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**DEFINING AND DIVIDING PROPERTY RIGHTS IN THE COMMONS:  
TODAY'S LESSONS FROM THE JAPANESE PAST**

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**Abstract**

This paper examines the process by which commons became common property, the nature of the "property" in common property, and the patterns of ownership of that property in Japan since the emergence of commons. It looks at community rules to see how users themselves defined property rights and at legal decisions to see how much protection and recognition the larger society gave to these definitions, from the evolution of property rights in the commons during the the medieval period (1185-1600), through the ownership and use patterns that prevailed during the Tokugawa period (1600-1867) when the commons came under pressure because of their importance, and on to the changes that resulted after assault on the commons during the Meiji period (1867-1912). The Japanese developed the notion of dividing and segmenting different rights to property early in the evolution of property rights, and by about 1600 considered most upland forest and meadow to be the shared private property (e.g., common property) of villages as corporate groups. The legal protection afforded the commons helped the system of common property as an arrangement for managing resources to weather the assaults from Meiji-period modernizers who wanted to nationalize forests and eliminate common access use rights from that land. The survival of the Japanese commons demonstrates that common property is not fundamentally defective or inconsistent with modern institutions, as long as it has the same benefits of legal protection that are given to individually-owned private property in capitalist societies. Indeed, the Japanese experience offers useful lessons in the workability of segmented rights each owned by the most appropriate or concerned community of user-beneficiaries, with income flows from resources owned by individual appropriators while a community of individuals continues to own the resource base that generates both those income flows and community-wide environmental services. Finally, the Japanese case illustrates how devolution of property rights to the local level turns potential resource saboteurs into resource owner-protectors, an issue of world-wide concern today.

## DEFINING AND DIVIDING PROPERTY RIGHTS IN THE COMMONS: TODAY'S LESSONS FROM THE JAPANESE PAST\*

Margaret A. McKean\*\*

The objective of this paper is to examine the process by which commons became common property, the nature of the "property" in common property<sup>\*\*\*</sup>, and the patterns of ownership of that property in Japan since the emergence of commons. I do this by looking at community rules to figure out how users themselves defined property rights and at legal decisions to figure out how much protection and recognition the larger society gave to these definitions. I will focus attention on the evolution of property rights in the commons during the the medieval period (1185-1600), the ownership and use patterns that prevailed during the Tokugawa period (1600-1867) when the commons came under pressure because of their importance, and then on the changes that resulted after assault on the commons during the Meiji period (1867-1912).

Two-thirds of Japan, or 25 million hectares, is forested or uncultivated meadow; all of Japan's cities, rural residential land, and cultivated fields today comprise only one third of the land. A very large portion of this uncultivated or forested land was managed as commons during the Tokugawa period, much of it owned by villages themselves for this purpose and the rest as an exercise of usufruct on other lands, granted by feudal lords and officials to villages in exchange for protection of those forests. Beginning in 1873 with the Meiji campaign to survey and register all land in Japan for purposes of taxation, the common access rights to a large quantity of these lands were either "lost" or sold, so only 2.5 million hectares is still held and used in common today.<sup>7</sup> In some ways, the changes that lasted centuries in the Japanese case mirror much more rapid and compressed developments now taking place in LDCs. They bear close examination, particularly because the Japanese have arrived at some sort of a *modus vivendi* between common property regimes and the institutions of modern capitalism. If the world's second largest economy and richest country can leave 10% of all of its uncultivated and forested land under common property management and can integrate this form of ownership into modern property law, then those who insist that common property is archaic or quaint or simply inconsistent with market capitalism need to take a close look at the Japanese experience.

In much of the discussion of common property management elsewhere in the world, there appears to be tension between *de jure* and *de facto* notions of property and ownership, or between "formal" and "informal" institutions, or between "modern" and "traditional" institutions, with

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\*\*\* I should warn readers immediately that I use the term "common property" to refer to well-defined rights held collectively rather than separately by individuals, and not to refer to open access resources, which really ought to be called "non-property."

common property regimes being equated with de facto or informal or traditional customary patterns that are seen to be inconsistent with formal law and modern market capitalism. Those of us who study common property regimes see value and lessons for all in the rich variety among these regimes, but many of us sadly agree with the critics of these institutions that these regimes are indeed vulnerable and perhaps unlikely to survive much longer. Common property institutions in Japan have had their ups and some very serious downs too, but they seem to have gone through this cycle of rise and decline not once but perhaps twice, and to have reached an equilibrium today. Their history and survival, though rocky in the last century, makes the dichotomies above seem absurd in the Japanese case. Many Japanese leaders, as enamored of rapid industrialization and as uninterested in externalities or environmental issues as anyone before or since, have criticized common property for being "inefficient" or "backward," but common property institutions have nonetheless had legal protection since the 17th century or earlier, and they survived the spread of a cash economy. They are as formal and as legally "real" and in some ways as modern as many other things in Japan.

### **Emergence of the Commons in Medieval Japan (1185-1600)**

The story of the Japanese commons begins with their presumed formation in the medieval period (1185-1600, if we include Kamakura and Muromachi shogunates as well as the unification of Japan under Nobunaga, Hideyoshi, and Ieyasu). The two most important developments for our purposes during the medieval period were (1) the development of a system of property rights (shiki and later kajishi) that allowed for splitting and trading of shares to different kinds of property rights, and (2) the emergence of the nucleated (clustered) self-governing village with secure claims to surrounding commons.

The early (645-900 or so) Japanese government appears to have had prematurely totalitarian ambitions, expecting to be able to declare itself the owner of all land, put peasants anywhere it wanted them on an agricultural grid of equal-sized square fields (even those that turned out to be potholes or ravines), order the peasants to build irrigation works (not warranted by the abundance of land and the shortage of labor), tax the dickens out of them, and live well. The aristocracy's attempts to make the Kyoto-Nara area look like thousands of tic-tac-toe games, with one able-bodied adult per box feverishly growing irrigated rice for taxation, instead chased many peasants off into the hills to practice swidden farming, to grow rice without irrigation (lower yields but with much less effort), and to evade taxation. Except for the Kyoto-Nara plain close to the capital, land was in many ways an open access resource in this early period.

This government of civilian aristocrats eventually learned that it had not gridded enough land to provide for its lavish ambitions, it lacked the draconian means of enforcement to keep peasants

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\* Shogun (great general) and shogunate (hereditary military government headed by the general's family, also bakufu in Japanese) have crept into the English language. The Kamakura or Minamoto shogunate (1185-1333) was based in Kamakura, the Muromachi or Ashikaga shogunate (1333-1567) was located in the Muromachi section of Kyoto, and the Tokugawa shogunate (1600-1867) was based in Edo, now Tokyo. James Clavell's novel *Shogun* concerned the early years of the Tokugawa shogunate, whose founder, Tokugawa Ieyasu, and his English visitor, Will Adams, were "Toranaga" and "John Blackthorne" respectively in the novel.

on this land, and it would have to award property rights in land to give people the incentive to

- develop new fields. New property rights went both to peasants and to nobles who demanded independent control of lands they developed in order to support their personal needs.<sup>7</sup> Thus emerged great independent estates (shôen, fully developed by the 11th century), free from both taxation and entry by the central government, and an unusual system of divisible property rights called shiki, later kajishi. Rather than being the conventional rights to land that we might imagine likely -- e.g., the right to use or transfer the land — these were rights to **income** from the land. The central proprietor of an estate held all the rights to income (these were the honke shiki) produced by estate lands, and essentially paid the staff and even the senior peasants living and working on the estates by divvying up his own rights and allocating shares to them. These shares, or shiki, rapidly became dissociated from the land itself and became tradable assets. After a century or two, rights-holders might well have bits of shiki to many non-contiguous lands in different estates in different provinces.

A government that lacks means of enforcement is an easy target for takeover by its hired enforcers. Thus after years of bloody and chaotic competition between rival military houses for control of the court, the winning Minamoto family established in 1185 a shogunate, the medieval system of dual symbiotic government by the civilian imperial court and the strongest military house. But the shogunates established only an ephemeral peace, and peasants continued to face civil disturbances along with new intrusions and exactions from shogunate officials who invaded the estates. At the same time, growing population densities and shrinking ratios of land to population increased the intensity of agricultural techniques. Cultivators became increasingly interested in forming nucleated (clustered) settlements -- the first real villages in Japan -- the better to defend themselves against marauders and the better to pool their labor for irrigation and transplantation of rice.

As land became somewhat scarce, peasants also discovered the need to exercise management, as opposed to indifferent non-management, over the uncultivated mountainsides from which they gathered fodder, fertilizer, fuel, construction timber, thatch, fiber for clothing, bamboo for household products, wild game, and sundry foods. Villages developed increasingly secure claims to particular commons, recognized by neighboring villages and by local officials of the shogunate, during the medieval period. This is entirely consistent with the theoretical argument that people create property rights to resources when those resources become valuable enough to warrant enforcement of claims.<sup>8</sup> The shogunate quickly found it necessary to establish courts to deal with disputes among estate proprietors, shogunate officials on the estates, and the cultivators themselves. For example, in 1207 on Kunitomi estate in Wakasa province, the shogunal court determined that rights to mountain hemp — the chief material for their clothing — belonged to the peasants on the estate, not to its own shogunate representative who was trying to claim the hemp instead.<sup>9</sup> Rights to the commons eventually included not only the right to use the products of the commons (e.g., usufruct), but apparently also the right to sell and exchange the commons itself (e.g., land ownership<sup>10</sup>). In this way, medieval villages not only began the process of closing the commons

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\* Japan specialists are reluctant to say that the notion of "ownership," meaning possession of a complete bundle of property rights including the right to alienate for cash, existed in Japan before 1867. I see no reason to limit the term to possession of complete bundles - the owner of a shiki in medieval Japan owned something as tangible and tradable as the owner of a share of ITT does today. It seems clear to me that all the necessary ingredients for "ownership" of assorted property rights did exist, and often in complete

and converting open access resources into common property, but also rearranged rights to these commons by swapping and selling commons amongst each other in order for each to get a desirable assortment of different types of land in convenient locations.<sup>8</sup>

Gradually for many reasons, not the least of which was the desire to exert power over increasingly productive and valuable land, it became undesirable to hold scattered shiki and much more desirable to hold large portions of the shiki to a given piece of land, and to hold shiki to contiguous pieces of land. During the 14th and 15th centuries, the shiki system evolved into a system of myoshu kajishi, also rights to agricultural surplus, now often owned by rich peasants and not just by nobles and warriors.<sup>9</sup>

This system of rights to income had two important implications for common lands. First, the kajishi could be traded more freely than shiki and often ended up in the hands of cultivators or former peasants now involved in agricultural by-employments like brewing sake or moneylending, who had a direct reason to invest more heavily (than did absentee shiki-holders of the past) in the intensification of agricultural technique. To make this intensification and increased yield possible, peasants turned more frequently to products from the uncultivated lands beyond the fields for fertilizer and other inputs. More systematic use of the commons increased the need to manage it well, define eligible users and uses, and exclude ineligible users and uses. Sound resource management required cooperation by all villagers, and became the impetus to solidary (and occasionally democratic!) self-government by village units. Thus the development of secure private property rights to arable lands simultaneously stimulated the use of commons, led to a richer and therefore more assertive peasantry organized into self-governing villages, and led to the assertion of village ownership of the commons.<sup>10</sup>

Second, the experience with shiki and kajishi familiarized the Japanese with the idea of breaking up the standard "bundle" of property rights in unusual ways and trading in the pieces. I have no evidence capable of demonstrating a causal connection here, but it seems obvious to me that this tradition made it easy, even natural, for Japanese peasants and rulers alike to conceive of dividing rights to land in more complex ways than physical property itself could be divided -- the right to surface uses, the right to constrain those uses, the right to change those uses in some radical way, the right to sell, bequeath, or transfer the land -- and also to conceive of sharing ownership (by owning shares!) of some of these rights. Interestingly, the parts of the system that changed the least over the medieval period were the rights of actual cultivators (jinushi shiki and saku shiki), who usually maintained their rights intact in spite of tremendous turnover in upper levels of shiki.<sup>11</sup> This survival of lower shiki may signify that tenant cultivators had rights that their landlords (who owned, after all, only the right to sell the land or more precisely the right to sell the right to income from the land) could not interfere with. Such an arrangement would slow down changes in land use and would be considered a drag on efficiency, which would seem undesirable in a country capable of tremendous unrealized material growth, but might be highly desirable (actually, socially efficient) in a country that is brushing up against environmental limits. I cannot help but think that this system of fragmented, interlocking, and shared property rights would have made valuable contributions to the process of creating legal legitimacy to complex rights in the commons in Japan.

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bundles anyway by the beginning of, and not just after, the Tokugawa period.

The medieval period ended with the unification of Japan in the late 1500s, through civil wars fought amongst the several strongest daimyo contending for national leadership. A vitally important feature of unification that concerns us here is the cadastral surveys of the 16th century. In contrast to the attempt in the 7th and 8th centuries to make the land conform to a lovely but unrealistic grid design on paper, these were an attempt to arrive at paper measurements and descriptions that actually conformed to the physical layout of fields on the land, descriptions that also took into account quality of the land and likely yields. As a result of the shiki and kajishi system of divisible property rights during the medieval period, the surveyors often found that the right to cultivate the land and the right to transfer the land were not held by the same person. Although there is considerable controversy over how thorough they were, the surveys abolished whatever remnants of shiki and kajishi that they found, along with distinctions among different classes of rights and cultivators.<sup>12</sup> The surveys reportedly vested both rights of use and cultivation and rights of transfer to any plot of land to its actual cultivator, and made the village the primary unit of assessment and tax collection, which included tax responsibility for uncultivated meadow and forest not owned by particular individuals within the village. We must not miss the enormous significance of these changes, which, for whatever motives, made the cadastral surveys an attempt at nationwide land reform granting full rights in land to the tiller and granting full ownership of the commons to villages.

### **Ownership of the Commons in Tokugawa Japan (1600-1867)**

The Pax Tokugawa gave the Japanese people a much-deserved rest from incessant warfare — the longest such period of peace known anywhere in the world, for that matter, if we don't count peasant rebellions later in the period. This was the heyday of the self-governing village, and the beginning of the rule by law, if not the rule of law, in Japan.<sup>13</sup> The Tokugawa shogunate, ostensibly a military dictatorship, withdrew the samurai from the land on most domains and forced them into castle towns where they had little choice but to become paper-pushing bureaucrats, civilians in all but name.<sup>14</sup> The removal of swaggering bullies from the countryside made cooperative and peaceful self-government by villages, not to mention lower tax payments, more than the ideal they had been struggling toward. Peace was also good for the economy, and the revised historiography of Tokugawa Japan indicates that most people busied themselves with production and commerce. Although the system was clearly dictatorial and autocratic — life was probably only a little bit less brutish, nasty, and short than before - the Tokugawa shogunate left the governing of domains to the daimyo, and both left the governing of rural life to villages. Higher levels of authority were interested principally in tax revenue and therefore also in protecting property rights by resolving disputes that people and communities could not take care of themselves.

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\* "Daimyo" has entered the English language according to most recent dictionaries. It means "great name," and refers first to the warrior chieftains who collected bands of vassals together in the 15th and 16th centuries (shugo daimyo and then sengoku daimyo) and competed for leadership, and after 1600 to the approximately 270 feudal lords who were awarded, by the Tokugawa shoguns, domains that each generated more than 10,000 koku of rice per year (one koku is 5.1 American bushels) and who in turn granted fiefs within their domains to their own vassals.

• The commons underwent two serious crises during the Tokugawa period, and in many places undoubtedly was mismanaged, but the idea of common property survived and the techniques for sound commons management evolved considerably in some villages. The first of these crises was serious deforestation, lasting from about 1570 to 1670, as daimyo built castle towns and great cities emerged (Edo, now Tokyo, went from a small fishing settlement to the world's largest city, with a population of one million, in just a century).<sup>16</sup> We know that deforestation occurred both on common land and on daimyo land (the lord's forest). Observers of the time commented more often about the deforestation on common land, but no one has yet managed to add up the voluminous but scattered evidence from particular cases to see if the destruction was worse on common or daimyo forest.<sup>16</sup> It is certain that deforestation on common land occurred, but it is much more difficult to determine if environmental recovery on degraded commons took place more often after privatization to individuals or through concerted management efforts by villages acting collectively.<sup>17</sup> Nonetheless, Japan's forests recovered, and without the elimination of common forests. Indeed, daimyo enthusiasm for establishing new supplies of high-grade timber may have increased Japan's total forest cover after 1670 above what it had been before deforestation, to the point where rural communities were beginning to worry that they were converting too much grassland to forest. To convince the daimyo to stop creating incentives for villages to afforest daimyo land and their own land, villagers would occasionally resort to arson on the lord's forest, which usually reminded the daimyo of his need for their cooperation.<sup>18</sup>

The second crisis faced by the Tokugawa commons was massive conversion to cultivated fields. In the first century of the Tokugawa period, the commons probably expanded somewhat as peasants got their commons back from now-defunct officials who had claimed forest and meadow as personal property earlier.<sup>19</sup> But this was only regaining lost ground. Thereafter, new cultivated fields were carved out of the commons at an astonishing rate: Hayami Akira believes that cultivated acreage in Tokugawa Japan doubled from 1600 to 1700 and trebled from 1600 to 1867, reaching a total of 4.4 million hectares (but recall that even today Japan still has 2.5 million hectares of commons).<sup>20</sup> This most frequently occurred when villages parcelled their commons for individual use for long periods of time. Although these collective village decisions almost always included specific references to the temporary nature of the parcellization and the need to prevent the conversion of common property into individual property, conversion did take place if the villages decided later to allow it.<sup>21</sup> Given that Japan remained closed to foreign trade until after 1856 and was self-sufficient in resources, we have to conclude that the greatly altered ratio of common to arable land that resulted from the Tokugawa conversions was sustainable within the Japanese ecosystem. This is perhaps a testimony to the extraordinary prudence of Japanese villagers about their commons, to have arrived at fairly well-defined common property rights and to have developed in some areas careful rules of restraint on the commons even though they were in fact well short of their environmental limits.

At the beginning of the Tokugawa period, cultivators owned their fields, and throughout the Tokugawa period villages or groups of villages owned the commons (as well as non-landed commons, such as irrigation networks, hot springs, and coastal fisheries). As far as I can determine, virtually all uncultivated wasteland had claimants or owners intent upon closing access to others — the only example I have encountered of an intentionally open access or unowned commons in the Tokugawa period was "land for discarding bodies of dead horses," which was open to all the local villages in this instance and therefore did not have to have firm boundaries.<sup>22</sup> Most domains had provisions for assigning an owner to "wasteland" that began to undergo use (usually the individual

or the village who did the work, the rule of assignment that we usually see everywhere).<sup>23</sup>

Owning the commons consisted of owning not only the products of the commons, but also the right to decide how best to use the commons, and the right to transfer commons to individual owners or to other villages. The village also owned any investment in "improving" the commons -- for example, a village or a multi-village irrigation network would own the sluices and pipes and waterwheels and dams involved, and would pay rent to the individual landowners (almost certain to be beneficiaries of the irrigation network and therefore co-owners of the irrigation system too) whose lands the system traversed. In that the commons required an investment in labor - to enforce use rules, to patrol for intruders and violators, to cut firebreaks for the annual burning of grasslands, or to engage in joint harvesting -- the village also owned a piece of each household's labor as well. (Most villages forbade commuting this labor obligation with cash or hiring others to perform the work in one's stead.)

Each village was collectively responsible for paying the tax (to the holdier of the fief or domain) on its arable and non-arable lands. The land registers were public documents that recorded ownership of land, and villages used these as a rule of thumb to assign tax burdens to individual households, in normal circumstances asking families to pay tax in proportion to the assessed value of their arable lands. Similarly, the village paid a (much lower) tax on its common land, and was free to determine its own rules for assessing individual shares of that tax from member households. The land registers and tax records that demonstrated a history of having paid the tax on a piece of common land were important evidence in documenting a village's claim to common pasture and forest in disputes. Tokugawa legal records demonstrate clearly that common property benefitted from legal protection, that villages were jural persons entitled to take their grievances to court, and that the courts accorded this form of ownership and property the same weight that it did any other.<sup>24</sup>

The description above is a simple and tidy one, but reality included a few additional complications. First, villages could own usufruct rights on land owned by others (other villages, daimyo, wealthy individuals, shrines, and temples). After the daimyo discovered that their own rapacious demand for timber was deforesting their holdings, a practice emerged whereby a lord would award use rights in his forests to a village in exchange for that village functioning as forest guards watching for other intruders.<sup>25</sup> Shrines and temples made similar arrangements to protect their holdings. These negative policies may have stopped further deterioration, but only afforestation on a nationwide scale could bring the forests back. The daimyo thus developed the world's first scientific forestry effort aimed at sustainable yields, and the use rights granted to local villages now included participation in domain-initiated social forestry programs (also probably a first). That is, in exchange for planting and protecting tree seedlings for 30 to 100 (!) years, the planter-protectors -- or their heirs! - would receive a share, usually two-thirds, of the profits earned after harvest.<sup>26</sup> In this way, a village with guard status came to own permanent use rights in forests on domain or other large expanses of private land, and a village (or for that matter a single individual) with an ownership share in particular trees planted on land owned by others essentially owned temporary partial use of a forest.

Second, in most domains the daimyo claimed ownership of particular trees (cypress, cedar, cyptomeria, and several other valuable species), no matter what land they happened to grow on.<sup>27</sup> Thus a village could own its commons and almost everything that could be removed from it, but

not-certain trees. The daimyo's agents might well come along and mark these trees, and watch timber markets to see if such trees appeared for sale without their permission. But as in the situation described above where daimyo had to grant rights to villagers in order to win their cooperation in protecting other daimyo resources, the daimyo would often grant permission to villagers to cut such trees for a small fee, in effect acknowledging the need to pay someone to protect the tree to maturity and then to engage in the labor of cutting it and transporting it to market.<sup>28</sup> Thus just as the daimyo's ownership of his own forests could become attenuated by a village's ownership of use rights in the forest, so a daimyo's claim to own particularly valuable trees on others' land could be attenuated by the daimyo's need for villagers' help in protecting and then cutting those trees.

Third, many expanses of common land were owned not by one village but by several. This may have been an artifact of the multi-village leagues that emerged in the 16th century — the villages in such a league would sometimes make formal agreements with each other about the boundaries and use of shared commons<sup>29</sup> - but it may also have resulted from ecological or political difficulties that would result from trying to divide some commons into smaller pieces. The disputes over common land that most frequently reached Tokugawa courts concerned disputes between villages. Some of these clearly involved honest disagreements: a stream that marked the boundary between two commonses changed course slowly over the years; the tall pines that marked a boundary fell down and got confused with another group of trees; a village stopped using a distant part of its commons and literally forgot for years that it was there until another village began to use it; villages began to use different place-names and became unable to match their customary names with those recorded on original documents. Other disputes involved brazen aggrandizement by one village against another: removing and reburying boundary stones, planting a new line of trees in the hope that 20 years later it would look like a convincing boundary, just lying and hoping the courts could find no independent disconfirmation of one's fabrication. Boundary problems — except on mountain ridges, which tended to stay put -- were always frequent prior to advent of modern surveying equipment.<sup>30</sup> There was an understandable trend during the period for multi-village commons to be divided, by mutual agreement or by the courts, into single-village commons to eliminate such controversies.<sup>31</sup>

Finally, a village with abundant commons could decide to grant access and use rights, on terms of its choosing (for a fee or not, for a limited term or not, for particular products or all, via certain entry roads or not), to other villages in more desperate straits. For example, Shimmaki village in Kazusa province granted temporary access to Osakabe village to enter its commons for a fee and subject to limits on use: a maximum of 60 loads of grass to be cut during a two-month period during the summer at the rate of one horseload per day, and three days' entry to collect firewood to be collected by a maximum of 43 horses, according to a 1667 arrangement that granted Osakabe precisely 43 horse-entry tickets for this purpose. Shimmaki filed suit against Osakabe a century later for ignoring the limitations on use. Osakabe argued feebly in its defense that Shimmaki was misremembering the 1667 document, now burnt, but the 1774 court found the publicly deposited copy of the 1667 document and fined Osakabe accordingly.<sup>32</sup> Granting access to other villages was a way of making temporary additional gains (either in good will one hoped would be remembered and reciprocated later or in plain cash) from a large commons that the village did not currently need full use of, without selling away the opportunity to make fuller use of it later.

Since the village was a corporate owner of its common property rights, how the village defined its members was a terribly important issue. It is almost certain that from the very beginning, the membership unit was the household, represented by whoever was recorded as the household head (always male), rather than the individual, since all economic accounting had been done in household units since the institution of household registers (koseki) in the 7th century.<sup>34</sup> In the 16th century when self-governing villages emerged, village documents and contracts began to be signed by all cultivators (little as well as big, those without surnames or seals as well as those with them), who were clearly acquiring citizenship rights in the village. With the cadastral surveys of the late 16th century, all of these households became owner-cultivators, possessing both freehold or fee-simple ownership of their arable land (except perhaps for the lord's confounded trees), and a share of the village commons.

The Tokugawa shogunate and the domains tried to freeze owner-cultivators in place and prevent tenancy by forbidding all sales of arable land in perpetuity, but there were simple routes around this provision in a society that also protected the property rights of moneylenders. A prospective seller would simply offer his land as collateral and "borrow" money for a fixed term from a buyer, and when the seller/borrower failed to repay the loan the buyer/creditor acquired the land both in substance and in the tax registers. Conversely, of course, land-hungry buyers would seek out vulnerable farmers who needed quick cash in hopes of foreclosing on them. In some domains, the seller/borrower was allowed to change his mind, for a period of years or perhaps without limit, and could have his land back at any time he came up with the loan amount.<sup>35</sup> Thus trade in arable land, concentration of landholdings, and tenancy and destitution among cultivators did occur during the Tokugawa period.

The most common pattern in Tokugawa Japan was for village citizenship to be awarded to the farmers who owned arable land and paid tax on it to the domain (the honbyakusho, descendants of those who won both cultivation rights and landowning rights in the cadastral surveys). At the beginning of the Tokugawa period this rule, if applied to fairly egalitarian villages of owner-cultivators, would have had democratic results. But as concentration of land, the emergence of tenancy, and migration between villages took place, this rule would begin to exclude the unfortunate. A village that followed this rule quite strictly would exclude from citizenship and from entitlement to the commons all members of headless households (households without an adult male), non-farming households, branch (bunke) households that had not been given rights independent of their main house (honke), recent arrivals, vagrants and wanderers, low-caste persons,<sup>36</sup> and perhaps even tenant farmers (kosakunin, those who had cultivation rights and tenants but no longer the attached landowning rights).

This might sound very exclusive, even cruel, but one must remember that there was actually some flow between categories. Households were headless only temporarily sometimes, branch households could acquire legal independence after demonstrating their viability, recent arrivals who began paying taxes could eventually acquire status as regular residents (thus taking the place of extinct or departed households), and there was enough trade in land so that some landowners and tenants exchanged places (and many farmers were both at once). Some villages coped with the flux in these categories by allowing tenant households eligibility in the commons too. After all, large numbers of village residents ineligible to use the commons could pose quite a problem for commons management, and eligible users might have preferred to extend some rights to them rather than cope with sabotage and mutiny.<sup>36</sup> Legally, the jural person that owned the commons