>35</sup> The sanctions Jewish courts impose—shame, loss of status within the community, expulsion, or other religious sanctions—are not enforced by the state's arms.<sup>36</sup> But they can be powerful sanctions, nonetheless.<sup>37</sup>

### C. Formality and the Scope of Trade

Formal, explicitly state-enforced rules let investors and traders expand the scope of their businesses beyond their immediate social group.<sup>38</sup> For most of human history, people invested and traded according to pre-formal customs.<sup>39</sup> Shaped by on-the-ground business practice, these customary rules tended to be adaptable. They tended to suit local economic patterns.<sup>40</sup> And because they relied for their continued existence on mutual (albeit often tacit) consent, they tended to avoid outrageous results.<sup>41</sup> At times, they could govern remarkably complex systems,<sup>42</sup> like traders in Afghanistan,<sup>43</sup> diamond dealers,<sup>44</sup> and farmers in California.<sup>45</sup>

The formal legal system expands the reach of compliance measures to anyone subject to the jurisdiction of the state.<sup>46</sup> When communities enforce their rules through informal sanctions, they can often compel compliance from members within the community.<sup>47</sup> Over people outside

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<sup>33</sup> *Id.* See also Ellickson, *supra* note 17.

<sup>34</sup> See ED SANDERS, *JEWISH LAW FROM JESUS TO THE MISHNAH: FIVE STUDIES* (2016); NEIL HECHT, ET. AL., *AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW* (1996).

<sup>35</sup> Moshe Silberg and Amihud Ben Porath, *75 Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306 (1961).

<sup>36</sup> Suzanne Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157 (1990).

<sup>37</sup> Ellickson, *supra* note 17 at 208-214 (discussing the 'stick' effect of these sort of sanctions).

<sup>38</sup> Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 5 U. PENN. L. REV. 1765 (1996). See also Michael Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43 (1989); Bruce Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989). But see Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE LJ 1341 (1947).

<sup>39</sup> See Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT'L L. 39 (2004).

<sup>40</sup> See, e.g., Bernstein, *supra* note 38. "Primitive" societies, to use Richard Posner's term, Richard Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J. LAW & ECON. 1 (1980), order their affairs by rules grounded in the informal side of this spectrum—by custom, norms or at most by quasi-law. As economies become more complex, however, societies tend to shift to more formal systems of commercial governance. See, e.g., GEORGE MOUSOURAKIS, *THE HISTORICAL AND INSTITUTIONAL CONTEXT OF ROMAN LAW* (2017).

<sup>41</sup> Ellickson, *supra* note 17.

<sup>42</sup> See, e.g., Howard Stein, et al., *The Formal Divide: Customary Rights and the Allocation of Credit to Agriculture in Tanzania*, 52 J. DEV. STUD. 1306 (2016).

<sup>43</sup> See MAXWELL FRY, *THE AFGHAN ECONOMY: MONEY, FINANCE, AND THE CRITICAL CONSTRAINTS TO ECONOMIC DEVELOPMENT* (1974).

<sup>44</sup> Bernstein, *supra* note 20.

<sup>45</sup> Ellickson, *supra* note 17.

<sup>46</sup> Posner, *supra* note 40.

<sup>47</sup> *Id.* at 15-28.



that community, however, these sanctions have little force.<sup>48</sup> A firm that can rely on state-enforced sanctions can therefore contract with a broader range of suppliers and a larger number of buyers.<sup>49</sup>

With a broader range of potential suppliers and buyers, a firm will be able to exploit greater economies of scale—and the specialization and division of labor that flow from it.<sup>50</sup> This increased diversity of commercial options, however, weakens the power of informal rules to secure compliance.<sup>51</sup> Shaming is a powerful tool in small homogenous society where people can communicate with each other.<sup>52</sup> It is less powerful when applied to merchant traders who may visit the same port only once per year.<sup>53</sup>

## **II. Failed Legal Transitions**

Many societies have successfully transitioned to well-functioning regimes of formal private law rules.<sup>54</sup> This transition is generally an essential element to igniting exponential growth.<sup>55</sup> Yet, these transitions often fail—sometimes catastrophically. Despite the importance of getting these transitions right, and despite the fragility of their success, the subject of private law transitions is relatively understudied.

Public law transitions—primarily in the form of radical constitutional change—have been thoroughly studied by the legal community.<sup>56</sup> By contrast, private law transitions have attracted far less attention—and much of that attention has focused on narrower subsets of private law change, like legal transplants<sup>57</sup> and mergers of legal systems. This is unfortunate. Getting a private law transition right profoundly benefits the ordinary people in society—and builds enormous legitimacy for the state.<sup>58</sup> Getting private law transitions wrong can lead to economic collapse<sup>59</sup>—and often to government collapse as well.<sup>60</sup>

### **A. Historical Examples**

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<sup>48</sup> *Id.*

<sup>49</sup> Richard Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982).

<sup>50</sup> See generally Smith, *supra* note 8.

<sup>51</sup> Bernstein, *supra* note 20.

<sup>52</sup> Ellickson, *supra* note 17.

<sup>53</sup> JANET LANDA, TRUST, ETHNICITY, AND IDENTITY: BEYOND THE NEW INSTITUTIONAL ECONOMICS OF ETHNIC TRADING NETWORKS, CONTRACT LAW, AND GIFT-EXCHANGE (1994).

<sup>54</sup> See, e.g., HAROLD COOK, MATTERS OF EXCHANGE: COMMERCE, MEDICINE AND SCIENCE IN THE DUTCH GOLDEN AGE (2007) (discussing Holland's successful private law transition); JOHN LANGBEIN, ET. AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS (2009).

<sup>55</sup> KENNETH POMERANZ, THE GREAT DIVERGENCE (2021).

<sup>56</sup> See Amar, *supra* note 1; Ackerman, *supra* note 2.

<sup>57</sup> Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EURO. COMP. L 111 (1997).

<sup>58</sup> See de Soto, *supra* note 9.

<sup>59</sup> See John Marangos, *Shock Therapy and Its Consequences in Transition Economies*, 48 DEVELOPMENT 70 (2005).

<sup>60</sup> Legrand, *supra* note 57.

Failed private law transitions are, sadly, not a new phenomenon. For as long as we have had private law, we've had private law transitions—some of which failed.<sup>61</sup> For a taste of this history, we start in the Middle Ages, with two failed attempts to formalize private law rules. The first failed because the new rules made no economic sense. The second failed because the background customary rules were fundamentally unworkable.

### 1. Usury and Mounts of Piety

Some private law reforms fail because they contradict basic economic principles. Take the prohibition on usury. Based on passages from the New Testament, church authorities from as long ago as the Council of Nicea (C.E. 325) sought to ban the practice of charging interest on a loan.<sup>62</sup> This presented an obvious problem: absent interest, no one will lend.<sup>63</sup>

In this religiously circumscribed environment, Jewish merchants offered a straightforward solution.<sup>64</sup> In the process, they created the Western European financial services industry.<sup>65</sup> The Papal ban applied to men and women within the Christian religion. Because Jewish merchants lived outside those religious boundaries, they generally lived outside the jurisdiction of the Papal ban as well.<sup>66</sup> Precisely because of their outsider status, they were able to provide the debt capital that would fund the activities of the largely Christian (non-financial) entrepreneurs.<sup>67</sup>

Jewish merchants also expanded the geographical reach of the capital market.<sup>68</sup> Italy was then a composite of many cities that were effectively separate states.<sup>69</sup> The courts within any one city had jurisdictional reach only over people and firms within that city.<sup>70</sup> By contrast, Jewish merchants had long-term ties with each other across a much broader territory as members of a coherent, relatively tightly knit ethnic group. Against each other, they could enforce contractual performance by invoking sanctions specific to their community.<sup>71</sup>

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<sup>61</sup> Jody Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEG. STUD. 377 (1997). Others trace their origins to more inchoate customs, trade practices, and informal agreements.

<sup>62</sup> Wayne Visser and Alastair Macintosh, *A Short Review of the Historical Critique of Usury*, 8 ACCT. BUS. & FIN. HIST. 175 (1998); SIDNEY HOMER AND RICHARD SYLLA, *A HISTORY OF INTEREST RATES* 70 (3rd ed.) (1991). Interestingly, prohibitions against charging interest can also be found in the Torah; these provisions have led to quite sophisticated and elaborate contracts within the Orthodox Jewish community. Several cases in New York have addressed the meaning of these unusual contracts. See James Ackerman, *Interest Rates and the Law: A History of Usury*, 61 ARIZ. ST. LJ 1 (1981).

<sup>63</sup> See John Munro, *The Medieval Origins of the Financial Revolution: Usury, Rentes, and Negotiability*, 25 INT'L HIST. REV. 505 (2003).

<sup>64</sup> Benjamin Ravid, *The Legal Status of the Jewish Merchants of Venice, 1541–1638*, 35 J. Econ. Hist. 274 (1975).

<sup>65</sup> Ackerman, *supra* note 62.

<sup>66</sup> Kenneth Stow, *Papal and Royal Attitudes toward Jewish Lending in the Thirteenth Century*, 6 AJS Rev. 161 (1981).

<sup>67</sup> Aaron Kirschenbaum, *Jewish and Christian Theories of Usury in the Middle Ages*, 75 JEWISH QUART. REV. 270 (1985).

<sup>68</sup> *Id.*

<sup>69</sup> DANIEL WALEY AND TREVOR DEAN, *THE ITALIAN CITY REPUBLICS* (2013).

<sup>70</sup> *Id.*

<sup>71</sup> CORNELIA AUST, *THE JEWISH ECONOMIC ELITE: MAKING MODERN EUROPE* (2018).

Unfortunately, the profits of the Jewish moneylenders aggravated endemic European anti-Semitism.<sup>72</sup> In part for that reason, entrepreneurs in Perugia founded the Monte di Pietà di Perugia in 1462.<sup>73</sup> The Monte di Pietà di Perugia tried to opt out of the profit-maximizing framework entirely. Rather than borrow, the new institution raised funds by voluntary charitable contributions. The hope was that this initial sum of donated funds would provide the working capital for the bank. Because donors had contributed the funds out of charity, the Mount of Piety could then lend money (ostensibly to the poor) without charging interest.<sup>74</sup>

Alas, the Mounts quickly failed.<sup>75</sup> Because Mounts could not offer returns, they asked merchants to donate in order to demonstrate their virtue. Predictably, however, too few merchants cared enough about virtue to keep the Mounts funded.<sup>76</sup>

## 2. Ineffective Reforms in Romagna:

During the Renaissance, the direct Papal States occupied a region of modern-day Italy called Romagna.<sup>77</sup> In the Middle Ages, the small towns and rural estates in the area comprised a temporal province governed directly by the Pope.<sup>78</sup> These states paid tax to the Papacy,<sup>79</sup> and the Pope governed them temporally and materially.<sup>80</sup>

Romagna's privileged location should have provided substantial economic opportunity.<sup>81</sup> It was close to Rome.<sup>82</sup> It was connected to Italy's cultural and religious elite.<sup>83</sup> It boasted considerable fertile agricultural land.<sup>84</sup> Indeed, many of the communes within Romagna had been important contributing parts of the Roman Republic and later Empire.<sup>85</sup>

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<sup>72</sup> MARISTELLA BOTTICINI AND ZVI ECKSTEIN, *THE CHOSEN FEW* (2012); Visser, *supra* note 62.

<sup>73</sup> Ariel Toaff, *Jews, Franciscans, and the First Monti di pietà in Italy (1462–1500)*, in SUSAN E. MYERS, STEVEN J. MACMICHAEL (EDS.), *FRIARS AND JEWS IN THE MIDDLE AGES AND RENAISSANCE* (2004) at 239-253.

<sup>74</sup> *Id.* Ackerman, *supra* note 62.

<sup>75</sup> Panu Kalmi, *The Role of Stakeholder Banks in the European Banking Sector* in EWA MIKLASZEWSKA (ED.), *INSTITUTIONAL DIVERSITY IN BANKING* (2017) at 33-50.

<sup>76</sup> Maristella Botticini, *A Tale of "Benevolent" Governments: Private Credit Markets, Public Finance, and the Role of Jewish Lenders in Medieval and Renaissance Italy*, 60 *J. ECON. HIST.* 164 (2000).

<sup>77</sup> JOHN LARNER, *LORDS OF ROMAGNA* (1965).

<sup>78</sup> *Id.* See also C. THOMAS MCINTIRE, *ENGLAND AGAINST THE PAPACY 1858-1861: TORIES, LIBERALS AND THE OVERTHROW OF PAPAL TEMPORAL POWER DURING THE ITALIAN RISORGIMENTO* (1983).

<sup>79</sup> Mauro Carboni, *Public Debt, Guarantees and Local Elites in the Papal States (XVI-XVIII Centuries)*, 38 *J. EURO. ECON. HIST.* 149 (2009).

<sup>80</sup> *Id.* Stow, *supra* note 66.

<sup>81</sup> Donatella Strangio, *Public Debt in the Papal States, Sixteenth to Eighteenth Century*, 43 *J. Interdisc. Hist.* 511 (2013).

<sup>82</sup> Carboni, *supra* note 79.

<sup>83</sup> *Id.*

<sup>84</sup> Lerner, *supra* note 77.

<sup>85</sup> *Id.*

Unfortunately, these economic resources could not overcome Romagna's utterly ineffective customary norms.<sup>86</sup> Property within Romagna had been held throughout the Middle Ages in landed estates maintained by ancient noble families based in Rome.<sup>87</sup> Many of these estate owners traced their ancestry to the old Senatorial families.<sup>88</sup> All title outside these estates, including commercial title to goods and to the means of production (like waterworks), was ambiguous at best.<sup>89</sup>

As a result, for most of the Renaissance, Romagna failed to develop effective norms to regulate private commercial behavior.<sup>90</sup> The few customary rules that existed were generally ineffective.<sup>91</sup> Even when local custom developed between merchants, the highly connected estate families could ignore it, relying on Roman connections to override any customary agreements.<sup>92</sup>

Over time, Popes often tried to tighten control over the region. In their temporal capacity, they issued several edicts that governed private commercial behavior.<sup>93</sup> Unfortunately, most Popes did not understand the commercial forces shaping the region's markets.<sup>94</sup> They decreed rules against usury that were ineffective, and often promoted corruption.<sup>95</sup> They did little better with other commercial decrees—at one point, the pope banned the sale of goods for profit entirely.<sup>96</sup>

Unsurprisingly, the combination of poor customary rules and ineffective commercial law led to poor results. Despite Romagna's natural resources, the economy lagged throughout the Renaissance.<sup>97</sup> In some ways, that legacy continues to plague the region's economy to this day.<sup>98</sup>

### B. Modern Examples

The medieval Popes did not dedicate much energy to understanding business or economics. Modern reforms—based on an improved understanding of microeconomics and legal theory—might seem likely to do better. Many countries seeking to transition to modern economic rules

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<sup>86</sup> Stefano Coronella et al., *Fraud and Incompetence: Multiple Failures in the Papal States* in ACCOUNTING HISTORY (2021).

<sup>87</sup> Larner, *supra* note 77.

<sup>88</sup> *Id.*

<sup>89</sup> Peter Partner, *The Papacy and the Papal States* in RICHARD BONNEY (ED.), THE RISE OF THE FISCAL STATE IN EUROPE, C. 1200-1815 (1999) at 359-80.

<sup>90</sup> Coronella, *supra* note 86.

<sup>91</sup> Simone Rosati, *Community (Custom) vs. State (Law): The Debate about Property in the Papal States in the 18th–19th Centuries*, 80 STUDIA IURIDICA 335 (2019).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> There were exceptions, of course, and knowledge generally improved over time. But papal economic theories tended to focus on moral criticism of economic policy or economic outcomes, rather than positive understanding of forces shaping the market. *See* RUPERT EDERER, ECONOMICS AS IF GOD MATTERS: OVER A CENTURY OF PAPAL TEACHING ADDRESSED TO THE ECONOMIC ORDER (2011).

<sup>95</sup> PETER SEDGWICK, THE MARKET ECONOMY AND CHRISTIAN ETHICS (1999).

<sup>96</sup> *Id.*

<sup>97</sup> William Caferro, *Warfare and Economy in Renaissance Italy, 1350–1450*, J. INTERDISCIPLINARY HIST. 167 (2008).

<sup>98</sup> Partner, *supra* note 89.

now seek advice from leading academics.<sup>99</sup> And advice is given: from the Restatement of Contracts, to the law of modern security interests, to bankruptcy regimes that prevent the premature liquidation of financially constrained firms—even alternative mechanisms for recording real estate transactions have been thoroughly explored by legal scholars.<sup>100</sup>

Alas, despite this wealth of theory, modern transitions have been haphazard at best. Some new regimes incorporated the advice that scholars offered and thrived. Others incorporated that same advice and failed.

### 1. Afghanistan

Afghanistan is one of the poorest countries in the world, with a moribund economy that generates anemic output.<sup>101</sup> This has unfortunately been the case for most of the past fifty years.<sup>102</sup> Afghans have remarkably sophisticated customary norms governing commercial transactions, but those rules have not promoted economic growth.<sup>103</sup>

True, Afghanistan's recent history has been so turbulent that it is doubtful any private law regime could have facilitated much economic growth.<sup>104</sup> But even before the Communist takeover in the 1970s, Afghanistan struggled economically.<sup>105</sup> In part, the problems follow from simple geography. Afghanistan is a country with enormous regional variation.<sup>106</sup> Afghanistan's mountainous geography, combined with the multiplicity of ethnic and religious backgrounds of her people, has stymied the widespread adoption of any single set of commercial norms.<sup>107</sup> Specific regions have sophisticated customary rules, particularly regarding agriculture and money transfers.<sup>108</sup> But these rules differ dramatically between regions.<sup>109</sup>

The variation in customary law prevented the informal legal system from facilitating inter-regional trade.<sup>110</sup> But Afghan entrepreneurs need to be able to enforce agreements with people outside of their own social networks. To do so, they need formal legal institutions. To exploit economies of scale and the division of labor, in other words, they need a uniform set of rules and

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<sup>99</sup> John Williamson, *The Washington Consensus as Policy Prescription for Development* in TIMOTHY BESLEY AND ROBERTO ZAGHA (EDS.), *DEVELOPMENT CHALLENGES IN THE 1990S: LEADING POLICYMAKERS SPEAK FROM EXPERIENCE* (2004) at 31-33.

<sup>100</sup> *Id.*

<sup>101</sup> VANDA FELBAB-BROWN, *NO EASY EXIT: DRUGS AND COUNTERNARCOTICS POLICIES IN AFGHANISTAN* (2016).

<sup>102</sup> Peter Franck, *Problems of Economic Development in Afghanistan*, 3 *MIDDLE E. J.* 293 (1949).

<sup>103</sup> Ali Jalali, *The Future of Afghanistan*, 36 *THE US ARMY WAR COL. QUART.: PARAMETERS* 9 (2006).

<sup>104</sup> JENNIFER MURTAZASHVILI, *INFORMAL ORDER AND THE STATE IN AFGHANISTAN* (2016).

<sup>105</sup> See Christopher Cramer and Jonathan Goodhand, *Try Again, Fail Again, Fail Better? War, The State, and the 'Post-Conflict' Challenge in Afghanistan*, 33 *DEV. & CHANGE* 885 (2002). See also Franck, *supra* note 102.

<sup>106</sup> Murtazshvili, *supra* note 104.

<sup>107</sup> See LEWIS IRWIN, *DISJOINTED WAYS, DISUNIFIED MEANS: LEARNING FROM AMERICA'S FAILURE TO BUILD AN AFGHAN NATION* (2012) at 1-55.

<sup>108</sup> Jennifer Murtazshvili and Ilia Murtazshvili, *Coercive Capacity, Land Reform and Political Order in Afghanistan*, 36 *CNTRL. ASIAN SURV.* 212 (2017).

<sup>109</sup> Irwin, *supra* note 107.

<sup>110</sup> Murtazshvili, *supra* note 104.

enforcement institutions<sup>111</sup> Afghanistan's regional diversity -- coupled with primitive transportation and communication networks -- made developing those rules challenging.<sup>112</sup>

The U.S. sought to change this. After the invasion of 2001, American advisers promoted a unified set of legal codes.<sup>113</sup> The new unified legal system was designed to bring the different Afghan regions together and to harmonize their private law practice.<sup>114</sup> But this legal system failed, for two primary reasons: (1) it imposed transaction costs that were too high for the issues in dispute; and (2) it failed to address Afghanistan's largest industry.<sup>115</sup>

Because Afghanistan is so heterogeneous, the new legal system emphasized the need for translators and for counsel to be present in order to resolve legal disputes.<sup>116</sup> In principle, this might seem like a prudent requirement.<sup>117</sup> But Afghanistan is so poor that most disputes between private parties involve a very small amount of money.<sup>118</sup> When four parties argue about who is the rightful owner of a chicken, a legal system that requires each party to retain separate counsel is doomed to be ineffective—and consequently ignored.<sup>119</sup>

To thrive economically, Afghanistan also needed a legal regime that helped settle disputes in its largest industry.<sup>120</sup> Unfortunately, that industry is opium, and the new government—backed as it was by the United States and the international community—was not about to legitimize narcotics trafficking.<sup>121</sup> So, the new formal rules failed properly to address the country's principal industry, leaving a huge swath of economic activity untouched.<sup>122</sup>

Even if the new rules had been efficient, any effective legal transition would have needed to address the difficulties involved in the transition itself. In Afghanistan, that would have been hard even in the best of times. Unfortunately, Afghanistan was mired in a two-decade long civil

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<sup>111</sup> See Magnus Holmen, Thaw Tar Min and Emilia Saarelainen, *Female Entrepreneurship in Afghanistan*, J. DEV. ENTRPRNEUR. 307 (2011).

<sup>112</sup> JENNIFER MURTAZSHVILI AND ILIA MURTAZSHVILI, *LAND, THE STATE, AND WAR: PROPERTY INSTITUTIONS AND POLITICAL ORDER IN AFGHANISTAN* (2021).

<sup>113</sup> Torsten Jochem et. al., *Establishing Local Government in Fragile States: Experimental Evidence from Afghanistan*, 77 WORLD DEV. 293 (2016).

<sup>114</sup> Murtazshvili (2017), *supra* note 108. See also Jonathan Goodhand, *From War Economy to Peace Economy? Reconstruction and State Building in Afghanistan*, 58 J. INT'L AFF. 155 (2004).

<sup>115</sup> Murtazshvili (2016), *supra* note 104.

<sup>116</sup> Murtazshvili (2021), *supra* note 112.

<sup>117</sup> See Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 AM. SOC'Y POL. LEGAL PHIL. 3 (2011).

<sup>118</sup> Jenifer Murtazashvili, *Informal Federalism: Self-Governance and Power Sharing in Afghanistan*, 44 PUBLIUS: J. FEDERALISM 324 (2014).

<sup>119</sup> Cf. Terry Anderson and Peter Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. L. & ECON. 163 (1975).

<sup>120</sup> Jenifer Murtazashvili, *Gaming the State: Consequences of Contracting Out State Building in Afghanistan*, 34 CNTRL. ASIAN SURV. 78 (2015).

<sup>121</sup> Jonathan Goodhand, *Frontiers and Wars: the Opium Economy in Afghanistan*, J. AGRARIAN CHANGE 191 (2005). See also Murtazashvili, *supra* note 104.

<sup>122</sup> This is not to say either that these new reforms should have tried to regulate opium nor that doing so would necessarily have proven more successful; such normative theses are beyond the scope of this paper. But it is probably fair to say that any new economic regime that ignores a country's largest industry is very likely to fail. See Jochem, *supra* note 113.

war. Beset by these problems, the new system never caught on, and Afghanistan's economy continued to struggle.<sup>123</sup> So, the attempted transition failed.<sup>124</sup>

## 2. Post-Soviet States

Another example of modern transition failure comes from many post-Soviet countries. The Soviet communist legal regime did a poor job of defining and allocating rights to resources.<sup>125</sup> Soviet laws provided poor security of title.<sup>126</sup> The laws failed to provide the transparency necessary for mortgaging.<sup>127</sup> More broadly, the laws failed to supply the clarity necessary for exchanging a wide variety of claims to land, goods and firms.<sup>128</sup>

Because the communist government banned many formal markets, people traded goods and services through informal mechanisms on the black market.<sup>129</sup> To govern these transactions, they developed their own rules.<sup>130</sup> Inevitably, however, these informal institutions tended to provide only ambiguous title, supplied poor dispute resolution mechanisms, carried relatively high contracting costs<sup>131</sup> and suffered from inconsistent, politicized enforcement.

The collapse of the Soviet Union in 1989-1992 provided an opportunity for rapid economic growth in many of these post-Soviet states.<sup>132</sup> Some boasted a robust and highly trained labor force.<sup>133</sup> Some controlled valuable natural resources.<sup>134</sup> All they seemed to need was a clear and consistent private law system. So, many of the post-Soviet states tried shock therapy: the immediate replacement of all private law rules, from basic principles to detailed minutiae.<sup>135</sup> They recruited famous legal and economic scholars from Western universities, who created civil,

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<sup>123</sup> See Ilia Murtazashvili and Jennifer Murtazashvili, *Anarchy, Self-Governance, and Legal Titling*, 162 PUB. CHOICE 287 (2015).

<sup>124</sup> Irwin, *supra* note 107.

<sup>125</sup> PAUL ROBERTS AND KATHARINE LAFOLLETTE, *MELTDOWN: INSIDE THE SOVIET ECONOMY* (1990).

<sup>126</sup> *Id.*

<sup>127</sup> Roy Friedemann, *Mortgage Markets in Central and Eastern Europe—A Review of Past Experiences and Future Perspectives*, 8 EURO. J. HOUSING POLICY 133 (2008).

<sup>128</sup> See JOHANNES LINN, *ECONOMIC (DIS)INTEGRATION MATTERS: THE SOVIET COLLAPSE REVISITED* (2004); NUMA MAZAT AND FRANKLIN SERRANO, *AN ANALYSIS OF THE SOVIET ECONOMIC GROWTH FROM THE 1950'S TO THE COLLAPSE OF USSR* (2015).

<sup>129</sup> Aron Katsenelinboigen, *Coloured Markets in the Soviet Union*, 29 SOVIET STUD. 62 (1977). See also Roberts, *supra* note 125.

<sup>130</sup> Huseyn Aliyev, *WHEN INFORMAL INSTITUTIONS CHANGE: INSTITUTIONAL REFORMS AND INFORMAL PRACTICES IN THE FORMER SOVIET UNION* (2017).

<sup>131</sup> See ROBIN NAYLOR, *WAGES OF CRIME: BLACK MARKETS, ILLEGAL FINANCE, AND THE UNDERWORLD ECONOMY* (2004) (identifying contracting cost as a principal driver of black-market activity, even in legal goods).

<sup>132</sup> Daniel Berkowitz and David DeJong, *Policy Reform and Growth in Post-Soviet Russia*, 47 EURO. ECON. REV. 337 (2003) (discussing the optimism that pervaded early assessments of post-Soviet economic growth potential).

<sup>133</sup> See ARARAT OSIPIAN, *THE IMPACT OF HUMAN CAPITAL ON ECONOMIC GROWTH: A CASE STUDY IN POST-SOVIET UKRAINE, 1989–2009* (2009).

<sup>134</sup> Alexander Libman and Evgeny Vinokurov, *Regional Integration and Economic Convergence in the Post-Soviet Space: Experience of the Decade of Growth*, 50 J. COM. MRKT. STUD. 112 (2012).

<sup>135</sup> See, e.g., Peter Murrell, *What is Shock Therapy? What Did It Do in Poland and Russia?*, 9 POST-SOVIET AFF. 111 (1993); Marangos, *supra* note 59.

commercial, and corporate codes that promised secure property rights, and sophisticated financial capacity.<sup>136</sup> In some cases, the states implemented these new formal rules nearly overnight.<sup>137</sup>

The legal regimes that countries like Georgia, Belarus and Ukraine implemented were -- in some abstract sense -- excellent codes of private law. Scholars based the codes on templates taken from highly successful civil or common law jurisdictions.<sup>138</sup> If the independent quality of the laws were all that mattered, rapid GDP growth should have followed.<sup>139</sup> After all, similar provisions had been effective in many other jurisdictions.

Alas, that growth did not follow.<sup>140</sup> The long decades of communism created a world where claims to property turned on financial graft and political favors.<sup>141</sup> That corrupt tradition could not be eliminated simply by enacting new statutes.<sup>142</sup> As formally rational as the new statutes were, they could not overcome the customary norms imbedded in the basic structures of both legal and commercial institutions.<sup>143</sup> So, instead of a competitive, liberal market economy, Belarus, Georgia and Ukraine found themselves with whatever economy could survive the control of the new economic oligarchs -- men best-positioned to exploit opportunities for institutional corruption.<sup>144</sup>

In some cases, the new laws triggered what Michael Heller calls a tragedy of the anti-commons: a plethora of overlapping, conflicting claims to title that prevent anyone from moving scarce resources to their most productive use.<sup>145</sup> The tragedy of the commons carries an extensive literature.<sup>146</sup> Commons dilemmas occur when a lack of private property rights causes beneficiaries not to internalize the costs of maintaining the resource.<sup>147</sup> Those beneficiaries rush to consume, and the resource disappears.<sup>148</sup>

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<sup>136</sup> See, e.g., Padma Desai, *Economic Reform and Democracy: Beyond Shock Therapy*, 6 J. DEMOC. 102 (1995) (discussing the contributions of economist Jeffrey Sachs).

<sup>137</sup> Marangos, *supra* note 59.

<sup>138</sup> Murrell, *supra* note 135.

<sup>139</sup> Desai, *supra* note 136.

<sup>140</sup> Nazim Habibov, *Who Wants to Redistribute? An Analysis of 14 Post-Soviet Nations*, 47 SOC. POL. & ADMIN. 262 (2013).

<sup>141</sup> See Roberts, *supra* note 125.

<sup>142</sup> Berkowitz, *supra* note 132.

<sup>143</sup> See Zvi Lerman, *Experience with Land Reform and Farm Restructuring in the Former Soviet Union*, in JOHANN SWINNEN ET AL. (EDS.), *AGRICULTURAL PRIVATISATION, LAND REFORM AND FARM RESTRUCTURING IN CENTRAL AND EASTERN EUROPE* (2018) at 311.

<sup>144</sup> Osipian, *supra* note 133.

<sup>145</sup> Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, HARV. L. REV. 621 (1998).

<sup>146</sup> See Garrett Hardin, *The Tragedy of the Commons: the Population Problem Has No Technical Solution; It Requires a Fundamental Extension in Morality*, 162 SCIENCE 1243 (1968); Garrett Hardin, *Extensions of "The Tragedy of the Commons"*, 280 SCIENCE 682 (1998); David Feeny et al., *The Tragedy of the Commons: Twenty-Two Years Later*, 18 HUM. ECOLOG. 1 (1990); ELINOR OSTROM ET AL, *THE DRAMA OF THE COMMONS* (2002); Björn Vollan and Elinor Ostrom, *Cooperation and the Commons*, 330 SCIENCE 923 (2010).

<sup>147</sup> Elinor Ostrom, *Tragedy of the Commons*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* (2008); Julian Edney and Christopher Harper, *The Commons Dilemma*, 2 ENVIRON. MANAGEMENT 491 (1978).

<sup>148</sup> See Suzanne Thompson and Kirsten Stoutemyer, *Water Use as a Commons Dilemma: The Effects of Education that Focuses on Long-Term Consequences and Individual Action*, 23 ENVIRON. & BEHAV. 314 (1991).



Conversely, Heller's tragedy of the anti-commons occurs when there are too many competing private property claims, rather than too few.<sup>149</sup> Because the informal norms in Ukraine created property arrangements that conflicted with the new formal rules, the two sets of competing claims meant that no one had clear security of title.<sup>150</sup> In the absence of a claimant with clear title, a wide range of people could veto a transaction.<sup>151</sup> These "veto gates," prevented property from moving to higher valued uses.<sup>152</sup>

### III. Explaining the Results: Is Incremental, Organic Reform Required for Success?

Clearly, private law transitions can fail—and do so with alarming frequency. But they clearly also *sometimes* succeed. The private law transitions in England and Holland developed slowly during the tail end of the Renaissance. They were both incremental transitions—slow formalizations of merchant rules that took place over decades. But both transitions clearly succeeded and led to flourishing, robust, modern economies.

When William the Conqueror invaded England in 1066, his success was ensured by the relative wealth of France and the continent compared to the relative poverty of Britain. And why not? The Continent was warmer; it had more arable land; and it was closer to Italy, the heart of European prosperity.<sup>153</sup> France and Italy had long been wealthier and more prosperous than Britain.<sup>154</sup> So, it remained for most of the Middle Ages.<sup>155</sup>

Then, gradually but surely, things started to change.<sup>156</sup> Several events happened at once: climate change and plague sharply lowered the population, increasing the economic incentive to invest in productivity;<sup>157</sup> capital shifted North, driven by instability in Southern Europe;<sup>158</sup> cultural changes caused the development of an unusually robust middle class in the Hanseatic cities.<sup>159</sup> And, importantly, English law developed with great variety and skill.

England began to develop its own law—what would become the English common law—by the High Middle Ages.<sup>160</sup> This system was mediated through an innovation in English jurisprudence: the development of twin legal systems; the Courts of Chancery and the Courts of Law.<sup>161</sup> Precedent ossified through the former to create maxims of equity, a systematic reinforcing net for reliably reaching judicial decisions considered reasonable and appropriate.<sup>162</sup>

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<sup>149</sup> Heller, *supra* note 145.

<sup>150</sup> Osipian, *supra* note 133.

<sup>151</sup> James Buchanan and Yong Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J. L. & ECON. 1 (2000).

<sup>152</sup> *Id.*

<sup>153</sup> Chris Wickham, *FRAMING THE EARLY MIDDLE AGES: EUROPE AND THE MEDITERRANEAN, 400-800* (2006).

<sup>154</sup> See CHRISTOPHER DYER, *MAKING A LIVING IN THE MIDDLE AGES, MAKING A LIVING IN THE MIDDLE AGES* (2003).

<sup>155</sup> *Id.*

<sup>156</sup> Pomeranz, *supra* note 55.

<sup>157</sup> GREGORY CLARK, *A FAREWELL TO ALMS* (2008).

<sup>158</sup> MAUREEN MAZZAOUI, *THE ITALIAN COTTON INDUSTRY IN THE LATER MIDDLE AGES, 1100-1600* (1981).

<sup>159</sup> Clark, *supra* note 157.

<sup>160</sup> RICHARD HELMHOLZ, *ROMAN CANON LAW IN REFORMATION ENGLAND* (1990).

<sup>161</sup> *Id.*

<sup>162</sup> Richard Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613 (1983).

The self-reinforcing nature of this precedent-based legal system led rapidly to the development of a remarkably sophisticated and flexible system of private law.<sup>163</sup> This system survived and adapted to the changes brought on by the reign of Henry VIII and the Anglican-Catholic split.<sup>164</sup> The system excelled at arbitrating commercial disputes of the day, helping merchants in London from all over the world trust each other enough to engage in long-term commercial planning.<sup>165</sup>

Similar legal changes occurred simultaneously in Holland. Like the English transition, the Dutch transition blended merchant custom with historic rules to create a reliable hybrid system.<sup>166</sup> When technological changes opened new market opportunities during the Age of Sail, the English and Dutch systems were able to extend capital rapidly and take advantage.<sup>167</sup> The results, in both countries, were commercial golden ages, along with immense improvements in living standards.<sup>168</sup>

So, clearly, private law transitions can succeed. What explains then why some fail? Why did things work out in Holland but fail in Afghanistan?

Little scholarship has sought to answer this question. One of the few exceptions—albeit in a somewhat different contrast—is legal literature exploring legal transplants and legal families.

#### A. Legal Transplants and Legal Families

Economic and legal scholars in the legal transplant tradition have identified a variety of facets of a given country's legal transition that might matter in determining whether a transition succeeds. Andrew Shleifer, for example—a participant in the post-Soviet Russian transition—suggested with a series of co-authors that a legal system's "family" mattered.<sup>169</sup> Countries within the common law tradition tended to perform well.<sup>170</sup> Those using the French legal system were least successful.<sup>171</sup> Countries from other legal traditions fell somewhere between the two.<sup>172</sup>

Alas, as a scholarly enterprise, the legal-family approach failed because it did not account for institutional characteristics that correlate with legal family.<sup>173</sup> Two critiques were particularly telling. First, Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard pointed out that there was a basic difference between those countries that chose a legal system deliberately, and those that have their legal system thrust upon them.<sup>174</sup> A few countries (like Japan) deliberately choose

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<sup>163</sup> *Id.*

<sup>164</sup> RAOUL CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* (1988).

<sup>165</sup> Paul Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, 30 J. LEG. STUD. 503 (2001).

<sup>166</sup> Clark, *supra* note 157.

<sup>167</sup> JOOST JONKER AND KEETIE SLUYTERMAN, *AT HOME ON THE WORLD MARKETS: DUTCH INTERNATIONAL TRADING COMPANIES FROM THE 16TH CENTURY UNTIL THE PRESENT* (2001).

<sup>168</sup> Clark, *supra* note 157.

<sup>169</sup> Rafael La Porta, et. al., *Legal Determinants of External Finance*, 52 J. FINANCE 1131 (1997).

<sup>170</sup> *Id.*

<sup>171</sup> Rafael La Porta, et. al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

<sup>172</sup> Rafael La Porta, et. al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

<sup>173</sup> Daniel Klerman, et. al., *Legal Origin or Colonial History*, 3 J. LEGAL ANAL. 379 (2011).

<sup>174</sup> Daniel Klerman, *Legal Infrastructure, Judicial Independence, and Economic Development*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. LJ 427 (2006).

their private law system.<sup>175</sup> A much larger number adopted whatever legal system their European colonizer imposed.<sup>176</sup>

The countries that chose their legal system deliberately, reason Berkowitz and his co-authors, understood what was involved.<sup>177</sup> Necessarily, they were better positioned to use it toward the ends they had in mind.<sup>178</sup> As a result, "[c]ountries that have developed legal orders internally" simply "have more effective legality than countries that received foreign law without any similar predispositions."<sup>179</sup> Among the several sets (or "families") of modern legal regimes, Berkowitz et. al. argue that one does not necessarily function better than another.<sup>180</sup> But those sets that a country deliberately selected and implemented will tend to function better than sets "imposed via colonization," where "the population within the transplant was not familiar with the law."<sup>181</sup>

Daron Acemoglu, Simon Johnson and James Robinson made an analogous point.<sup>182</sup> They too focused on the former colonies and asked whether the imperial country intended to settle the country or merely to extract scarce resources.<sup>183</sup> In colonies where immigrants from the imperial country intended to settle, the imperial country tended to establish stable, honest, and well-functioning legal systems.<sup>184</sup> In colonies where the imperial country intended only to extract and leave, countries may not have cared enough to invest resources in a functioning legal system.<sup>185</sup>

In North America and Australia, English settlers drove most of the indigenous inhabitants off the land.<sup>186</sup> In India, they arrived as a permanent administrative class.<sup>187</sup> By contrast, France, Germany, and Belgium chose some territories simply to extract whatever resources they could find.<sup>188</sup> They hired local workers, dug mines, and sent the extracted material home.<sup>189</sup>

Like Acemoglu and his co-authors, Daniel Klerman and his co-authors—Paul Mahoney, Holger Spamann and Mark Weinstein—note that legal family correlates with other policies: "Colonizing powers differed in their policies relating to education, public health, infrastructure,

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<sup>175</sup> See J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, *THE POLITIC OF OLIGARCHY: INSTITUTIONAL CHOICE IN IMPERIAL JAPAN* (1995).

<sup>176</sup> Klerman, *supra* note 173.

<sup>177</sup> Berkowitz, *supra* note 174.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Daron Acemoglu, Simon Johnson and James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

European immigration, and local governance."<sup>190</sup> These strategies were "determined by whether Europeans could settle in the colony. In places where Europeans faced high mortality rates, they could not settle, and they were more likely to set up worse (extractive) institutions."<sup>191</sup>

### B. A Theory of Failure

This research has motivated some scholars to conclude that only legal transitions that evolve organically and incrementally from within a society can succeed.<sup>192</sup> On this account, the same thing was wrong in Afghanistan, post-Soviet Georgia, and Romagna: the transition involved a distant power imposing a novel legal regime on an economy with radically different customary rules. Failure was caused because the new rules were foreign and imposed externally.

According to this theory, private law transitions like the one pursued by the United States in Afghanistan will always fail.<sup>193</sup> This hypothesis is obviously important: if imposed transitions *always* fail, then outside powers should stop trying to impose them. And at first glance, this theory seems well supported by the evidence.

However, if this theory is right, then *all* successful private law transitions spring up from within society—as in England and Holland. That’s a testable hypothesis. So, in the next section, we test it. We look at two successful private law transitions: one in Florence and one in Japan.

## IV. Successful Private Law Transitions

As we have seen, private law transitions often fail—sometimes causing great harm to state legitimacy and to ordinary persons. But private law transitions don’t *always* fail; sometimes they succeed marvelously. Two historical examples are Renaissance Florence and 19th Century Japan.

### A. The Private Law Transition in Renaissance Florence

Florence did not become the jewel of the Renaissance merely through artistic talent. It was powered, at least in part, by roaring economic growth accompanying a successful private law transition.<sup>194</sup> That transition layered a well-designed legal system onto a customary tradition that itself functioned remarkably well.<sup>195</sup> The Florentine transition was not a revolution. It was a series of incremental changes masterminded by the merchant community.<sup>196</sup> Florentine merchants

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<sup>190</sup> Klerman, *supra* note 173.

<sup>191</sup> *Id.*

<sup>192</sup> See, e.g. Ahmad Alshorbagy, *On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law*, 22 IND. INT'L & COMP. L. REV. 237 (2012) (arguing that legal transplants can only succeed if the country receiving the transplant is able to evolve the transplanted rules organically through a well-functioning judicial system); Paul Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN LJ 199 (1994) (raising several concerns about transplants in the domain of copyright law); Helen Xanthaki, *Legal Transplants in Legislation: Defusing the Trap*, 57 INT'L & COMP. L. QUART. 659 (2008) (providing a range of sources on transplant failure and skeptical theorists arguing against the efficacy of legal transplants imposed from external powers).

<sup>193</sup> See, e.g., Eirini Galinou, *Legal Borrowing: Why Some Legal Transplants Take Root and Others Fail*, 25 COMP. LAB. L. & POL'Y. J. 391 (2003).

<sup>194</sup> JOHN NAJEMY, *A HISTORY OF FLORENCE, 1200-1575* (2008).

<sup>195</sup> Thomas Kuehn, *The Renaissance Consilium as Justice*, 59 RENAISSANCE QUART. 1058 (2006).

<sup>196</sup> Francesca Trivellato, *Renaissance Florence and the Origins of Capitalism: A Business History Perspective*, 94 BUS. HIST. REV. 229 (2020).

caused the ruling council to adopt their own customary norms. Their familiar -- and functional -- rules thus became formally enforceable.

Florence in the late 14th century had been governed by a hodgepodge of legal rules adopted from the Code of Justinian (interpreted by Church authorities) and local customs that arose from merchant interactions.<sup>197</sup> These customs were both sophisticated and widely understood, from the heart of the Ponte Vecchio to the distant countryside.<sup>198</sup> Not coincidentally, Florence was also more prosperous than almost anywhere else in Christendom, except perhaps Constantinople.<sup>199</sup>

As Florence expanded its economic reach and absorbed more of the rural surrounding areas in Tuscany, Florentine merchants began to expand their economic networks.<sup>200</sup> Florentine families increasingly came to orient their operations around export and the provision of services.<sup>201</sup> They provided accounting and financial services for the Catholic Church, and export and insurance services for merchant houses in Genoa and Venice as well.<sup>202</sup>

This expanded commercial reach opened great opportunities for Florence. But it also posed new challenges, because merchants in Genoa, Venice, Sienna and Ravenna did not follow the same customary private law norms.<sup>203</sup> With this in mind, starting in the early 15th century, the Signoria, the ruling council of Florence, began to change Florentine merchant law.<sup>204</sup> It did so by formally adopting many of the legal norms of the leading merchant families.<sup>205</sup> The authority of the Signoria to adopt these rules was confined, legally, by its nominal sovereign inferiority to the Pope.<sup>206</sup> But in practice great discretion was given to the cities to set their own policies.<sup>207</sup>

Through its legal reforms, Florence solidified its economic prominence.<sup>208</sup> First, Florence standardized and formalized commercial norms.<sup>209</sup> Then, Florence adopted those norms as laws through acts of the City government.<sup>210</sup> In the process, Florentine law increased the security of

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<sup>197</sup> Donald Kelley, *Civil Science in the Renaissance: Jurisprudence Italian Style*, 22 HIST. J. 777 (1979).

<sup>198</sup> *Id.* See also, e.g., PHILIP JACKS, *THE SPINELLI OF FLORENCE: FORTUNES OF A RENAISSANCE MERCHANT FAMILY* (2001) (describing one merchant family and their representative experiences).

<sup>199</sup> Najemy, *supra* note 194.

<sup>200</sup> Judith Brown, *Prosperity or Hard Times in Renaissance Italy?*, 42 RENAISSANCE QUART. 761 (1989).

<sup>201</sup> John Padgett and Paul McLean, *Economic Credit in Renaissance Florence*, 83 J. MOD. HIST. 1 (2011).

<sup>202</sup> DALE KENT, *THE RISE OF THE MEDICI: FACTION IN FLORENCE, 1426-1434* (1978).

<sup>203</sup> PETER HOWARD, *CREATING MAGNIFICENCE IN RENAISSANCE FLORENCE* (2012).

<sup>204</sup> Thomas Kuehn, *Arbitration and Law in Renaissance Florence*, RENAISSANCE & REFORMATION 289 (1987).

<sup>205</sup> Andrea Caracausi, *Foreign Merchants and Local Institutions: Thinking about the Genoese Nation in Venice and the Mediterranean Trade in the Late Renaissance Period* in GEORG CHRIST ET. AL. (EDS.), *UNION IN SEPARATION: DIASPORIC GROUPS AND IDENTITIES IN THE EASTERN MEDITERRANEAN (1100-1800)* (2015).

<sup>206</sup> GENE BRUCKER, *THE CIVIC WORLD OF EARLY RENAISSANCE FLORENCE* (2015).

<sup>207</sup> See Martin Schmidt, *The Problem of Papal Primacy at the Council of Florence*, 30 CHURCH HIST. 35 (1961).

<sup>208</sup> Najemy, *supra* note 194; Howard, *supra* note 203.

<sup>209</sup> Padgett, *supra* note 201.

<sup>210</sup> Kelley, *supra* note 197.

commercial guarantees.<sup>211</sup> This increased the ability of Florentine merchants to trade beyond city bounds. Soon, Florence grew into the banking capital of Tuscany, then Italy, then Christendom.<sup>212</sup>

Wealth and economic productivity followed.<sup>213</sup> By the time of Lorenzo the Magnificent in the 16th century, Florence had become *primus inter parus*—the most economically successful city-state in Northern Italy.<sup>214</sup> Florentine banking law became the governing rule for Medici branches throughout Europe—and to their sister institutions that followed.<sup>215</sup> Commercial disputes were settled in Florence, and economic productivity sharply increased.<sup>216</sup>

The Florentine banking reforms were designed by merchants.<sup>217</sup> They sought to incorporate the practical trade wisdom merchants had gained through their customary practice.<sup>218</sup> Legal requirements about the availability of capital helped increase bank confidence and decrease bank-runs.<sup>219</sup> Accounting rules helped clarify obligations and made it easier to monitor outstanding debt.<sup>220</sup> By reducing lost loans, these rules increased the profit of money-lenders, and thus decreased the interest rates they needed to charge on money lent.<sup>221</sup>

In short, the formalization of customary private rules in Florence helped an already successful system become even better. The new rules helped ensure clarity of title and reduced transaction costs.<sup>222</sup> And they allowed Florentine bankers to extend their reach to other cities.<sup>223</sup>

This example buttresses the theory that successful transitions evolve organically. After all, that's exactly what happened in Florence—as it happened in England and Holland.

But even a single counterexample refutes a universal claim. For that counterexample, we turn now to an extended study of Japan's private law transition at the close of the 19th Century.

### B. The Private Law Transition in Nineteenth-Century Japan

In Florence, the state standardized and formalized existing informal commercial and banking norms. In Japan, the new state formally adopted an utterly different legal regime. The Tokugawa regime (1600-1868) employed a legal system that modern legal scholars can scarcely recognize. In the late 19th century, the Meiji government (1868-1912) replaced it with a set of modern German legal codes.

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<sup>211</sup> RICHARD GOLDTHWAITE, *THE BUILDING OF RENAISSANCE FLORENCE: AN ECONOMIC AND SOCIAL HISTORY* (1982).

<sup>212</sup> Keuhn, *supra* note 204.

<sup>213</sup> Howard, *supra* note 203.

<sup>214</sup> GENE BRUCKER, *RENAISSANCE FLORENCE* (1983).

<sup>215</sup> Kent, *supra* note 202.

<sup>216</sup> LAURO MARTINES, *LAWYERS AND STATECRAFT IN RENAISSANCE FLORENCE* (2015).

<sup>217</sup> See RICHARD GOLDTHWAITE, *THE ECONOMY OF RENAISSANCE FLORENCE* (2009).

<sup>218</sup> GENE BRUCKER, *FLORENTINE POLITICS AND SOCIETY, 1343-1378* (2015).

<sup>219</sup> Goldthwaite, *supra* note 211.

<sup>220</sup> They also changed the structure of firms. See, e.g. John Padgett and Paul McLean, *Organizational Invention and Elite Transformation: The Birth of Partnership Systems in Renaissance Florence*, 111 AM. J. SOC. 1463 (2006).

<sup>221</sup> Richard Goldthwaite, *The Practice and Culture of Accounting in Renaissance Florence*, 16 ENTERPRISE & SOC. 611 (2015).

<sup>222</sup> Keuhn, *supra* note 204.

<sup>223</sup> Howard, *supra* note 203.

### 1. Japan's Private Law Transition

The Japanese legislature enacted its new Civil Code in 1896.<sup>224</sup> The government had already adopted a constitution in 1889 that guaranteed private property rights. According to this Constitution, the government could take those rights only for the public interest and only through law.<sup>225</sup> The legislature tried a French-based Civil Code in 1890 but facing political opposition it replaced it with a German version a few years later.<sup>226</sup> This code structured the private ramifications of property rights that the Constitution guaranteed.

The results were immediate and dramatic. The economy boomed.<sup>227</sup> Technological, demographic, and economic change accelerated dramatically.<sup>228</sup> Change happened during the Tokugawa period too, but the pace was more deliberate. Now, the pace of change exploded. The population grew.<sup>229</sup> Cities boomed.<sup>230</sup> Capitalists invested in a broad range of new technologies.<sup>231</sup> Trade significantly expanded—not just between regions of Japan, but with other nations as well.<sup>232</sup> Entrepreneurs bought spinning machines from Lancaster.<sup>233</sup> Merchants sold their fabric on the international market.<sup>234</sup> Firms listed their shares on the new Tokyo and Osaka exchanges, and investors moved their funds across inter-regional and international lines.<sup>235</sup>

Given the larger scale of investments and the inter-regional nature of the new transactions, the government needed property law that brought a structure both intuitive for Japanese to use, and easy for foreign businesses to learn. The potential buyers of a piece of property were no longer just local investors. They might come from distant areas (even London, Paris, or New York). They needed to be able to understand local law.

### 2. A Counterexample?

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<sup>224</sup> Kazuo Hatoyama, *The Civil Code of Japan Compared with the French Civil Code*, 11 YALE LJ 403 (1902).

<sup>225</sup> See Johannes Siemes, *Hermann Roesler's Commentaries on the Meiji Constitution*, 19 MONUMENTA NIPPONICA 37 (1964).

<sup>226</sup> *Id.*

<sup>227</sup> See Randall Morck and Nakamura Masao, *Business Groups and the Big Push: Meiji Japan's Mass Privatization and Subsequent Growth*, 8 ENTERPRISE & SOC. 543 (2007).

<sup>228</sup> STEVEN ERICSON, *THE SOUND OF THE WHISTLE: RAILROADS AND THE STATE IN MEIJI JAPAN* (1996).

<sup>229</sup> See Naofumi Nakamura, *Reconsidering the Japanese Industrial Revolution: Local Entrepreneurs in the Cotton Textile Industry During the Meiji Era*, 18 SOC. SCI. JAPAN J. 23 (2015) (presenting several tables with demographic history taken from official sources).

<sup>230</sup> John Tang, *Railroad Expansion and Industrialization: Evidence from Meiji Japan*, 74 J. ECON. HIST. 863 (2014).

<sup>231</sup> *Id.*

<sup>232</sup> Steven Ericson, *Japonica, Indica: Rice and Foreign Trade in Meiji Japan*, 41 J. JAPANESE. STUD. 317 (2015).

<sup>233</sup> *Id.*

<sup>234</sup> Yoshiro Miwa and J. Mark Ramseyer, *Banks and Economic Growth: Implications from Japanese History*, 45 J. L. & ECON. 127 (2002).

<sup>235</sup> Yoshiro Miwa and J. Mark Ramseyer, *Directed Credit? The Loan Market in High-Growth Japan*, 13 J. ECON. & MANAGEMENT STRAT. 171 (2004).

No one disputes that Japan's new Meiji Civil Code was externally derived—Japan sponsored a formal diplomatic mission specifically designed to study foreign legal systems.<sup>236</sup> Yet Japan's transition was clearly successful; a story that flatly refutes the theory that successful private law transitions must emerge organically from within a society.

What explains then why Japan succeeded where Afghanistan, many post-Soviet States and Romagna failed? Surprisingly, despite the many differences in the origins of the Japanese and Florentine private law systems, there is much in common. This commonality helps explain the keys to private law transition success.

### 3. Japan's Private Law Transition Reconsidered

Japan appears initially radically different from Florence. In Japan, a new oligarchy replaced an indigenous legal regime with a system copied largely from Germany.<sup>237</sup> In Florence, the City shifted from disparate and informal rules to a formal legal system based on Florentine custom.

In fact, however, the transitions are more similar than it initially appears. Florence's disparate rules followed standard economic principles: they defined and enforced private rights to scarce resources, and the transfers of those rights. The Japanese transition followed the same dynamic. The new 19th century legal system in Japan defined and enforced private rights to scarce resources. It enforced transfers of those rights. Critically, so -- largely -- did the legal regime in place during the 2½ centuries that preceded it.

#### a. The Edo Period

From 1603 to 1868, the Tokugawa Clan presided over a largely peaceful country. Ruling as a shogunate (a type of military government), the Tokugawa closely monitored rival clans (the *daimyo*). The Tokugawa punished those thought to pose too great a threat. But local governance was largely left to the respective 260-270 (as of the mid-19th century) domains (called *han*).<sup>238</sup>

Along with local governance, the Tokugawa left private law primarily to these domains.<sup>239</sup> The Tokugawa adjudicated disputes between people in different domains.<sup>240</sup> The central government also issued occasional decrees that at least purported to bind Japanese everywhere.<sup>241</sup> But mostly, the Tokugawa ran a federal legal system that left private law to local governments.<sup>242</sup>

In turn, these local domains largely kept their formal private law to a minimum.<sup>243</sup> However, through the courts, they enforced contracts.<sup>244</sup> They also enforced claims to real

<sup>236</sup> This important diplomatic event was called the Iwakura Mission. See generally IAN NISH (ED.), *THE IWAKURA MISSION IN AMERICA AND EUROPE: A NEW ASSESSMENT* (1998).

<sup>237</sup> Kanamori Shigenari, *German Influences on Japanese Pre-War Constitution and Civil Code*, 7 *EURO. J. L. & ECON.* 93 (1999).

<sup>238</sup> Ryosuke Ishii, *Edo jidai tochiho no taikai* [The System of Land Law in the Edo Period], 38 *Jaannaru furii* 137, 140 (1983).

<sup>239</sup> See CARL STEENSTRUP, *A HISTORY OF LAW IN JAPAN UNTIL 1868* (1996).

<sup>240</sup> The classic, if now very dated, citation for this historical fact is the inestimable John Wigmore. See John Wigmore, *The Administration of Justice in Japan, Part I*, 45 *AM. L. REG. & REV.* 437 (1897).

<sup>241</sup> *Id.*

<sup>242</sup> Ramseyer, *supra* note 5.

<sup>243</sup> Mark West, *Private Ordering at the World's First Futures Exchange*, 98 *MICH. L. REV.* 2574 (1999).

<sup>244</sup> Charles Sheldon, *Merchants and Society in Tokugawa Japan*, 17 *J. PUB. POL.* 477 (1983).



estate.<sup>245</sup> And they enforced an obligation to compensate victims for torts.<sup>246</sup> So, the Tokugawa regime was federal, providing a legal system attuned to citizens' economic and social needs.<sup>247</sup>

The Tokugawa government also tried to enforce rules regulating scarce resources, including the sale of land.<sup>248</sup> However, enforcement of these rules was limited by practical realities. So, for example, in 1643, the Tokugawa government banned the sale of agricultural land by farmers.<sup>249</sup> According to most historical accounts, the government meant for the ban to save farmers from poverty.<sup>250</sup> Like most Tokugawa decrees, the order applied only to those few domains under direct control of the Tokugawa Clan.<sup>251</sup> Most other domains, however, followed the decree with their own bans.<sup>252</sup>

Even in domains covered by the order, however, the transfer ban did not have the scope sometimes attributed to it.<sup>253</sup> First, the ban applied only to farmland.<sup>254</sup> Second, the ban applied only to land on record in 1643.<sup>255</sup> The ban did not apply to newly developed land, and entrepreneurs doubled the amount of land in production during the Edo Period.<sup>256</sup> Third, the ban applied only to land owned by farmers.<sup>257</sup> The ban did not apply to non-farmers, and those non-farmers came to own substantial farmland.<sup>258</sup> Finally, the ban applied only to transactions formally denominated as sales.<sup>259</sup> Accordingly, farmers soon devised ways to circumvent the ban, most commonly by denominating a transfer as a secured loan.<sup>260</sup> As in the case of medieval bans on usury, the economic illogic of the rule led to its restriction and rapid atrophy.

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<sup>245</sup> Steenstrup, *supra* note 239.

<sup>246</sup> *Id.*

<sup>247</sup> Wigmore, *supra* note 240.

<sup>248</sup> Sheldon, *supra* note 244.

<sup>249</sup> Saito Osamu, *Land, Labour and Market Forces in Tokugawa Japan*, 24 CONTINUITY & CHANGE 169 (2009).

<sup>250</sup> *Id.*

<sup>251</sup> MICHAEL LAVER, *THE SAKOKU EDICTS AND THE POLITICS OF TOKUGAWA HEGEMONY* (2011).

<sup>252</sup> Hiroshi Matsuo, *Nihon ni okeru tochi shoyuken no seiritsu* [The Formation of Land Ownership in Japan], 41 Keio hogaku 93, 102; see Noboru Miyakawa, *Nihon ni okeru kindai teki shoyu ken no keisei* [The Structure of Early Modern Ownership in Japan] 35 (Tokyo: Ochanomizu shobo, 1969).

<sup>253</sup> See, e.g., Laver, *supra* note 251 (emphasizing the wide scope of the ban despite the fact that it formally applied only to domains under direct Tokugawa control).

<sup>254</sup> (Miyakawa 1969: 35- fn 252. (Miyakawa (1), 170) Noboru Miyakawa, *Meiji shonen no tochi shoyu ken no hoteki seikaku ni tsuite* [Regarding the Legal Character of Early Meiji Land Ownership], 21 Rikkyo keizaigaku kenkyu 147 at 170.

<sup>255</sup> (Miyakawa 1969: 35-fn 252).

<sup>256</sup> Nakamura, *supra* note 229.

<sup>257</sup> Citation needed; presumably to Miyakawa. Miyakawa fn 254 at 170; Miyakawa fn 252 at 35

<sup>258</sup> Miyakawa 1969: 35 - fn 252; Miyakawa (1), 170) - fn 254

<sup>259</sup> Citation needed; presumably to Miyakawa. Miyakawa fn 252, at 40.

<sup>260</sup> (Miyakawa 1969, p. 40 - fn 252

Vital both to enforcing claims to paddies and to transfers, governments kept public ownership records.<sup>261</sup> Crucially, these records included private mortgage-based transfers.<sup>262</sup> They issued public notices that amounted to "bills of sale."<sup>263</sup> Through these documents, the government maintained a public record of effective title to land.<sup>264</sup>

So, the Tokugawa central and local governments wound up with a generally successful private law regime.<sup>265</sup> Most domains enforced most claims to scarce resources.<sup>266</sup> And most enforced most transactions involving such resources.<sup>267</sup> The administrative enforcement apparatus was generally honest and effective.<sup>268</sup> And efforts to impose economically illogical rules generally failed, often rapidly.

The essentially honest and effective nature of the Tokugawa legal system helped Japan avoid the problems that plagued Russia and Eastern Europe in the late 20th century. Although those new regimes imported and implemented good law, they did so against a half-century of socialist corruption. As a result, men who had manipulated the socialist regime to their private advantage largely carried over their corruption. In Japan, there was little corruption to carry over.

#### b. Character of the New Rules

Both 15th century Florence and late 19th century Japan replaced informal and varied customs with rules that were uniform, clear, and formal. In the process, they facilitated trade beyond the bounds of customary sanctions. Because the systems were formal, entrepreneurs could trade beyond the reach of their social networks. Because the systems were clear and uniform, they could trade readily without investing heavily in local legal advice. In 15th century Florence, the new regime facilitated trade across city lines.<sup>269</sup> In 19th century Japan, it facilitated international trade with the West.<sup>270</sup>

In 19th century Japan, the new private law regime did create sources of tension. Predictably, the new rules sometimes created tension at exactly the points where the earlier regime had not defined and enforced private claims. Both the new and old rules enforced most rights to scarce resources. Yet they did not enforce all -- and it was precisely where the earlier regime did not enforce those rights that tensions under the new regime sometimes appeared.

#### i. Usage Rights and Residual Rights

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<sup>261</sup> Dan Henderson, *Some Aspects of Tokugawa Law*, 27 WASH. L. REV. & ST. BJ 83 (1952).

<sup>262</sup> Sheldon, *supra* note 244.

<sup>263</sup> Miyakawa 1969, 107-1 - fn 252

<sup>264</sup> *Id.*

<sup>265</sup> Steenstrup, *supra* note 239; Sheldon, *supra* note 244.

<sup>266</sup> Sydney Crawcour, *The Tokugawa Period and Japan's Preparation for Modern Economic Growth*, 1 J. JAPAN STUD. 113 (1974).

<sup>267</sup> *Id.* Sheldon, *supra* note 244.

<sup>268</sup> Wigmore, *supra* note 240.

<sup>269</sup> Goldthwaite, *supra* note 217.

<sup>270</sup> Laver, *supra* note 251.

Over the course of the last three decades of the 19th century, the Meiji government issued a wide range of rules that it hoped would smooth the market for real estate. In the process, it largely assigned title where it had lain during the Tokugawa period.<sup>271</sup>

Even under the Tokugawa private law regime, however, the courts did not protect all property claims.<sup>272</sup> Some property simply had too little value.<sup>273</sup> Societies expend resources to enforce claims.<sup>274</sup> As Demsetz explained, societies tend to allocate and enforce private claims only when the resources involved are sufficiently valuable.<sup>275</sup> Tokugawa-era Japanese communities enforced most claims, but where a resource had little value, they often did not bother.<sup>276</sup>

Transitional problems in Japan arose in precisely those sectors where the earlier legal regime had not partitioned and allocated claims.<sup>277</sup> With no customary rights to formalize, the new courts often struggled to impose consistent private property rules.<sup>278</sup> Exacerbating the problem, the Meiji private legal transition coincided with widespread economic change.<sup>279</sup> Resources that people had earlier ignored now sometimes had enormous value.<sup>280</sup> Earlier regimes did not partition these resources, because they previously held little value.<sup>281</sup> Now, suddenly, they did -- and in these sectors courts often floundered.

Major technological or demographic shifts can change an asset's highest valued use. People move to cities -- and the highest valued use of a parcel of urban land may change from residential to commercial.<sup>282</sup> Highways develop -- and the highest valued use of a farm may shift from growing food for the village to raising cash crops for the city.<sup>283</sup> Cities expand -- and the resultant construction boom may cause the highest valued use of a distant mountainside to switch

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<sup>271</sup> In 1868, the Meiji government confirmed ownership of land by farmers. See Dajokan fukoku 1096 of Dec. 18, 1868. In 1872, the government rescinded the 1643 ban on the sale of farm land. Farmers did not just own their land. They now could openly sell it. See Okura sho tatsu No. 25 of 1872; Okura sho tatsu No. 83 of 1872. Simultaneously (1871-72), the government created a national system of land titles. Through a series of orders, it ordered local officers to issue titles when land was transferred, and--more generally--to all privately held land. See Miyakawa 1969, 129, 168 (fn 252), ; Niwa 150; Kunio Niwa, Meiji ishin no tochi kenkaku [Land Changes of the Meiji Restoration] 150 (Tokyo: Ochanomizu shobo, 1962); Komura 1992, 59 [I can't find Komuro; please just drop him]; Matsuo 2018, 107, 111-12, 116-17 (fn 252). In 1886 and 1889, recordation followed. By statute, the government permitted people to record their sales. More basically, it set the foundation for land registries. Law No. 1 of 1886 (recordation act) and Law No. 13 of 1889 (land registries); followed by the Fudosan touki ho [Real Estate Recordation Act], Law. No., 24 of 1899.

<sup>272</sup> Steenstrup, *supra* note 239.

<sup>273</sup> West, *supra* note 243.

<sup>274</sup> North (1984), *supra* note 15. Cf. Anderson, *supra* note 119.

<sup>275</sup> See Harold Demsetz, *The Exchange and Enforcement of Property Rights*, 7 J. L. & ECON. 11 (1964).

<sup>276</sup> Sheldon, *supra* note 244.

<sup>277</sup> Ramseyer, *supra* note 5.

<sup>278</sup> Wigmore, *supra* note 240.

<sup>279</sup> Ericson, *supra* note 228.

<sup>280</sup> *Id.*

<sup>281</sup> An idea we adapt from Hardin, *supra* note 146.

<sup>282</sup> This general truth of economics holds across a range of different developing economies. See Paul Collier and Anthony Venables, *Urbanization in Developing Economies: The Assessment*, 33 Oxford Rev. Econ. Pol. 355 (2017).

<sup>283</sup> *Id.*

from pasturing cattle to growing trees for the lumber market.<sup>284</sup> At the same time, the invention of tractors and chemical fertilizers may reduce demand for livestock, and livestock grazing space.<sup>285</sup>

These shifts often involved a flip in the relative values of the usage rights (a lessee, for example) and residual rights (colloquially, the owner). For example, in cases involving the right to commons (such as on a mountain), the usage value in the mid-19th century (the right to graze cattle) was high, but the residual fee simple had very little value (no one could do anything else with the mountain). In time, the usage values would collapse (farmers bought tractors), while the residual values (the right to grow timber to sell to the city) soared.<sup>286</sup>

When parties sought to shift an asset (like a mountain) from one use (like grazing) to another (like growing timber), a court was often asked to decide who held the residual rights to the asset. Under the German-based Civil Code, judges looked to custom.<sup>287</sup> But where the residual interest had little value, participants had often not taken rights to the asset very seriously. In other words, because the land was not very valuable, locals had not bothered to specify clear title.<sup>288</sup>

As an example, consider mountain forests. Japanese farmers long used the forests to feed their livestock.<sup>289</sup> At the start of the Meiji period, about a third of Japanese rice farmers owned a draft animal -- a horse or a head of cattle that a farmer could use to cultivate his land.<sup>290</sup> Farmers also used the forests for other forms of fertilizer.<sup>291</sup> Some fertilized with grasses and leaves from the forests directly.<sup>292</sup> Others mixed the grasses and leaves with human excrement (or with manure).<sup>293</sup> Still others burned grasses they took from the forests and fertilized their fields with the ashes.<sup>294</sup> So, whether or not they owned livestock, farmers needed access to the forests.<sup>295</sup>

These farmers had "use" rights. Sometimes they held the underlying residual, and sometimes others did.<sup>296</sup> But because the use right was valuable and the residual was not, no one much cared who owned the residual. Crucially, who owned the mountain did not affect the use

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<sup>284</sup> This economic pattern is now so well understood and so consistently observed that it can be predicted with climate modeling. See Antje Ahrends et al, *Predictable Waves of Sequential Forest Degradation and Biodiversity Loss Spreading from an African City*, 107 PROCEEDINGS OF THE NAT'L ACAD. SCI. 14556 (2010).

<sup>285</sup> *Id.*

<sup>286</sup> These patterns are not unique to Japan; we continue to see them in developing economies even today. See William Kwadwo Dumeno and Elizabeth Asantewaa Obeng, *Climate Change and Rural Communities in Ghana: Social Vulnerability, Impacts, Adaptations and Policy Implications*, 55 ENVIRON. SCI. & POL. 208 (2016).

<sup>287</sup> Steenstrup, *supra* note 239.

<sup>288</sup> West, *supra* note 243.

<sup>289</sup> Björn Berglund, *Satoyama, Traditional Farming Landscape in Japan, Compared to Scandinavia*, 20 NICHIBUNKEN JAPAN REV. 53 (2008).

<sup>290</sup> THOMAS HAVENS, *FARM AND NATION IN MODERN JAPAN, 1870-1940* (2015).

<sup>291</sup> Berglund, *supra* note 289.

<sup>292</sup> *Id.*

<sup>293</sup> JAMES HUFFMAN, *DOWN AND OUT IN LATE MEIJI JAPAN* (2018).

<sup>294</sup> *Id.*

<sup>295</sup> Havens, *supra* note 290.

<sup>296</sup> Where the residents collectively owned the forest, the drafters of the Code placed their right to the commons within fee simple (Sec. 262). Where they held only a collective right to use someone else's forest, they placed it within servitudes (Sec. 294). In either case, the residents held the right in rem.

made of it. Regardless of who held the title, villagers grazed their livestock. They gathered firewood and vegetables. They prevented overuse by regulating how much they each did this. And they watched for fires. The locus of the title simply made no difference to anything anyone did.<sup>297</sup>

Sometimes villagers owned a forest collectively, and then they sometimes recorded the title in the name of village leaders.<sup>298</sup> Hamlets were not yet legal entities that could hold land in their own names.<sup>299</sup> Recording joint title in the name of a representative from each of the households would require them to file changes every time a household head died. To avoid the recordation costs, some villages apparently placed the land in the name of one or more village leaders.<sup>300</sup> They did so with the understanding that those leaders acted as agent for the whole village.<sup>301</sup>

## ii. Kotsunagi: An Illustrative Example

For a taste of the sort of disputes that arose in adapting the new formal rules, consider a dispute from the opening of the 20th century. The collection of cottages that is the hamlet of Kotsunagi lies in the mountains of far northern Iwate prefecture. Through the mid-Meiji period, the villagers maintained a modest economy as a post town. Some villagers operated inns or ran restaurants. Others tended fields or irrigated paddies, but only on a small scope. For serious agriculture, the hamlet was too mountainous, too far north, and too cold.<sup>302</sup>

In 1917, 36 households lived in Kotsunagi. At the end of the Tokugawa period, Kotsunagi farmers cultivated a total of 23.8 ha, 1 ha of this as irrigated paddy.<sup>303</sup> Next to the hamlet rose the eponymous Mt. Kotsunagi. Villagers grazed their horses and cattle on the mountain. They gathered grass and firewood. Occasionally, they cut trees.

Through this hamlet, the railroad arrived in 1892.<sup>304</sup> Villagers who had run inns and restaurants based on the old roads found their business gone. On the other hand, entrepreneurial villagers now had access to national markets. By the turn of the century, construction in Tokyo and other urban centers boomed. From 1891 to 1901, the population of Tokyo jumped from 1.33 million to 2.02 million. By 1911, it had soared to 2.73 million.<sup>305</sup> New residents needed houses, and for that they needed lumber.

The Meiji government issued title to most of Mt. Kotsunagi to Kitota Tachibana. Tachibana's family had served as the resident priest in the local shrine, and as the designated

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<sup>297</sup> Margaret McKean, *Common-Pool Resources in the Context of Japanese History*, 5 *WORLDWIDE BUS. REV.* 132 (2003).

<sup>298</sup> Margaret McKean and Elinor Ostrom, *Common Property Regimes in the Forest: Just a Relic from the Past?*, 46 *UNASYLVA* 3 (1995).

<sup>299</sup> Steenstrup, *supra* note 239.

<sup>300</sup> Havens, *supra* note 290.

<sup>301</sup> This sort of responsibility arrangement is common in Japanese legal history, and in East Asia more broadly. See Steenstrup, *supra* note 239. See also Taisu Zhang, *Property Rights in Land, Agricultural Capitalism and the Relative Decline of Pre-Industrial China*, 13 *SAN DIEGO INT'L LJ* 129 (2011).

<sup>302</sup> Cite to 1963 court decision. This is case 8, cited below at fn 315. Sorry!

<sup>303</sup> Kaino 1964, 9; 1 ha = 108,000 sq. ft., or 2.5 acres. Michitaka Kaino, *Kotsunagi jiken [The Kotsunagi Case]* 9 (Tokyo: Iwanami shinsho, 1964).

<sup>304</sup> Kaino 1964, 51).fn 303

<sup>305</sup> Tokyo to no tokei [The Statistics Regarding Tokyo], available at: <https://www.toukei.metro.tokyo.lg.jp/jugoki/2001/01qdj200001.htm>

"guardian" of the mountain's spirit over the course of the Tokugawa period.<sup>306</sup> In 1897, Tachibana sold the mountain. A decade later, the title came to lie with Kamekichi Kashimura.<sup>307</sup> Kashimura was not local; at least one source describes him as a loan shark.<sup>308</sup>

In June 1915, a fire broke out in Kotsunagi. All but 2 homes in the village burned to the ground. Planning to rebuild, villagers went to the local mountain and began to fell trees. Kashimura stopped them. He planned to sell the trees at a newly accessible timber market and so wanted no trees cut. To enforce his ban, he brought in strong men from outside the village.<sup>309</sup> This attempt to block residents from using trees to rebuild their homes split the village, and the ensuing litigation lasted nearly a half century. Twelve households supported Kashimura. Twenty-four others either opposed Kashimura's development plans or took no side.<sup>310</sup>

In 1917, the anti-Kashimura faction sued to confirm their rights in common to the mountain. They lost in the District Court (1932; Decision 1), appealed, and lost in the High Court (1936; Decision 2). They appealed again and lost at the Supreme Court (1939; Decision 3).<sup>311</sup> Then, in 1944, prosecutors brought criminal charges against several villagers. The District Court convicted them in April of 1945 (Decision 4), but the High Court reversed that in September (Decision 5).<sup>312</sup>

In 1946, the anti-Kashimura faction sued again to confirm their commons rights. They lost in 1951 (Decision 6) and appealed.<sup>313</sup> In 1953, the High Court recommended negotiations, and the parties settled that October.<sup>314</sup> Under the terms of the settlement, Kashimura agreed to pay the villagers 2 million yen (or timber of equivalent value) and provide them a 150 hectare share of the mountain. In return, the villagers promised to renounce all claims to rights in common.<sup>315</sup>

The settlement settled nothing at all. To coordinate this last round of litigation, the villagers retained a man called Zenjiro Yamamoto. Yamamoto borrowed eight million yen in the name of the villagers (he held their powers of attorney), and promptly squandered most of it. Almost immediately, the plaintiffs began to claim that they had not authorized him to settle their claims, and many sought to renounce the agreement.<sup>316</sup>

In October of 1955, several of the anti-Kashimura villagers entered the mountain to cut trees. A corps of 150 police arrived and arrested them.<sup>317</sup> Prosecutors filed charges. Several of the

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<sup>306</sup> (Kaino 1964, 15-16)fn 303

<sup>307</sup> Kaino 1964, 207 fn 303

<sup>308</sup> Matsubara 1956, 168 Kuniaki Matsubara, Iriai sosho jiken no hoshakaigaku teki kosatsu [A Law & Society Analysis of a Commons Case], Chosa kenkyu, 167, 168. (1956).

<sup>309</sup> Kaino, *supra* note 307 at 76. fn 303

<sup>310</sup> Kaino 1965, 70 fn 303 (1964).

<sup>311</sup> See Tachibana v. Kashimura, 4380 Horitsu shimbun 5 (Sup. Ct. Jan. 24, 1939). See Kaino (1964, 207) for information about the Morioka District Court decision of Feb. 29, 1932, the Miyagi High Court decision of Aug. 31, 1936, and of the Jan. 24, 1939 decision of the Supreme Court.

<sup>312</sup> See Kaino, *supra* note 307 at 208. probably fn 303 (and elsewhere below)

<sup>313</sup> *Id.*

<sup>314</sup> Kaino, *supra* note 307.

<sup>315</sup> See Kaino, *supra* note 307 at 208; Kuni v. Yamamoto, 336 Hanrei jiho 4 (Sendai High Ct. May 8, 1963).

<sup>316</sup> Kuni v. Yamamoto, 207 Hanrei jiho 7 (Morioka D. Ct. Oct. 26, 1959).

<sup>317</sup> *Id.*

villagers were acquitted in 1959 (Decision 7), but the High Court reversed the acquittals in 1963 (Decision 8). The Supreme Court affirmed the convictions in 1966 (Decision 9).<sup>318</sup>

Despite all this litigation, the judges never reached a consensus.<sup>319</sup> They never agreed about who owned the mountain during the Tokugawa period, about who owned it during the Meiji period, or about what rights (if any) the villagers held in common. The plaintiffs argued that during the Edo Period, the village (not the *han*) collectively owned the land.<sup>320</sup> During the Meiji period, this common ownership as fee simple continued under the terms of Civil Code.<sup>321</sup> When the government assigned Tachibana title in 1877, it assigned it as representative of the village. The villagers had merely agreed, the plaintiffs explained, to have Tachibana hold nominal title to economize on recordation costs.<sup>322</sup> In the late 19th century, records would have been kept in a distant city, and trains did not yet connect to hamlets like Kotsunagi.

In 1959, the Morioka trial court (Decision 7) held that the local domain (not the village) owned the mountain during the Edo Period, and that the Meiji government gave title to the locally powerful Tachibana after the Restoration.<sup>323</sup> The court noted that some villages in the area had indeed assigned one of their members to hold title to their common land on their collective behalf. But the court concluded that the residents of Kotsunagi had not done that. Instead, the court held that the local villagers maintained their customary commons right as servitude.<sup>324</sup> Furthermore, the court explained that the villagers did not hold a customary right to use the mountain as they pleased. Rather, the villagers' customary right applied only if the villagers first provided labor and various goods to Tachibana (as the owner) and then obtained his permission.<sup>325</sup>

In its unpublished 1932 opinion (Decision 1),<sup>326</sup> the District Court reasoned that the villagers exchanged their rights in common for contractual rights to participate in Kashimura's timber plans. But the 1959 court disagreed (Decision 7). Villagers could only waive customary rights in common unanimously—and not all the villagers supported Kashimura's plans. Meanwhile, by 1951, the District Court in a new unpublished opinion (Decision 6)<sup>327</sup> held that the villagers indeed held fee simple ownership in common.<sup>328</sup> Unfortunately for the villagers, the court

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<sup>318</sup> Kuni v. Yamamoto, 207 Hanrei jiho 7 (Morioka D. Ct. Oct. 26, 1959), rev'd 336 Hanrei jiho 4 (Sendai High Ct. May 8, 1963), aff'd 434 Hanrei jiho 2 (Sup. Ct. Jan. 28, 1966).

<sup>319</sup> The named parties varied between the two suits, so claim preclusion was inapplicable. See Kaino, *supra* note 307, p. 131-32.

<sup>320</sup> *Id.* at 24, 31; *but see* Sugimoto 1966. Hisashi Sugimoto, Kotsunagi jiken ni okeru oyama no hoteki seishitsu [The Legal Character of the Mountain in the Kotsunagi Case], 6 Noringyo mondai kenkyu 91 (1966).

<sup>321</sup> See §262 of the Civil Code (*Mimpo*), 1896.

<sup>322</sup> Kaino, *supra* note 307 at 13, 25, 29.

<sup>323</sup> For background on this family, see Takeshi Abe, Izumi Shirai and Takenobu Yuki, *Socio-Economic Activities of Former Feudal Lords in Meiji Japan*, 64 BUS. HIST. 405 (2022).

<sup>324</sup> §262 of the Civil Code (*Mimpo*), 1896.

<sup>325</sup> The 1959 and 1963 opinions state that this was also the position of the District Court in its 1932 (unpublished) opinion. For the most part, the 1939 (Supreme Court) and 1963 (High Court) opinions track these findings as well.

<sup>326</sup> As explained in the 1959 (district court; Case 7) and 1963 (high court; Case 8) opinions. Kaino, *supra* note 307.

<sup>327</sup> According to the 1959 (district court; Case 7), the 1963 (high court; Case 8) opinions. See also Kaino, *supra* note 307 at 15.

<sup>328</sup> The court again cited §262 to describe the type of ownership in common. §262 of the Civil Code (*Mimpo*), 1896.

reasoned that the villagers lost that ownership right to Kashimura through adverse possession. But the 1959 court disagreed with this as well.<sup>329</sup> Kashimura and the villagers had been locked in litigation, it noted—and litigation tolls adverse possession claims.<sup>330</sup>

What caused all these battles and all this legal uncertainty? Fundamentally, economics. As noted above, Tokugawa farmers simply did not use the mountains and forests as intensively as they did paddies.<sup>331</sup> Correspondingly, they did not invest in mountains as heavily as they did paddies. The mountains and forests were not as scarce, so farmers did not define and enforce their rights to them as intensively and uniformly as they enforced their rights to the paddies.

During the 19th century, mountains tended to have higher value in current use (for fertilizer, firewood, and so forth) than as a residual. By the mid-20th century, these relative values switched.<sup>332</sup> With railroad access to a booming Tokyo construction market, an owner of the residual could now grow timber to sell. Meanwhile, because of technological changes, farmers no longer had much use for their customary commons rights.

Because these rights were uncertain, when later courts turned to custom to decide who could use or own a mountain the customs dated from a time when use had value and residual ownership did not. Just as our theory of private law transitions would predict, this meant that even well-designed new rules (like the new Civil Code) often failed in implementation, because the underlying customary rules no longer made sense.

As a post town along a Tokugawa-era highway with no serious agricultural potential, Kotsunagi was bound to fade away. It has. No one has manned the Kotsunagi train station since 2009. Outside the small, aluminum-sided train station building, a faded wooden sign stands under a streetlamp. On it, one can still decipher "Kotsunagi Station," though the wooden sign has long since been replaced. A pay phone and a vending machine stand on the highway a few yards away.

### iii. Lessons from Kotsunagi

The Kotsunagi dispute brings into sharp clarity a few key ideas. First, specifically, Japanese private law prior to the Meiji transition was often vague, but generally this was for economic reasons. There is little need to clarify title to land if the land has little value, so vague property titles do little to hinder growth. Much of Japanese customary law had this feature: incomplete in some abstract sense, but (ordinarily) perfectly satisfactory for use in real-life situations.<sup>333</sup>

Second, broadly speaking, the new Meiji Code improved these customary norms by standardizing, modernizing, and updating rules, helping trade to expand across communities<sup>334</sup>—

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<sup>329</sup> Kuni v. Yamamoto, 207 Hanrei jiho 7 (Morioka D. Ct. Oct. 26, 1959).

<sup>330</sup> A position with strong support in legal systems around the world. See, e.g., Richard Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. ULQ 331 (1983); Thomas Merrill, *Property Rules, Liability Rules and Adverse Possession*, 79 NW. UL REV. 1122 (1984); Robert Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. ULQ 723 (1986).

<sup>331</sup> McKean, *supra* note 297.

<sup>332</sup> (Watanabe xx, 4-5) See generally Yozo Watanabe, *Iriai to ho* [The Commons and the Law] 3-5 (Tokyo: Tokyo daigaku shuppankai, 1972).

<sup>333</sup> Ramseyer, *supra* note 5.

<sup>334</sup> Morck, *supra* note 227.



a similar story to Florence. And, just as in Florence, this transition helped grow the economy by permitting broader trade, and by easing the path for new capital from the West.<sup>335</sup>

Third, also as in Florence, part of what made the Meiji transition successful was that the (effective) new rules generally integrated well with the (already quite effective) old customs. As in Florence, the harmony between these two effective regimes helped make the new system work.

Still, there were tensions. What Kotsunagi shows is that—fourth—these tensions developed precisely where a focus on harmony would predict: where the old customary rules left great ambiguity, and so where the new rules had to be imposed without an effective customary backdrop, the outcome was muddled and growth-hindering.

At first glance, this fourth point seems to bolster the view that transitions imposed externally cannot succeed. But a closer glance tells a different story, particularly since the transition overall was generally very successful. While it is true that the new rules in Kotsunagi were foreign, that's *not* what caused the problem. The problem in Kotsunagi was that the new rules did not harmonize with the old customs, because technological change meant that the old customs no longer reflected economic realities.

#### 4. Character Reconsidered

The rules introduced to Japan through the Meiji transformation were derived from a foreign source, but they were imposed on Japan in a way that, for the most part, carefully integrated with the old customary rules. Contrast that with Romagna and with the post-Soviet States. In Romagna, the private law transitions failed because the new formal rules made little economic sense.<sup>336</sup> Naturally, the new rules failed in Romagna—they were, themselves, poorly designed. But while the quality of the new rules is a necessary condition, it alone is not sufficient. In Georgia and other post-Soviet states, rules of good intrinsic quality failed because they did not harmonize well with existing merchant customs. When this harmony is absent, the transition fails—we need look no further than Afghanistan for a contemporary and important example.

In other words, to succeed private law transitions must both impose new formal rules that are of high quality and the new rules must integrate well with preexisting commercial customs and prevailing social norms. This harmony requirement helps explain why organic, incremental transitions tend to be more successful—by their nature, these transitions are more likely to integrate successfully with preexisting customs. That's why Florence, Holland, and England—and why the new rules imposed by the transition were embraced so readily.

But it is a mistake to overread this requirement as requiring that successful private law transitions evolve internally. Though it is difficult, it is *possible* for a radical private law transition to succeed even when it is imposed externally—but only if the new rules are very well designed and only if they harmonize with preexisting customs and norms. An original contribution of this paper is to prove this is possible by working through Japan's private law transition.

Japan was very fortunate. Japan's private law transition was carefully orchestrated by gifted statesmen with deep commercial experience.<sup>337</sup> These statesmen incorporated feedback from leading business figures, enforced the new rules carefully, and sought to integrate local

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<sup>335</sup> West, *supra* note 243.

<sup>336</sup> Ederer, *supra* note 94; Sedgwick, *supra* note 95.

<sup>337</sup> See IWATA MASAKAZU, OKUBO TOSHIMICHI: THE BISMARCK OF JAPAN (1964) (providing a thorough biography of one great statesmen of the period, along with detailed descriptions of many others).

custom rather than displacing it.<sup>338</sup> Japan also had the luxury of security; Japan was able to impose its own externally derived rules, rather than have new rules imposed by an outside power.<sup>339</sup>

Japan's private law transition still led to some conflicts—and these could be quite bitter, as the Kotsunagi example shows. These conflicts tended to occur precisely where the new rules did not harmonize well with preexisting customs, often because of technological changes to the economy. But overall, the new rules harmonized well with the old customs—and that harmony led to rapid economic growth.

## **Conclusions**

Private law transitions occur when the rules that govern private agreements and private disputes within a society—principally the rules of contract, tort, and property—evolve from informal customs to formal law. Private law transitions are very important: when they succeed, they generate prosperity and bring legitimacy to the state. When they fail, the opposite occurs.

Despite this importance, private law transitions have been studied little by legal scholars—unlike public law transitions. It is natural to conclude from this limited literature that private law transitions are easy to understand and to implement properly. Alas, the evidence thoroughly refutes this optimistic conclusion. Private law transitions frequently fail, often with disastrous results. Experiences in the Middle Ages in Italy, in post-Soviet Europe and in contemporary Afghanistan provide just some of the many examples of transition failure.

Still, private law transitions do succeed sometimes. In England, Holland and Florence private law transitions succeeded brilliantly and economic prosperity followed. The contrast between the examples of success and of failure has led some of the few theorists that have studied private law transitions to conclude that only organic, incremental private law transitions can succeed. On this account, radical private law transitions imposed swiftly and based on external laws are doomed to fail.

Evidence from Japan's late 19th century private law transition suggests that these theorists overstate their case. Japan imposed a radical private law transition based on an external, foreign private law tradition. Japan's transition was remarkably successful, despite its foreign origin and sudden imposition. It seems that, in at least some cases, private law transitions *can* succeed even when they don't evolve organically from within.

Why did Japan's transition succeed where so many others failed? The answer is found in the relationship between Japan's new formal legal rules and preexisting Japanese commercial customs. Because these two systems integrated harmoniously—and because the new rules imposed by the Meiji Restoration made good economic sense—the new private law transition succeeded. In other cases, where the new rules clashed, the private law transition failed—even if the new rules made sense in the economic abstract.

Japan's experience suggests that what matters is whether new private law rules integrate successfully with the old private law customs. Formal rules that evolve organically and internally are more likely to achieve this goal—as they did in England, Holland, and Florence. Formal rules that are imposed based on external legal systems are less likely to do so—as they failed to do in Romagna, Georgia, and Afghanistan.

But less likely does not mean impossible. A carefully crafted private law transition can succeed, even if it is imposed suddenly and based on an external legal system. Figuring out just

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<sup>338</sup> *Id.*

<sup>339</sup> Cf. Klerman, *supra* note 173.

how to craft these new rules is fiendishly difficult—because every customary regime is unique. Still, despite the challenge, getting it right is incredibly important.

A well-executed private law transition greatly benefits society. So, figuring out the right way to transition matters a lot. It may be very hard to calculate the best rules in advance, but Japan's example shows that it's not impossible. And it is very much worth the effort.