

“Family, Marriage and the Law in Classical Japan—an Analysis of Gender in the
Ritsuryō Codes on Residence Units”

Yoshie Akiko

Good afternoon. I'm Yoshie Akiko. My research concerns the history of Japan in the classical period—roughly the third through the tenth centuries--especially the history of women. Research on women's history in this period began in the 1930s with the work of Takamura Itsue on the history of family and marriage, but research by specialists in women's history dates from the 1970s, when I began my own work. Debates on household registers, property holdings, communities, lineages, and the nature of the realm became common from this time, and we shared interests in certain areas with male scholars.

However, the results of this research were not yet shared throughout the scholarly world. One reason is that the eighth-century law codes, the legal framework of the classical Japanese polity, had adopted the systematic law codes of China, making it seem on the surface that a system of male dominance had already penetrated Japan at that time. In light of this situation, while there is considerable research that investigates the nature of classical Japan through a comparison of Chinese and Japanese law codes, this work only partially incorporates the viewpoint of gender analysis.

Therefore, Prof. Piggott, Dr. Ijuin, and I have initiated a project entitled “Gender in the Japanese Administrative Code,” and as a first step, we have translated the laws on residence units into modern Japanese and English, with notes and commentary. Today, I want to examine three issues based on our work: 1) Japanese and Chinese law codes and differences in the societies that produced them; 2) the comparative meanings and methods in these two legal systems; and 3) some concrete examples that analyze gender in the Japanese codes.

Law codes and society in Japan and China

Sometime between the end of the seventh and beginning of the eighth century, the term “Nihon” was adopted to designate the kingdom that had developed on the Japanese archipelago. Before that, the term used was the Country of Wa. For convenience, I will use “Nihon” here, which in English we translate as Japan.

History of the compilation of the Japanese law codes

The system of control set out in the Taihō code of 701 established a bureaucratic polity under centralized authority. There were two major sections of the code: *ritsu* or criminal law, and *ryō* or administrative regulations. The term *ritsuryō* is used to designate the Japanese codes, while the reading *ritsurei* (same characters, different pronunciation for the second one) designates the codes of China. Some scholars maintain that there was an earlier law code in Japan, the Ōmi code of 671, but there are strong doubts concerning its

existence; even if it did exist, it was probably not a systematic body of laws but just a simple set of rules.

The first actual law code adopted on the archipelago was the Asuka Kiyomihara administrative code, established in 689 by Jitô Tennô (r. 690-697). It did not include penal laws—it is thought to have utilized the Tang penal laws just as they were. That means then that the first systematic effort to promulgate a Japanese legal code incorporating both administrative and penal laws was the Taihō code of 701.

When did the compilation of law codes begin in China? The first criminal statutes appeared at the end of the third century B.C.E., during the Qin dynasty, the first unified empire. The Tai-shi code, the first unified code containing both criminal and administrative law, appeared in 268 C.E., under the Western Jin. This code was revised again and again, and in Sui and Tang times it reached a high degree of systematization, taking its final form in 737, as the code of the year Kaiyuan 25. The model for the Japanese Taihō code was an earlier version of the Tang laws, the Yonghui code of 651.

In other words there was a 450-year gap between the first systematized Chinese legal code of 268 and the Taihō code of 701, and if we consider the criminal statutes of the Qin dynasty, the gap becomes 900 years. A legal system which had developed over centuries to standardize and control the complex society of China was adopted in its final form by Japan, resulting in the construction of an efficient political system for the realm.

Differences between Chinese and Japanese society

Beyond the quite abbreviated process of forming the Japanese legal codes, there were other problems. Most important were that 1) the social systems of the two countries were fundamentally different, and 2) there was a big gap in the developmental level of the two societies.

In regard to the first problem, the kinship system, marital customs, and household forms were entirely different. In contrast to basic elements of Chinese family structure such as patrilineal descent, patrilocal residence, and small nuclear families centered on husband and wife, Japanese society was based on bilineal descent, and either matrilineal or visiting marriages—in the latter, the woman remained with her natal family and the husband visited her. Thus Japan's family structure was fluid. In terms of gender, the Chinese system was clearly male-dominated, while in Japanese society men and women were relatively equal.

As for the second problem, by the end of the sixth century Japan had reached the terminal stages of what is called "*Uji* society." The ruler known as "the great king" and elites across the archipelago were connected by ties based on traditions of each clan (*uji*) in which leaders directed members to serve the great king by performing designated functions, established, it was claimed, in the age of a first ancestor. Thus *Uji* society was held together by principles of organization that predated the bureaucratic system.

The first problem—how social systems differed in China and Japan—has been a focal interest in my research, which analyzes kinship structures and the transmission of lineage. When I examined Chinese inscriptions from the Yin (1401-1137 B.C.E.) and Zhou (1122-255 B.C.E.) dynasties, I was reminded of conditions in Japan during the fifth and sixth centuries C.E. Of course, since the course of historical change differs in different societies, it is impossible to argue that the two were closely equivalent. However, my view is that while Japan lagged about 1000 years behind China in terms of development, it caught up very quickly in the seventh century, and in one stroke attained the outer forms of an advanced society by the beginning of the eighth century. We may say that the springboard for this accomplishment was the legal codes.

Imposing a legal system--a means of control developed in a society that had attained a high degree of civilization--on a yet undeveloped conical clan society, resulted in friction and contradictions at various points. While the ruling strata of eighth century Japan freely used the framework and vocabulary of the Chinese codes, putting them into effect was extremely difficult. While the codes did incorporate existing laws and customs, they were also intended as a means to advance the development of Japan. Through the addition and amendment of content and form, the Yôrô code that supplanted the Taihō code in 757 produced a more advanced legal system that continued long after.

Gender and the Permeation of Codal Law

Throughout the eighth century, the principles of control in the legal system permeated Japanese society, greatly altering the relationships between sovereign and subject, the concept of ownership, and gender norms. In the early Heian period, at the beginning of the ninth century, the entire society was becoming civilized according to the standards of the time. Strong determination to make Japan more Tang-like (*Tôfûka*) during the reign of Saga Tennô (r. 809-823) was based on contemporary confidence in the success of that civilizing process. Then came development of “the ways of our realm” (*kokufûka*) during the period of the Northern Fujiwara regents’ rule over the court from the later ninth through late eleventh centuries.

Specifically in the early Heian period, patriarchal organization was realized to a great degree in Japanese society, from the court to the provinces. The position of women declined in comparison to the Nara period. This signified a significant turning point in the history of Japanese women, as women’s autonomy and freedom in marriage declined. That being said, throughout the premodern period women maintained deeply-rooted social roles, even as they changed in form. Anyone familiar with works of Heian literature such as *The Tale of Genji* will recognize, in addition to patriarchal control and patrilineal descent in aristocratic society, such phenomena as the stability of ties between mother and child, the looseness of marital ties, and the routine practice of uxori-local marriage. The starting point for these apparently contradictory practices in Heian times was the introduction of the Chinese legal system in the eighth century, which grafted foreign laws onto a totally different society.

Methodology and significance of comparative research on Japan and China, using laws as basic materials

Up to this point I have been discussing penal and administrative statutes. Many penal laws in the Japanese codes were copied directly from Tang law, and they therefore failed to establish deep roots in Japanese society. Perhaps because of this, written versions of the statutes were soon scattered and lost, and only fragments of them remain today. On the other hand, precisely because Japan adopted the law codes to hasten the establishment of a realm-wide governmental system, the compilation of laws forming the basis of the administrative organization were undertaken first, and even in medieval times they continued to be highly regarded as fundamental law. Contemporary manuscript versions of these laws still remain.

Manuscripts of the Taihō code, however, were scattered and lost, and now we have a complete version of only the Yōrō code, which was promulgated in 757. Fortunately however, the *Ryōnoshūge*, a compilation of commentaries on the laws compiled in the mid-ninth century, includes a commentary on the Taihō code called the *Koki*. Using that text, we are able to partially reconstruct the Taihō code.

As for the condition of the Tang law codes, the penal statutes are all mostly extant, but the administrative regulations have been scattered and lost. But by using various texts that quote these lost materials and also by examining the Yōrō code, research reconstructing the Tang administrative statutes has progressed. Up to now this process has been indirect and incomplete, but quite recently, a manuscript listing the laws of Kaiyuan 25 (737) was discovered in China, advancing the reconstruction of the Tang codes in a single stroke. Thanks to this discovery, we can now more reliably examine such questions as: what items from the Tang laws were incorporated into the Taihō code and what items were not or could not be adopted, as well as where and how the Chinese models were revised.

To examine these matters by comparing texts of the codal laws for China and Japan, please see the explanations in Yoshie Akiko, Ijuin Yōko, and Joan R. Piggott, “Gender in the Japanese Administrative Code Part 1: Laws on Residence Units” [*Teikyō Journal of History* 28 (Feb. 2013)], as well as references in the short bibliography at the end of the Japanese version of this paper.

Gender and the construction of the Japanese administrative code

The Japanese administrative code is made up of thirty sections. Given the differences in Japanese and Chinese society, the application of a common legal framework resulted in contradictions and incongruities in the Japanese case. The most striking of these can be found in Section 3 (Laws on Officials in the Back Palace) and Section 8 (Laws on Residence Units). Through a comparison of Section 3 with its counterpart in China, we can better understand the political roles of women in classical Japan, how those roles fit into the bureaucratic system of the administrative laws, and how they changed through time. From the Laws on Residence Units, we can perceive how basic Japanese social

mechanisms such as kinship structures and marital practices stubbornly persisted despite the persistent and intensive penetration of completely different Chinese laws and norms.

The initial effort of our team examines the Laws on Residence Units. Our next effort will focus on the laws on Officials of the Back Palace, where female officials performed their duties.

The Laws on Residence Units comprise 45 clauses that deal with the organization and administration of residence units, their family structure, the status order of free and bound persons, and regulations on the education of the people by provincial and district officials. The residence unit (*ko*) was not simply a family. Rather, it was an artificial construct that served as the fundamental local unit of provincial administration. The head of the residence unit was legally responsible for duties such as allotting paddy for cultivation, paying tribute to government authorities, and conscripting men for military service. The Laws on Residence Units are our most direct source for a picture of the realm as seen by eighth-century ruling elites, and for viewing aspects of the lives of the common people.

From these 45 clauses we have selected fourteen clauses that have been the focus of productive research on women's and family history in the classical age. We have assembled them into eight sections, translated them into modern Japanese and English, and included explanations of important points. Today I will use these materials to focus on the issue of agency in marriage, discussing one aspect of gender in classical Japan by comparing Chinese and Japanese laws. Then on Wednesday Dr. Ijuin will discuss the Laws on Officials in the Back Palace.

Agency in marriage, and the concept of illicit sexual relations—as seen in Clauses 24, 25, 26, and 27 of the Laws on Residence Units

Clauses 24 and 25 deal with conditions and methods for establishing a marriage, while clauses 26 and 27 deal with the dissolution of marriage and compulsory divorce.

The interpretation and actual condition of “marriage” (婚嫁)

Let us first look at Clause 24. It sets the minimum age for marriage at fifteen for men and thirteen for women. [This is according to traditional Japanese age count, which generally speaking, adds about a year to the chronological age as calculated today.] At first glance this seems to present no problem. However, the term used for marriage in the clause is *konka* 婚嫁; *kon* refers to a man taking a wife, and *ka* to a woman entering her husband's household—in other words, this is a term that describes the Chinese system of virilocal marriage. Similarly, Clause 25 begins: “In marrying a woman to a man. . .”, taking virilocal marriage as a premise.

However, for the most part marriage in classical Japan actually took two forms: visiting marriage, in which the couple lived apart, and uxorial marriage, in which the husband moved into the wife's residence. The difference between the term used in the law and actual circumstances indicates that the Japanese law had simply copied the Tang version

word-for-word. Even now, it is not rare to find examples in survey literature on the history of Japanese law that take the term *yomeiri* (taking a wife virilocally) directly to describe classical-era marriage. However in our translation and annotation of the Laws, we explain the original meaning of *konka* and note that it differs from actual conditions in Japan at the time. We have rendered *konka* in modern Japanese as *kekkon*, the neutral term used for marriage today.

Women as agents in contracting a marriage

Clause 25 determines the family members to be informed when *a woman is married to a man*. To understand this terminology—indicating that the woman is given in marriage—we first need to understand the Chinese practice. In China a marriage came about when the kin of both bride and groom selected a marriage contractor and then exchanged contractual promises. Beginning with senior paternal relatives, those involved and their hierarchical order was strictly decided. The couple themselves were not the agents of the contract. Furthermore for a couple to marry on their own initiative without the sanction of their kin resulted in what was considered an illicit sexual relationship, and according to Clause 27, they were compelled to divorce.

The latter clause states, “If a man and woman engage in an illicit sexual relationship and then marry, even if their crime is forgiven (in an amnesty), they must divorce.” But in fact, in classical Japan it was usual for a couple to come to an agreement to have sexual relations, which meant they were married. So if the Tang law had been implemented, almost all Japanese marriages would have ended in compulsory divorce.

It was perhaps because marriage customs were so different in China and Japan that the compilers of the Japanese code made some amendments to Tang laws, one example of which can be seen in Clause 25. Therein maternal relatives of the bride were included in the list of those to be consulted, and the bride’s relatives were to be informed rather than being asked for permission. At the end the clause states, “If a woman does not have such kin, let her make whomever she wishes the marriage contractor.” Thus the provision legally recognizes the agency of the woman concerned. Authoritative legal commentaries from the end of the eighth century note that the woman was to inform her grandparents and parents, and that this was the woman’s responsibility. The Japanese lawmakers ventured to add a loophole and legal scholars employed a flexible interpretation, aiming at a compromise between the trappings of Chinese civilization and the reality of customs on the archipelago.

Fluid and ambiguous marriage and divorce

Finally, I would like to explore the ambiguous nature of marriage and divorce by examining Clause 26 and its commentaries. The clause reads, “If, after arrangements are made, the marriage does not take place within three months. . . then if the woman’s household seeks to nullify the marital arrangements, it shall be permitted. And, after the marriage has taken place, [if the husband disappears for a long time and nothing can be done about it], then the woman shall be permitted to remarry.”

However, a commentary on the Taihō code remarks as follows on the first provision in Clause 26, regarding the cancellation of the marriage contract: “[This means] that without any reason the man does not visit the woman for three months continuously.” The commentary therefore indicates that first, marriage in mid-eighth century Japan did not involve a contract and that instead the couple made an agreement to engage in sexual relations, and that meant they were married. And second, it indicates that it was common for couples to live separately, with the husband visiting the wife. And third, it tells us that when the husband stopped visiting, the marriage came to an end.

A ninth-century official commentary further clarifies the conditions for divorce—they were, “if the couple live in the same administrative village [*sato* or *ri*, an administrative unit made up of several natural villages], and do not visit one another.” The relatively fluid form of marriage, sustained by frequent visits, is made clear here. There also existed such visiting marriages among common people living in nearby villages, in which the man visited the woman at night and returned home in the morning.

Conclusion

It is possible to grasp the special characteristics of an entire social system, for the most part, through comparative analysis of law codes. To analyze gender issues in particular, I find such comparisons especially valuable. I hope that many English-language readers will develop an interest in comparative research on the law codes and in gender in classical Japan. Today I thank you very much for your interest in joining us here.