

5 The mystery of property: inheritance and industrialization in England and Japan

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'Well! Some people talk of morality, and some of religion, but give me a little snug property' (Edgeworth, cited in Goody 1962: 284).

The mystery

In one way or another most of the great social theorists have seen the development of individualized property relations as the central and decisive factor in the rise of modern civilization and, in particular, capitalism. The link was apparent to Locke at the end of the seventeenth century (1956: 43, 48, 63). Private property was a natural right and the sole purpose of the state was its protection. The security of property was likewise seen as the basis of liberty and wealth by the eighteenth-century political economists (Millar 1812: 114-15; Kames 1796, 1: 91; Smith 1976: 415). Nineteenth-century theorists continued to stress the central importance of property distinctions. De Tocqueville (1956: 184) noted that wealth and private property seemed to be connected in England, Maine thought that 'we are indebted to the peculiarly absolute English form of ownership for such an achievement as the cultivation of the soil of North America' (1875: 126). Tönnies believed that the opposition between private and communal property was the essence of the distinction between *gemeinschaft* and *gesellschaft* (1955: 75, 60). But it was, of course, Karl Marx who most famously emphasized the connections. In his earlier philosophical notebooks he outlined how the history of the growth of landed property mirrored the growth of capitalism (1973:107, 252; 1964: 27). Then in a central passage in *Capital* he argued that 'The legal view... that the landowner can do with the land what every owner of commodities can do with his commodities ... this view... arises ... in the modern world only with the development of capitalist production.' 'Modern' private property is seen as an essential feature of 'capitalist production'. Marx argues that capitalism institutes modern, freehold property, thus 'transforming' feudal landed property, clan property, small peasant property (1974: 3, 616-17). It is his work above all which

has led writers such as Mann to talk of 'that single universalistic, diffuse set of property power relations we know as capitalism' (in Baechler *et al.* 1988: 18).

These views of the nature and importance of private property have continued in the twentieth century. Anderson (1974: 424-9) sees the development of private property as central to the origins of modern capitalism. Jones stresses, as Locke, Kames and others did, the necessity for security of private property for economic growth. He suggests that: 'Economic development in its European form required above all freedom from arbitrary political acts concerning private property' (1981: 85; cf. 93, 165 for the contrast).

It thus seems clear that the development of secure private property has had immense consequences. But how and why did it emerge? It is here that the mystery lies, for as yet there has been no satisfactory explanation for this puzzling phenomenon.

For those who speculated most deeply on the subject from the middle of the eighteenth century the puzzle could be solved by some version of a necessary development or evolutionary *tendency*. For eighteenth-century thinkers, the sense of private property was both innate and justified. It was a seed present in all primitive societies which would finally grow into what had emerged in favoured parts of north-western Europe. Kames believed that 'Among the senses inherent in men, the sense of property is eminent' (1976, 1: 86). Locke had written that the origins of property rights was in labour: 'As much land as a man tills, plants, improves, cultivates and can use the product of, so much is his property' (1956: 17). Adam Smith echoed this: 'The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable' (1976: 136). The writers of the second half of the nineteenth century inherited this concept of the inevitable and natural evolution towards private property. Maine originally developed his famous ideas of the movement from communal to individual property in *Ancient Law* (1890: 244 ff.). He gave this flesh in his later works. Yet, despite all his wide-ranging speculation, he was not able to provide a solution to the mystery. He sensed that the growth of new views of property was somehow linked in the West to the developments after the fall of the Roman Empire, and in particular the development of feudalism, a system which 'had somehow been introduced into the Western world by the barbarous conquerors of Roman imperial territories' (Maine 1901: 149). Morgan likewise accepted an evolutionary view, arguing that the concept of private property was absent in the simplest societies: 'commencing at zero in savagery, the passion for the possession of property, has now become dominant

over the human mind in civilized races' (1877: vii). It was Marx who most powerfully expressed the sequence. His evolutionary views of a movement from 'tribal' (communal) through 'ancient' (communal and state), to 'feudal' (or estate) to capitalist private property, with some odd exceptions such as the 'oriental' (Asiatic) and 'slavonic' are scattered throughout his voluminous writings. The important point is that for Marx there is no real puzzle insofar as we know that this movement, which gradually made the unit holding property both smaller and more individual, both happened and had to happen. Even Weber, with all his realization of the peculiarities of the West, does not help us much in understanding how private property emerged beyond suggesting that 'money is the father of private property' (1961: 179) and that new property relations were somehow linked to the rise of cities in the West.

While such an approach allows the mind to rest from the task of explaining the emergence of private property there has been increasing awareness of anomalies in the paradigm. One of these was recognized by both Marx and Weber. If there was this natural tendency why had most of the world's population managed to avoid it, namely all those who lived outside the charmed circle of north-western Europe and America? As information increased, it became apparent that the natural progression had *not* happened in most of Africa, Asia, the Pacific, Eastern Europe and elsewhere. This could not be satisfactorily brushed aside with talk of the 'stationary' Asiatic mode of production.

A second difficulty was the discovery by historians and anthropologists that the simple sequence along a continuum from 'communal to individualist' property, most notably suggested by Morgan, was mistaken, or at best a half-truth. Of course, as many anthropologists have documented, concepts of highly individualized, absolute, property tend to be absent in many tribal societies. Indeed, as Gluckman wrote, in such societies in relation to ownership of land 'it is too simple to talk of them as marked by either communism or individualism' (1965b: 41). Some of the evidence for the complex situation in 'simpler' societies was summarized by Lowie. He reported, for example, that in the Torres Straits, 'Every rock and waterhole had its owner, the only common piece of common land being the village street' (1929: 216), and went on to add that a parent 'may deprive any of his children from a share in his estate' (*ibid.*: 232). Lowie effectively attacked the idea of 'primitive communism', though he admitted that collective ownership was indeed common (*ibid.*: 196 ff.). Later Forde emphasized what every anthropologist now knows: that private property is to be found in the very simplest hunter-gatherer groups (1946: 15, 29; cf. Woodburn, chapter 2). A

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similar undermining of a straight evolutionary path had been effected by Maitland. He showed that private rather than family ownership was characteristic of Anglo-Saxon England, which maintained 'the most absolute individualism' (Maitland 1921: 340, 346-7, 353).

The most interesting and wide-ranging recent theories put forward to explain the development of private property have been those of Jack Goody. Among the theories he considers are the following. He first draws attention (1977: 19) to the connection already noted by Morgan between individual property rights and a particular kinship terminology (Eskimo), which isolates the nuclear family. Secondly, Goody suggests that there may be a technological factor: the presence of the plough. He suggests, noting an overlap with an earlier theory of Vinogradoff, that the development of ploughing seemed to encourage private land ownership as land rather than labour became the scarce resource (1977: 6, 20, 33). A related argument put forward by Goody concerns the importance of population density. He notes an absence of individual rights in land where population is light, as in sub-Saharan Africa, and the reverse in Europe (1971: 29). More recently, Goody has added two further arguments. The first concerns the role of the Christian church, which protected individuals against the pressures of their family from the eighth or ninth centuries, and hence encouraged the idea of individual ownership of property (Goody 1983). Finally, there is a set of arguments concerning the effects of writing. For instance, Goody suggests that 'literacy permits or encourages' among other things the accumulation of landed property. More specifically, he argues that 'Writing was used to record personal loans ... but in no area was it of greater importance than in registering title to land' (1986: 19, 79).

All these points seem to provide necessary but hardly sufficient or determining causes. They may explain why private property did not develop in oral, lightly populated, hoe-cultivating societies, but when faced with the vast variations of property arrangements in Europe and Asia, the argument has to become more complex. Some of the difficulties of finding any correlation between population density and the forms of property for instance, were pointed out long ago by Sorokin (1928: 395-6), and it is not difficult to add to his counter-instances. Many parts of India or China, for example, had very dense populations, use of the plough and a stratum of literati, yet they were not notable for their development of individualized property. All they lacked was cognatic kinship, but it is difficult to see how this can be the cause of the difference, particularly if we even half accept Leach's famous suggestion (1961: 305) that 'kinship structure is just a way of talking about property relations'. How are we to proceed further? 'The classical theories are

unsatisfactory and die major twentieth-century theories, as synthesized by Goody, are clearly only a beginning. Let us start by looking at what Marx and others considered to be the earliest and classic case of the development of private property and its association with capitalism, namely England.

The case of England

England is an extreme case, though there are some striking similarities with Holland. I have already dealt with the subject at length elsewhere (Macfarlane 1978, 1987: chs. 7, 8). I have argued that the widespread view that a revolutionary change in property relations took place in the sixteenth to eighteenth centuries, for the first time creating modern private property is far too simple. The medieval situation was long ago outlined by Maine, who suggested (1901) that the basic move to private ownership occurred in the later twelfth and thirteenth centuries. The central change was from concepts of divisible to indivisible property. By the application of the principle of primogeniture not only to the nobility but to ordinary people, 'a wholly new conception of landed property had arisen' (1901: 344). He even suggested an ingenious theory to account for the change, which incorporates political pressures, cattle raising and growing population pressure and hence an increase in the value of land (1901: 346 ff.). What Maine saw very clearly was that the growth of the conception of a particularly strong property in land was intimately associated with feudalism. What feudalism did was to substitute contract for status, in other words it placed artificial and political relations rather than blood relations at the centre of the social structure. Maine believed that the 'link between Lord and Vassal produced by Commendation is of quite a different kind from that produced by Consanguinity'. Without the destruction of the smaller kinship groupings, 'we should never have had the conception of land as an exchangeable commodity' (1875: 86-7). Marx picked up this hint when he wrote that 'feudal landed property is already essentially land which has been disposed of, alienated from men' (1963: 133).

Maine's insights were given precision and documentary support by Maitland. He showed that at every level by the thirteenth century, while recognizing the distinction between seisin/possession and property/best right (Pollock and Maitland 1923, 1: 146; 11: 29 ff.), strong property rights were very widespread. Ordinary tenants, holding by customary tenures, also had strong rights. 'We can produce no text of English law which says that the leave of the lord is necessary to an alienation by the tenant' (1908: 29). Thus there was freedom of alienation at the lower

levels of society by the thirteenth century. Even those who were supposedly 'unfree', the serfs, could hold property and dispose of it almost as they wished. 'In relation to men in general, the serf may have land and goods, property and possession and all appropriate remedies' (1923, 1: 419). Hence it is not surprising to find that the 'plea rolls of Richard's reign and John's are covered with assizes of novel disseisin, many of which are brought by very humble persons and deal with minute parcels of land' (1923, 11: 48).

In terms of *freehold* land, by the thirteenth century, English law was grasping Bracton's maxim '*nemo est heres viventis*' (no one is the heir of a living man). As Maitland summarized the situation:

Free alienation without the heir's consent will come in the wake of primogeniture. These two characteristics which distinguish our English law from her nearest Idn, the French customs, are closely connected ... Abroad, as a general rule, the right of the expectant heir gradually assumed the shape of the *restraint lignager*. A landowner must not alienate his land without the consent of his expectant heirs unless it be a case of necessity, and even in a case of necessity the heirs must have an opportunity of purchasing' (1923, 11: 309, 313).

Thus children had no birthright from the thirteenth century onwards, they could be left penniless. Strictly speaking it is not even a matter of 'disinheritance'; a living man has no heirs, he has complete seisin of property. As Bracton put it, 'the heir acquires nothing from the gift made to his ancestor because he was not enfeoffed with the donee' (1968: 66). In effect he has no rights while his father lives, they are not co-owners in any sense.

In my earlier work this was as far as I was able to go. All I could show was that a peculiar individualistic form of land tenure was present in England by the early thirteenth century and that this is linked to England's later development into industrial capitalism. While this may help to explain why it was, as Wittfogel observed, that 'there emerged out of the womb of feudal society one of the strongest forms of private property known to mankind' (1957: 84; cf. 417), it only deepens the mystery and pushes it further back in time. We are still left with problems of both origins and causes.

It would be possible to pursue several further lines of argument. The first concerns the question of whether Maine was right to think that there was a revolution in the late twelfth century. Was this a complete transformation, or was it one of a series of changes which had started to occur much earlier? There has for a long time been a belief that there was something odd about the concepts of property of some of the Germanic peoples who settled in parts of Europe after the collapse of the Roman empire. This was a point made by Montesquieu in the mid-

eighteenth century when he wrote that 'In perusing the admirable treatise of Tacitus *On the Manners of the Germans* we find it is from that nation the English have borrowed their idea of political government. This beautiful system was invented first in the woods' (1949,1: 161). As Montesquieu went on to observe, the Germanic system as described by Tacitus was one of absolute individual property. There was no 'group' which owned the land, and hence no idea that the family and the resources were inextricably linked. In his description of the Salic law he stresses that it 'had not in view a preference of one sex to the other, much less had it regard to the perpetuity of a family, a name, or the transmission of land. These things did not enter into the heads of the Germans' (1949, 1: 283). This point was taken up by Marx, who noted the basic difference between the Germanic mode of production and the Asiatic (1964: 75). Likewise Weber noted (1961: 25) some of the tendencies towards private property, primogeniture and the exclusion of younger sons in old Germanic laws. It is thus not surprising that Maitland found no evidence of family property or communal property in late Anglo-Saxon England. Property was in the hands of the individual (1923, 11: 247; cf. 1921: 340, 346, 353).

The problem can now be restated as follows. If much of north-western Europe was colonized by peoples who had a rather unusual property system and if this combined with the insecure conditions of conquest to create a form of feudal civilization which laid the foundations for the later emergence of full-blown individual property, why, by the late seventeenth century, was England so very different from most of the rest of Europe? When did the trajectories of England and the continent diverge, and how great were the differences?

In Macfarlane (1978) I give evidence to suggest that both English and foreign observers had noticed a wide divergence of property law and social structure back to about the fifteenth century. The major differences lie in the area of primogeniture, freedom of disposition and the expropriation of 'peasants', that is the severing of the land from the family, which is often thought to have occurred in the late fifteenth and sixteenth centuries. Yet the greatest of legal and social historians, Maitland and Bloch, see the basic differences as present earlier, going back to at least the thirteenth century. Under the heading, 'A great and sudden change', Maitland notes that 'our law about the year 1200 performed very swiftly an operation that elsewhere was but slowly accomplished. Abroad, as a general rule, the right of the expectant heir gradually assumed the shape of the restraint lignager. A landowner must not alienate his land without the consent of his expectant heirs' (1923, 11: 313). England took another line and allowed free alienation. This was linked

to a difference which Bloch had noted going back even earlier, namely that 'In the England of the Norman kings there were no peasant allods' (1962: 248). In other words, all land was ultimately held from the crown. The allodial system was later the basis of peasantry. As Bloch realized, from the second half of the twelfth century the agrarian structures of England and France were different (1967: 58-62). It was this difference which led all over Europe to the institution of small landed peasant family properties, in contrast to the case of England.

Thus by the end of the twelfth or early thirteenth century there were already signs that something unusual was happening on parts of this island. But there were many other parts of Europe which probably still resembled England. What then seems to have happened is perhaps best described as an absence. Something did not happen in England which happened over the whole of the rest of Europe. Elsewhere a tide turned and brought all the varying property laws into a uniform and different system. This was the 'reception' or re-introduction of Roman law, which basically suppressed what was remaining of the more individualistic Germanic customary systems.

As the legal historian Baker writes, 'Within Europe ... England was and has remained to this day an island in law' (1971: 28; cf. I I ff.). It preserved through the fact of its island position an unusual legal system. The importance of this in conserving and extending the concepts of individual property is only apparent if we look briefly at the major differences between Roman law and common law concepts of property. Maine wrote that:

Nothing can be more singularly unlike than the legal aspect of allodial land, or, as the Romans would have called it, land held in dominium, and the legal aspect of feudal land. In passing from one to the other, you find yourself among a new order of legal ideas ... no subversion of an accepted legal notion can be more striking than that of the Roman (which is the developed allodial) view of land as essentially divisible by the feudal conception of land as essentially impartible (1901: 342-3).

He sees what he terms 'this great revolution of legal ideas' (*ibid.*: 345), as allowing a far more flexible and ultimately capitalist view of property to emerge.

The difference has been well summarized by Stein and Shand. 'They note for example, that the Roman law tradition 'reflected in the Codes of France, Germany, Switzerland, Italy, and even the Soviet Union', tends to identify ownership with the thing owned, and to limit its definition of things to movable or immovable property, as opposed to more abstract rights. The common law, on the other hand, has developed from the tenures of medieval feudalism and has been more ready

to analyse ownership in terms of bundles of rights, obligations and interpersonal relationships arising from the control and enjoyment of property (1974: 216). The common law system is a far more flexible system and the one needed for capitalist endeavours. They note that 'the resulting flexibility has enabled the common law to accept more easily than civil [Roman] law systems such abstract rights as copyrights, patents, shares, and options as forms of property' (*ibid.*: 217). The absence of private property rights in traditional Roman law is shown, for example, in the fact that 'adult descendants unless formally emancipated from the power of the *paterfamilias*, could own no property in his lifetime' (*ibid.*: 116).

English concepts of property

This discussion takes us into the heart of a question which I have hitherto left on one side, namely what is property? All I want to stress here is the well-known anthropological point that property is ultimately a relationship between people in relation to 'things'. As Gluckman put it with regard to tribal society, 'Property law for tribal society defines not so much rights of persons over things, as obligations owed between persons in respect of things' (1965b: 46). This definition of 'property' follows that famously outlined by Maine: 'The rights of property are, in the eyes of the jurist, a bundle of powers capable of being mentally contemplated apart from one another and capable of being separately enjoyed' (1876: 158). Distinctions may be drawn between hereditary and acquired possessions, movable and immovable property, and so on (1890: 281, 283). But behind these stands the much deeper difference which sees property as a *relation* between persons and things, as in feudal and capitalist relations, and those systems which see property in the thing itself, a form of *fetishism* in Marx's terms.

This contrast has been explored by Maurice Bloch (1975), who found among the Merina a concept of property as a 'relationship between people and things', in contrast with the neighbouring Zafimaniry, who saw it as 'nothing other than part of the many rules which regulate interpersonal relations'. Bloch works with a binary distinction. He suggests that modern societies, like the Merina, misrepresent property as a relation between a person and a thing, whereas, as Gluckman, Goody and other anthropologists have stressed, 'the notion of property as a relationship between a person and a thing is a contradiction in terms'. In contrast, Marx and Engels realized 'that property is represented by ideology as a relationship between people and things but is in material terms a social relationship' (1974: 204-5). In fact, of course,

property is a three-way matter: that is, a relationship between people in relation to a 'thing'.

Part of this difference can be seen in a preliminary way if we contrast Roman and common law concepts of property, Roman lawyers saw the thing as property and it could be divided almost ad infinitum. Thus a piece of land could be divided and sub-divided among heirs again and again. Feudal lawyers on the other hand saw the thing as indivisible, but the rights in it, that is the relationships between people, the bundle of social ties between people and resources, were almost infinitely expandable. The difference is partly caught in Maine's observation that 'there is no symptom that a Roman lawyer could conceive what we call a series of estates - that is, a number of owners entitled to enjoy the same piece of land in succession, and capable of being contemplated together' (1901: 343). Once one has this idea of *relations* in a thing, it becomes easier to treat these interests as temporary and relocatable. The thing *itself* is not altered, but people merely buy and sell rights in it. As Marc Bloch described it, 'Medieval law in contrast with Roman and modern notions of landed property conceived the soil as being subject to a great number of real rights differing among themselves and superimposed. Each of them had the value of a possession protected by custom (saisine, seisin, Gewehr) and none was clothed with that absolute character which the word property carries with it' (1935: 206). What happened was that this peculiar system was stripped of some of its overtones and became that private property whose essence, as Marx notes, was the right to sell and alienate (1974: 101).

Thus feudal lawyers had a very flexible and realistic view of property. Yet, by a strange process, the more flexible the system became, the more it began to appear that *the thing* was the property. Property relations became 'mystified', as Marx, Maine and others later reminded us. Ultimately, under capitalism as under feudalism, property is a power relationship. As Marx noted, 'property signifies a relation of the working (producing) subject ... to the conditions of his production' (1964: 95). That relation was one of people to each other in relation to a 'thing', and it is necessarily a political relation. This is the heart of the mystery of the growth of private property. The Goody arguments took -us some way, suggesting some of the background features which would condition this power relationship. The problem is that these conditions applied over much of Western Europe from the fifth to the nineteenth century, and yet property systems varied enormously. At a gross level it may be true that all of Western Europe had a property system different from that found in the rest of the world. But at a deeper level the difference between the capitalist system that emerged only in particular parts of

Europe, and in particular in England, needs explanation. The explanation must be found not in technology, kinship or Christianity per se, but in these in combination with a particular and unusual set of power relations.

The essence of the feudal property system in England lay in the particular relations between the crown and the people, in other words in the tenurial structure. The central fact is that the property of subjects is most secure and developed when the ruler is strong but not too strong. Let us consider the extreme cases, In a situation of total fragmentation, that dissolution of the state which is how Bloch (1962: 214, 443) describes French feudalism, the leaders are unable to prevent the workers of the land from appropriating *dominium* - allodial rights. This is what happened over much of Europe between the eighth and the thirteenth century. The centre was weak and families built up the basis of family rights to inalienable peasant holdings. England avoided this extreme situation. But then, as the power of the state grew towards absolutist governments, the reverse difficulty arose. The 'reception' of Roman law went hand in hand with absolutism to undermine the security of the property of the citizen. As Davis summarizing Pizzorno puts it, Roman law is designed to protect the power and property of the state against the citizens, while English common law is the reverse (1977:102).

Wittfogel recognized the central point that 'in addition to being a legal and social institution, property is a political phenomenon' (1957: 228). It was all a matter of the balance of power. 'Strong property develops in a societal order which is so balanced that the holders of property can dispose over "their" objects with a maximum of freedom. Weak property develops in a societal order that is not so balanced' (*ibid.*). Speaking of the contrast between Western, feudal-type societies which he calls 'stratified', and the absolutist societies which he equates with 'hydraulic' agriculture, Wittfogel comments that 'In a number of stratified civilizations the representatives of private property and enterprise were sufficiently strong to check the power of the state. Under hydraulic conditions the state restricted the development of private property through fiscal, judicial, legal and political measures' (1957: 78). He then asks, 'Why were the feudal lords of Europe able to buttress their landed property to such an extraordinary degree? Because, as indicated above, in the fragmented society of Medieval Europe the national and territorial rulers lacked the means to prevent it' (*ibid.*: 83).

We may understand this better if we remember de Tocqueville's recognition of the need to keep a balance between too strong or too weak a state (1968: 98). What is needed is a state that is strong enough

to guarantee order and to protect property, and not to give in to the pressure to relinquish too much power either to the great lords or the peasant families. The 'dissolution of the state' is not a good basis for modern private property which is ultimately underpinned, as Locke and his successors recognized, by powerful, if largely invisible, state power. This is evidenced in that 'due administration of justice', peace and easy taxes which Adam Smith thought were the basic prerequisites for the wealth of nations (cited in Stewart 1854, V: 68).

On the other hand, if the state becomes too powerful, as it tends to do over time as its revenues build up and it makes heavier and heavier demands on its citizens in the name of 'Protecting' them against internal and external enemies, then property is again threatened, this time by predation from the state. This is what happened increasingly over much of Europe from the twelfth century until it reached its climax in the age of absolutism. But it did not happen in Holland and England. According to Landes (1972: 16), the necessary platform for economic growth included 'the growing assurance of security in one's property ... the ruler abandoned, voluntarily or involuntarily, the right or practice of arbitrary or indefinite disposition of the wealth of his subjects'. He goes on to argue (*ibid*: 17) that 'Europeans learned to deal with one another in matters of property on the basis of agreement rather than of force; and of contract between nominal equals rather than of personal bonds between superior and inferior'. All this did not happen in much of Europe until the nineteenth century - but had done so in England from the medieval period. It fits very well with Milsom's description of Maitland's vision of medieval property law: 'The world into which Maitland's real actions fit is essentially a flat world, inhabited by equal neighbours' (Milsom. 1968, 1: xlvii).

This helps to explain the puzzle which Weber tried to solve concerning the disappearance of 'peasants' in fifteenth-century England. He suggested a fruitful line of thought. 'Thanks to its insular position England was not dependent on a great national army' (1961: 129). This led, he believed, to a peculiar social structure since it was not necessary to protect the peasants as a potential fighting force. Hence they could be evicted and a new commercial agriculture and social structure could develop. But the argument can equally well be reversed. Because there was far less of an imminent threat of invasion, the coercive pressures which the king could put on his people were diminished. It is perhaps here, above all, that the answer lies, and it is worth elaborating a little on the effects of islandhood and the absence of the threat of war on the political relations of rulers and people, and hence on property.

The connection between liberty and the absence of the threat of

invasion was made in the eighteenth century by the Scottish philosopher, Millar. He placed the turning point as 1603, the unification of the crowns of England and Scotland: 'By the union of the crowns of England and Scotland, an entire stop was put to the inroads and hostilities between the two countries; which, at the same time, from the insular situation, were little exposed to the attacks of any foreign potentate! This meant that the crown had 'few opportunities of acting as the general of the national forces' and was hence far less powerful in relation to the people. There was no need to keep a large mercenary army. Hence taxation could be lighter, and could be withheld by the commons without immediate danger of invasion: 'the secure and peaceable state of their dominions afforded no plausible pretence for the imposition of such taxes as would have been requisite for keeping on foot a great body of mercenary troops'. As a result of all this, Millar believed, there arose a radical difference between constitutional monarchy in Britain, and absolutist governments on the Continent (1812, 111: 120-4).

This theme has been pursued by more recent historians. The only substantial explanation given by Anderson for what he considers to be a very short absolutist experiment in England is the absence of a standing army (1974: 135-9). Truth may be the first casualty of war; the balance of power upon which a constitutional monarchy rests is the second. If there is a constant state of 'Warre', in Hobbes's sense, then people are forced to accept 'protection' at the cost of their liberty. The sea barrier round Britain was a necessary, if not sufficient, background feature to the development of constitutional monarchy based on the security of private property, freed from the predatory demands of a ruler above the law.

If this is correct, then we have the following model. Some of the necessary conditions for the development of modern private property are those to which Goody drew attention, namely a productive agriculture where land has a high value, a bilateral (cognatic) kinship system, and a monastic religion which encouraged people to bequeath their wealth away from their families. To this we may add the development of a market economy. All these were present across much of Western Europe by about the tenth century. What made England increasingly different from its continental neighbours was a peculiar politico-legal system based on a curious form of 'centralized feudalism' (see Macfarlane 1987: ch. 8), an island of common law, and a powerful, but not absolutist, state where the crown was ultimately beneath and not above the law. 'There is one principal reason which explains both why England was not subjected to Roman law and did not gravitate to absolutism and

the extinction of the balance between centre and periphery out of which private property grew. This was the sheer accident of islandhood.

How can we test the hypothesis? Do we know of any other large, relatively densely populated island lying off a sophisticated continent which might have gone through a not dissimilar development?

The case of Japan

When Peter Thunberg visited Japan at the end of the eighteenth century, he found a country where 'Upon the whole, both the supreme government, and the civil magistrates, make the welfare of the state, the preservation of order, and the protection of the persons and property of the subject, an object of greater moment and attention in this country than in most others' (1796, IV: 11). It was a description which John Locke could well have written of England. How had this situation emerged?

Marc Bloch some time ago pointed out the curious similarity between European and Japanese feudalism, suggesting that the latter was of the same order as that in England (1962: 382, 446-7, 452). This was a view which has been shared in many respects by a number of other observers (e.g. Maitland 1911, 111: 303). The insight was developed by Norman Jacobs in his comparison of Japan, China and Europe. The central feature was, as Maine had argued earlier, the development of primogeniture. 'In China, the mandatory institutional pattern for the inheritance of all strategic (i.e. landed) property was equal division between all the legitimate heirs; normally the sons ... In Japan (as in western Europe), in contrast, strategic property is inherited by a single person: normally the eldest male' (Jacobs 1958: 149). This grand change had occurred in England at the end of the twelfth century, and it was roughly a century later that it occurred in Japan. It was based on the same idea - that a military leader needed to link himself to his followers. The best way to do this was to give them lands which were considered indivisible, but in which there were a multiplicity of overlapping rights. That *bundle* which Maine had described, combined with primogeniture, is exactly what we seem to find in medieval Japan. 'In Japan (as in western Europe) the conceptual rights and privileges of ownership and transfer developed concomitantly with the practical demands of the development of true feudalism, so that a new concept of private property holding and descent was created, namely primogeniture' (Jacobs 1958: 153).

The complex bundle of rights in a single indivisible unit is likewise well described by Jacobs: 'The inheritance system in the proto-manorial period of Japanese history denoted an inheritance of rights to landed

property (*shiki*) but not necessarily of ownership. There was a complex overlapping of many types of rights to any one piece of property ... Property rights could be inherited by any number of heirs' (1958: 150-1). The complex of rights has been described more recently as follows, 'Each type of *shiki* carried specific administrative authority or economic benefits ... *Shiki* differed from modern landownership rights in being property rights to a part of the agricultural enterprise ... an individual could concurrently hold different *shiki* to a single or several *shoen*' (Ryavec 1983: 377). This sounds similar to one element of early feudalism in England, likewise just before primogeniture became widespread. The same pressures seem to have led to the transition. 'There was interest in consolidating holdings, resulting from constant subinfeudation ... to divide property among all heirs was to invite political and economic disaster' (Jacobs 1958: 151). The *shoen* or manorial estates thus bore a strong resemblance to English manors.

This was a system with old roots. In the eleventh century, as the centralized Chinese-style system broke down, the situation was caught in the *Genji*. In describing the world of the Shining Prince, Morris notes that the society was 'ruled by an aristocracy with strong traditions of private ownership' (Morris 1969: 88). There were 'manors' and a complex system of rights in them. For instance 'The comparatively favourable position that upper-class women enjoyed in the Heian period was partly due to their privilege of inheriting or being given rights in manors, which provided them with an independence they lacked in later ages' (*ibid.*: 92). This multiple ownership has that same feel as in England. 'It was a complex system, in which no one enjoyed complete ownership of the land, and in which an individual could hold different rights in different capacities on the same manor or on widely separated manors' (*ibid.*: 90). As in England, it was a world which strangely combined a law based on oral customs with an enormous use of those literate instruments to protect contracts to which Goody drew our attention. 'The importance of the pen in this culture of the sword was truly remarkable. Oral arguments played only a small part in judicial procedure ... Pleadings were submitted in writing, while agreements as to property and service were regularly drawn up in the form of charters, deeds and bonds' (Sansom 1962: 284).

The recent publication of the *Cambridge History of Japan*, summarizing a great deal of the recent research on medieval and early modern political and economic life in Japan, allows us to pursue these themes a little further. As in England, proprietary rights were centralized. Under Hideyoshi, 'At the highest level, all proprietary rights became securely lodged in the hands of the national hegemon ... This use of the concept of land

held in trust for the overlord became the basis for the new centralization of power' (1991: 103). Although holding land of the shogun, the lords the next level also had strong rights. Lordship, as in England, gave immense *de facto* power. Thus under Nobunaga, Hideyoshi's immediate predecessor, 'complete proprietorships' were developed. We are told that this 'meant that within their domains, the *daimyo*, as proprietary lords, held the right to assign fiefs, command military forces, and exercise police and judicial authority' (*ibid.*: 101). 'The effect of this, at the fact that it was not something newly introduced in the later sixteen century is shown in the fact that 'local landholders possessed legal protected entitlements to their lands, including the right to buy, sell, and bequeath their holdings. Landownership was transferable ... In the Tokai region, small-scale private land-holders ... could buy and sell land, expand agricultural production, and open markets' (*ibid.*: 479). What Nobunaga and his successors did was to simplify and strengthen this preexisting system.

Several authorities in volume III of the *Cambridge History* indicate similar multi-layered feudal model of ownership to that of England. The 'organization of proprietary rights or tenurial hierarchy in the *shoen* system was complex and multi-layered' (1990: 261; cf. 264, 100). Within this system, those at the bottom technically had user rights, but, in fact, as in England, their practical power was much greater. In the early modern period the small tenants were 'given certain rights to the use of land. In a technical sense, these might be called. . . "user rights", although in actual practice they amounted to a close equivalent to what we would style ownership rights' (1991: 124). Likewise 'In the early medieval period, peasants did not hold land as private property in the true sense of the word.' The proprietor formally registered the title the land registry and because this land was the basis for certain rents, 'peasants were forbidden to buy and sell it without permission' (1990: 329). The same description could be applied to a customary tenant on an English manor, who had to come to the lord's court to transfer his land; in practice, however, he had considerable rights in the holding. Likewise, in Japan it is noted that 'the peasants' rights to cultivate *myo* were protected, and the fields could be passed on to their descendants as heritable *myoden*' (*ibid.*: 122).

Potentially such land could be sold off. For instance, in villages near the cities of Nara and Kyoto, 'the sale of the peasants' right to possess arable land began early. This included selling land outright, using it as collateral for a loan, and, in many cases, becoming a tenant on the land as a result of debt default' (*ibid.*: 329). Land became increasingly viewed as a valuable commodity and not merely as a family entitlement. Hence

'In the mid to late medieval period in central Japan and other nearby economically advanced areas there was a great change in the perceived value of land' (*ibid.*).

The complex web of multi-layered tenures, thought to be unique to England with its peculiar land law, also seems to be found, though with some variations, in Japan. Through a paradox which applies to both cases, the fact that all land was in theory held in a firm contractual and mutual relationship between superior and inferior made it relatively easy, in practice, to alienate the land. Ultimately, in both societies, political and then economic forces had displaced the family as the determinant of what happened to land. In most civilizations, including China, India and countries under Roman law, the first call on land is the next generation, the blood line. In these two islands the controlling interest was the lord. Such a lord could be paid off with cash, leaving the current holder free to do what he or she wished with the land in his or her lifetime, and to dispose of it by will at death. The differences between the *de jure* and *de facto* are noted by Bellah for the Tokugawa period. 'The institution of property was rather well developed. Land was inalienable in theory but by means of universal legal subterfuges this provision was a dead letter and land was in fact often bought and sold' (1957: 32).

The unusual nature of the situation in Japan becomes apparent when we compare it with China. 'The point is noted by Wittrogl who wrote that 'the Japanese peasants cultivated their land individually and under conditions which resembled tenancy rather than serfdom' (1957: 295). Thus 'The decentralized and property-based society of the Japanese Middle Ages resembled much more closely the feudal order of the remote European world than the hydraulic patterns of nearby China' (*ibid.*: 199). The Japanese did not, he writes, 'adopt their system of private landownership from their continental neighbours' (*ibid.*: 295), Indeed he stresses the 'persistence with which China's bureaucratic patterns of power, property and class were kept out of Japanese society' (*ibid.*: 415).

Both England and Japan had moved to the very unusual system of primogeniture early on. But what if the eldest-born male was unsuitable or quarrelled with his parents? In the English case, except in certain periods with the very richest families through entails, it was easy enough to disinherit the heir through sale or a will. There was no security even for the first born. The situation in Japan was different because it was much more important that the *ie*, or 'family estate'/'house', should continue. The Japanese were faced with a contradiction. They needed to maintain an institutional structure which appeared to be based on

family farms, yet to do this using blood ties leaves one open to the inefficient and random dealings of demography and genes. They solved the problem in an unusual way, by combining *gemeinschaft* and *gesellschaft* to create 'artificial kinship'. This they did through the system of adoption.

In those societies where there is very frequent and widespread adoption, the custom is to adopt close relatives as a 'strategy of heirship', particularly brothers' sons (cf. Goody 1977: ch. 6). In Japan, however, one could, and often did, adopt anyone, including non-kin, Chamberlain described the effects of this: 'It is strange, but true, that you may often go into a Japanese family and find half-a-dozen persons calling each other parent and child, brother and sister, uncle and nephew and yet being really either no blood-relations at all, or else relations in quite different degrees from those conventionally assumed' (1971: 17). The subversion of the blood family which this caused, and the turning of the family into an artificial corporation, is well summarized by Ratzell. In Japan 'this custom, which in course of time became extraordinarily widespread, had a destructive effect of the family. Ibis, on adoption becoming customary, sank to a corporation; and, with the admission of fresh strangers, the reputation of natural kindred grew to be an abuse' (1898, 111: 497). Rein noted in the later nineteenth century 'the further right of expelling members of the family and introducing strangers into it'. He continued that 'In this way the Japanese family lost much of its natural character, and assumed the aspect of a corporation' (1884: 422). The same point was made more recently by Robert Smith: 'The frequent adoption of successors shows clearly that the Japanese household is essentially an enterprise group, not a descent organization, and that passing over a son in favour of an adopted successor for the headship among merchants, craftsmen, and artists is a manifestation of a universalistic element in the definition of the role of the household head' (1983: 89-90).

The important fact was that the apparent 'descent group', the lineage or *ie*, was not based on birth (blood) but on choice (contract). As Smith puts it, 'The widespread practice of a bewildering variety of forms of adoption involves yet another principle. People do not generally unite to form groups, not even households, but are instead recruited into them! The major considerations, according to Smith, are 'the highly pragmatic ones of competence and availability' (*ibid.*: 90).

We can thus see why there was a structural similarity between England and Japan. Both had broken the nexus between family and land. The property relation was disembedded, to use Polanyi's metaphor. England is the extreme case. Japan is somewhat more hybrid. This was partly the

result of its relations to China and perhaps the necessities of wet rice cultivation or, as Wittfogel would say, hydraulic society. Wittfogel himself gave a characterization of this mixed situation as follows: 'traditional Japan was more than Western feudalism with wet feet. While the Far Eastern island society gave birth to a property-based and genuinely feudal order, its many and cherished elements of Chinese policy and thought show that, in a submarginal way, it was related to the institutional patterns of the hydraulic world' (1957: 200). Japan, in fact, stood poised between the two extremes. Looked at in one way its stem-family system of *ie* was extremely powerful and it seems a perfect example of the attempt of all real peasantries to 'keep the name on the land'. Yet the families were truncated - only one son - and often the whole 'family' was artificial and more like a business than an institution based on blood. This odd situation may not only be explained by the needs to keep estates intact and well run by family labour, but also by developments after about 1600.

It is a curious fact that if one had looked at English and Japanese property relations and land in general in about 1400 they would have seemed very alike (see Macfarlane 1995). The deeper separation of Japan, partly geographical and partly self-imposed, allowed the Tokugawa rulers to institute a form of government which was in some respects very authoritarian. It had not moved towards absolutism, but it moved in an opposite direction from the increasingly balanced rule which obtained in England. The Tokugawa attempted to bring order and discipline to the country, to keep people in their place both socially and ritually. The property system therefore looks much more like a familistic peasant system than that of England. There appeared to be little private property in land. An individual did not own the estate, the estate owned him. As one writer put it 'The farm family consists of the fields, wealth, and heirlooms handed down from ancestors. This property does not belong to us, the living members of the family. We must not imagine it does even in our dreams. It belongs to the ancestors who founded the house; we are only entrusted with its care and must pass it on to our descendants' (quoted in Smith 1988: 205). This was the system that was dismantled in the 1860s at the Meiji Restoration. Sansom, wrote: 'The provision of the new civil code by which a house-member could own, succeed to or bequeath property as an individual was a complete reversal of tradition, since before 1868 no house-member could exercise separate, personal property rights. Whatever he possessed, he possessed not as owner but by permission of the head of the house' (1950: 474). We can thus only understand the Japanese situation if we bear in mind two apparently contradictory tendencies:

the enduring presence of an apparently fixed family estate, small corporations into which people were born or recruited, combined with very considerable movement and artificiality.

We thus end up with a theory which suggests that the only way to understand property relations is to combine a series of dynamic parameters over long periods. There is no innate tendency in any direction, as some nineteenth-century theorists had thought. Rather the nature of that political relationship which is property will fluctuate over time as an aspect of the power and nature of the state. This is a lesson which nobody who has watched the rise and fall of communism in the twentieth century should need to be reminded of.

Nothing, therefore, was inevitable. Yet we can still see roughly what happened. It could be argued that modernity (capitalism), was very much the result of private (non-family) property, which was first and longest developed in England, which had never had 'peasant' or allodial property. Why did the 'normal tendency' towards peasantry not occur? This problem can better be understood if we look at the case of Japan, where there was a similar absence of a proper peasantry, although at a superficial glance the *ie* looks like a peasant holding. What unites Japan and England but separates them from their neighbours? It would seem to be the realm of law and politics, where on both islands there developed a peculiar form of 'centralized feudalism' and social structure. What allows this to survive and blossom, when elsewhere de Tocqueville's tendency first towards destructive fragmentation, and later towards too much political centralization and absolutism tends to occur? The answer seems to be the absence of protracted internal warfare and of the threat and actuality of outside invasions. Marc Bloch long ago suggested the 'extraordinary immunity' from outside invasions in which Western Europeans 'have shared the privilege with scarcely any people but the Japanese', which 'was one of the fundamental factors of European civilization, in the deepest sense, in the exact sense of the word' (1962: 56). England, like Japan, was the extreme case of this 'privilege' and it had, as Bloch implied, very deep consequences for political relations. The absence of invasion and the threat of invasion changes the relations of threat and power between rulers and ruled, so that a dynamic balance can be achieved and maintained between tenants and lords and, later, between subjects and rulers. There was nothing inevitable about this process; but it did happen - twice.