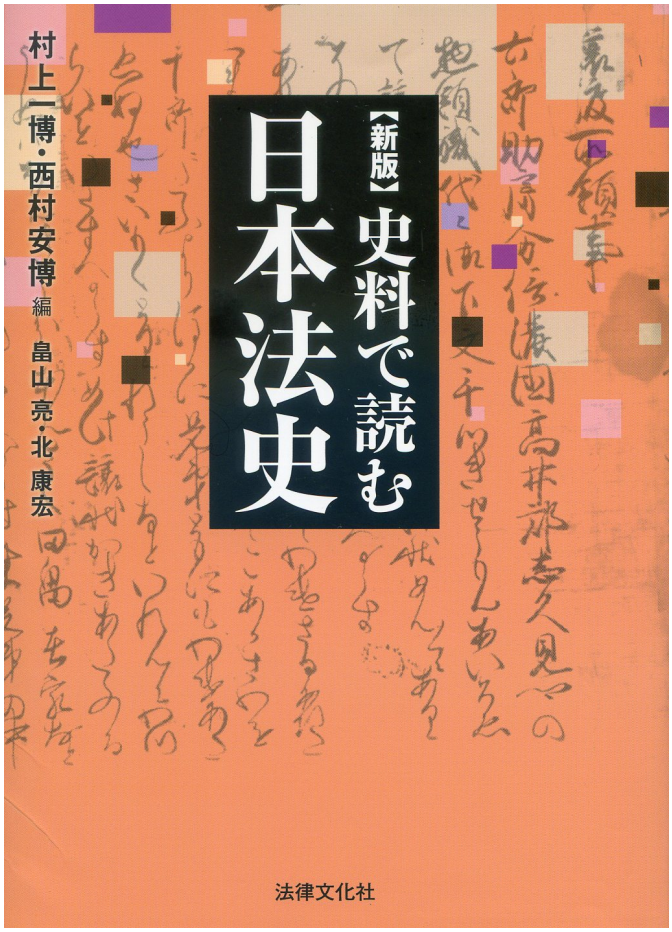

The History of Law in Japan, Through Historical Sources

Murakami Kazuhiro & Nishimura Yasuhiro eds.

Translated and Interpreted by Nadia Kanagawa

Lecture 1: The Reform Era in the 640s as the Foundation for *Ritsuryō* Law and the *Ritsuryō* Trial System of District Chieftains and Council Ministers

The Japanese *ritsuryō* 律令law codes, adopted and adapted from the Tang *lü ling* at the end of the seventh century, regulated state and society from the Nara period (710-84) through early Heian times. These laws did not emerge from local customs of the archipelago. Rather they were adopted from afar for a particular political purpose. As a result, there was a gap between laws and the ways of society. In considering this gap, we have to address two questions. First,

what was the impetus for adopting the codes? Second, what was the result of adopting the codes?

Research on *ritsuryō* began in Japan as a response to inquiries from the Meiji-period (1868-1912) government as it was in the process of reviving the classical monarchy and Council of State system. Thus, a restorationist view of history -- that laws could be used to negate the power of clans, like the Soga, that obstructed royal authority -- cast a shadow over that research. However, in recent analyses of the forces behind *ritsuryō* development, emphasis has been placed on the [mid-seventh century] war between Japan and Paekche on one hand and the allied Silla and Tang forces on the other, which resulted in the disastrous defeat of the Japanese forces in 663 CE, at Hakusunoki on the Korean peninsula. The current scholarly consensus is that the *ritsuryō* laws were a tool used by leaders on the archipelago to establish centralized power and a strong military in the face of international tension. Even so, old customs continued, and the new ruling order incorporated earlier chiefly and bureaucratic elements. This historical view is called the 'double-structure *ritsuryō* state theory.'

In order to implement the new legal mandates and carry out governmental affairs, it was essential to 1) improve the literacy rate of subjects, officials, and statesmen of the realm, and to 2) accumulate knowledge of the law. The first is the history of the expansion of the class that could apply the laws, and the second is the history of compiling volumes of legal commentary, precedents, and procedures.

1. From Divine Law to Secular Law -- Heavenly Crimes, Earthly Sins, and the Taika Abolition of Old Customs, from Sin and Purification to a Legal Consciousness

A. First, we will trace the manifestation of legal consciousness in insular society before the adoption of the *ritsuryō* laws. Previous scholarship has highlighted notions of "heavenly sins" and "earthly sins" referred to in prayers of the Procedures of the Engi Era (*Engishiki*, early 10th c.).

> Document 1: *Procedures of the Engi Era*, Rituals [Book 8], End of the Sixth Month, Great Purification
> "...the heavenly offenses (breaking down paddy dikes, filling in irrigation ditches, opening sluice-gates, double planting, setting up stakes, flaying alive, flaying backwards, cursing with excrement and many such, these are designated as heavenly offenses); and then earthly offenses (defilement due to cutting live flesh, cutting dead flesh; due to vitiligo, due to excrescences; defilement due to intercourse with one's own mother, or one's own daughter, due to cohabiting with a woman and then her daughter by previous marriage, or due to cohabiting with a girl and then her mother; defilement due to copulation with an animal, due to attack from creeping things, due to calamity from the *kami* on high, or from birds overhead, due to having caused death

to livestock or other evil magic), let all these defilements be purged." (cf. Felicia Bock, *Engi-Shiki Procedures of the Engi Era* Books VI-X, p. 86)

From actions that transgress against the agricultural community like double planting and the destruction of dikes and ditches, to cruel actions like flaying the skin of a living animal or a person, to sicknesses that are apparent on the skin, and to illicit relations with a mother and child or with one's own mother, bestiality, calamities caused by birds or insects, and evil magic—these wide-ranging offenses deviate substantially from our idea of crimes today. Events that gave rise to uneasiness and the unforeseen, and that deviated from every-day life and stable harmony, were called "sins" — they caused fear of the irregular and unease about the destruction of order. Purification (*harae*) and cleansing (*misogi*) were the means to deal with such sins. If we see purification as "canceling the causes of confusion and unease" and cleansing as "ablutions for the purpose of resolving unease," we can understand these actions. The fundamental emotional impetus for both was [desire for] the security of the community.

So, from what point in time can we confirm the existence of a legal consciousness that had the interests of individual people at its base? For evidence we turn to the earliest court annal, *Nihon shoki*, compiled in the early eighth century.

Document 2: *Nihon shoki* Taika 2 (646 03/22 CE)
22nd day. The Tennō decreed: - "We are informed that a Prince of the Western Land (China) admonished his people, saying: - 'Those who made interments in ancient times resorted to [use of] a high ground, which they formed into a tomb. They did not pile up a mound, nor did they plant trees. The inner and outer coffins were merely enough to last till the bones decayed, the shroud was merely sufficient to last till the flesh decayed. I shall therefore cultivate the unproductive pieces of land occupied by these tombs, to the end that their place may be forgotten after changing generations. Deposit not in them gold or silver or copper or iron, and let earthenware objects alone represent the clay chariots and straw figures of antiquity. Let the interstices of the coffin be varnished. Let the offerings consist of rice presented three times, and let not pearls or jewels be placed in the mouth of the deceased. Bestow not jewel-shirts or jade armour. All these things are practices of the unenlightened vulgar.' Again it is said: 'Burial is putting away, and proceeds from the desire to prevent the dead from being seen by people.' Of late, the poverty of our people is absolutely owing to the construction of tombs.

We now issue regulations making distinctions between noble and mean. The inner dimensions of tombs of persons of the rank of prince and upwards shall be nine feet in length by five in width. Their outer limits shall be nine fathoms square and their height five fathoms. The work shall be completed by 1000 labourers in seven days. At the time of interment, white cloth shall be used for the hangings (of the bier), etc. A hearse may be used.

The inner dimensions of tombs of Superior Ministers shall be similar in length, breadth, and height to the above. Their outer limits shall be seven fathoms square, and they shall be three fathoms in height. The work shall be completed by 500 labourers in five days. At the time of interment, white cloth shall be used for the hangings of the bier, which shall be borne on men's shoulders.

The inner dimensions of a tomb of a minister of lower rank shall be in every respect similar in length, breadth, and height to the above. Their outer limits shall be five fathoms square, and they shall be two and a half fathoms in height. The work shall be completed by 250 labourers in three days. At the time of interment, white cloth shall be used for hangings. In other matters, the same rule as before is to be followed.

The inner dimensions of the tombs of persons of the rank of Dainin and Shōnin shall be nine feet in length and four feet in height and breadth. The ground shall be made level and no mound raised. The work shall be completed by 100 labourers in one day.

In the case of persons from the rank of Dairei to that of Shochi inclusive, the tombs shall in all respects follow the rule of Dainin, but the work shall be completed by fifty labourers in one day.

Let small stones be used for the tombs of all from the status of prince down to the rank of Shochi, and let white cloth be used for the hangings.

When ordinary persons die, let them be buried in the ground, and let the hangings be of coarse cloth. Let the interment not be delayed for a single day.

The construction of places of temporary interment is not allowed in any case, from princes down to common people. Not only in the Home Provinces, but in the provinces generally, let plots of ground be set apart for interments. It is not permitted to pollute the earth by dispersed interments in various places.

There have been cases of people sacrificing themselves by strangulation when a man dies, or others are strangled as a sacrifice, or the dead man’s horse is sacrificed, or valuables are buried in the grave in honour of the dead, or hair is cut off, or thighs are stabbed and a eulogy is pronounced. Let all such old customs be entirely discontinued.

A certain book says: - 'No gold or silver, no silk brocades, and no coloured stuffs are to be buried.' Again it is said: - 'From the ministers of all ranks down to the common people, it is not allowed to use gold or silver.’

Should there be any cases of this decree being disregarded and these prohibitions infringed, the relatives shall surely receive punishment.

Again, there are many cases of persons who, having seen, say that they have not seen; or who, having not seen, say that they have seen; or who, having heard, say that they have not heard; or who, having not heard, say that they have heard—they are deliberate liars devoid of truth in words and sight.

Again, there have been many cases in which slaves, both male and female, are false to their masters in their poverty and betake themselves of their own accord to

influential houses in quest of a livelihood. The influential houses forcibly detain and purchase them, not sending them back to their original owners.

Again, there have been very many cases in which wives or concubines, when dismissed by their husbands, have, after the lapse of years, married other husbands, as ordinary morality allows. Then their former husbands, after three or four years, have made greedy demands on the second husband's property, seeking their own gain.

Again, there have been very many cases in which men, relying on their power, have rudely demanded people's daughters in marriage. In the interval, however, before going to his house, the girl has, of her own accord, married another, and the rude suitor has angrily made demands on the property of both families for his own gain.

Again, there have been numerous cases of this kind: sometimes a wife who has lost her husband marries another man after the lapse of ten or twenty years and becomes his spouse, or an unmarried girl is married for the first time. Then people, out of envy of the married pair, have made them perform purgation.

Again, there are cases in which women, who have become men's wives and who, being put away owing to their husbands' dislike of them, have, in their mortification at this injury, compelled themselves to become blemished slaves.

Again, there are cases in which the husband, having frequent occasion to be jealous of his wife's illicit intercourse with others, voluntarily appeals to the authorities to decide the matter. Let such persons not lay their information until they have obtained three credible witnesses to join with them in making a declaration. Why should they bring forward ill-considered plaints?

Again, there have been cases of men employed for forced labour in the border lands and who, when the work was over and they were returning to their village, have fallen suddenly ill and laid down to die by the roadside. Upon this (residents of the) houses by the roadside say: - 'Why should people be allowed to die on our road ?' And they have accordingly detained the companions of the deceased and compelled them to do purgation. For this reason it often happens that even if an elder brother lies down and dies on the road, his younger brother will refuse to take up his body (for burial).

Again, there are cases of peasants being drowned in a river. The bystanders say, 'Why should we be made to have anything to do with drowned men?' They accordingly detain the drowned man's companions and compel them to do purgation. For this reason it often happens that even when an elder brother is drowned in a river his younger brother will not render assistance.

Again, there are cases of people who, when employed in forced labour, cook their rice by the roadside. Upon this the (residents of the) houses by the roadside say, 'Why should people cook rice at their own pleasure on our road?' and have compelled them to do purgation.

Again, there are cases when people have applied to others for the loan of pots in which to boil their rice, and the pots have knocked against something and have been upset. Then the owner of the pot compels purgation to be made. All such practices are

habitual among the unenlightened vulgar. Let them now be discontinued without exception, and not be permitted in future.

Again, there are cases in which peasants, when they are about to proceed to the capital and are apprehensive lest their riding horses be worn out and unable to proceed, give two fathoms of cloth and two bundles of hemp to men of the two provinces of Mikawa or Owari, to hire them to feed their horses. After they have been to the capital and are on their way home, they make them a present of a spade, and then find that the men of Mikawa, etc., have not only failed to feed their horses properly but have allowed them to die of starvation. In the case of horses of a superior class, they [men of Mikawa etc.] conceive covetous desires, and invent lying tales of their having been stolen, while in the case of mares which became pregnant, they cause purgation to be made, and in the end make a plunder of the beast. Such things having come to our ears, We therefore now establish the following regulation: - 'Whenever horses are left at livery in any of the provinces along the highway, let the owner take with him the man whom he engages for this purpose, and make a full statement to the village elder, handing over (to the latter) at the same time the articles given as remuneration. It is unnecessary for him to make any further payment when he returns home. If the man charged with livery has caused the horse to suffer harm, he should get nothing. If anyone disobeys this edict, a severe penalty shall be imposed.

The dues payable to market commissioners on main roads and to ferrymen, are abolished and lands are granted instead.

Beginning with the Home Provinces, and embracing the provinces in all four quarters, during the agricultural months let everyone apply himself early to the cultivation of rice land. It is not meet at such a time to let them eat dainty food or drink sake. Let faithful messengers be appointed to transmit this to the Home provinces. And let the chiefs (*kuni no miyakko*) of provinces in every quarter choose good messengers to urge (the peasants to work) in accordance with the edict."
(cf. Aston, *Nihongi*, p. 217-223)

These provisions from a *Nihon shoki* entry of 646, known as the “Abolition of Old Customs Edict,” were primarily based on the report of a provincial governor from the eastern provinces and its contents are true to life. When widows who had lost their husbands remarried, and when unmarried women were married for the first time, envious people of their villages said they had been defiled and demanded purifications. “Purification” in such cases referred to fees, not actual purifications. If a person drowned in a river, people would complain of having to witness such a death. If people on the road to the capital cooked their rice in front of a house, the owners would complain and demand purifications. People also demanded purification if a horse entrusted to them gave birth. If the owner could not pay, they would take the horse as compensation. If these people really thought that there was an issue of defilement, they would never have taken possession of the horse in the first place! But because a custom existed in which payment was to be made for any acknowledged defilement, the accused would have to make payments even when people were clearly making

unreasonable accusations. Given that there was not yet a legal standard for mediating such disputes, some individuals used the notion of defilement to pursue their own profit. So in this edict, the mid-seventh-century government took the initiative to repudiate such long-standing customs, including the construction of mounded tombs (*kofun*) and rites of temporary burial, disdaining them as "old" and "foolish." Furthermore, if we consider that a husband who wished to appeal to the authorities about the adultery of his wife had to provide three credible witnesses and appear with a guarantor, we can imagine that this was the beginning of a judicial system that went beyond relying on the supernatural judgment of the gods.

Next, let us consider another law, concerning local chieftains. The "Edict to Provincial Governors of the Eastern Provinces" of the first year of Taika (645 CE) declared: "Provincial governors shall not pass judgment on crimes in their provinces." From this we can surmise that local and country chieftains held the right to pronounce judgments. Although this right was influenced by the tradition that chieftains had the right to purify sins and makes offerings to the gods, the following story from a provincial gazeteer (*fudoki*) shows that this was not just a matter of religious practice.

> Document 3: *Hitachi no Kuni Fudoki* - Namekata district
> "According to the elders, during the reign of the tennō [Keitai] who governed the realm from Tamaho Palace at Ihare, there was a man called Matachi of the Yahazu family. Matachi planned to reclaim the valley filled with miscanthus [that was] west of the district office. His rice-farming scheme was disrupted, however, by a plague of snakes. {People of this area refer to all snakes as *yatsu no kami* (valley gods)}. [The snakes that disturbed Matachi's reclamation project] are said to have had horns. [The local people believed that the horned snakes would harm them.] They [also] believed that when fleeing from a snake, they must never look back. Anyone who turned his face to the snakes would suffer a curse upon his household—he and his entire family would perish, leaving no descendants. [Even today,] snakes are numerous in the vicinity of the district office.}
>
> Matachi, outraged by the sudden appearance of the snakes, armed himself against them. Taking up his halberd, he slew several, and the rest retreated to the foot of the hill [on the east]. Matachi then thrust a long cane into the irrigation ditch [which his people had dug for him] to mark his territory, and said to the snakes, "[The land extending] from this place to the hill is your territory. [The land extending] from this landmark to the valley, however, is mine, and it is reserved for my people's farming." He continued, "Do not violate this boundary. Be not resentful of this decision, for I shall [construct a shrine for you and] serve as the priest there. My descendants will respectfully provide you with offerings." Thereupon Matatchi erected a shrine to consecrate the spirits of the serpents. He then reclaimed about twenty-four acres of rice fields [for the upkeep of the shrine]. His family has retained the priestship of the shrine ever since. (cf. Aoki, *Records of Wind and Earth*, p. 50)

Here the chieftain chased away the *yatsu no kami*, who represented flooding, with a cane, and then he "banished" them to the mountains. [The chieftain Matachi] secured his people's land by using his cane to check the unruly power of the gods, so governing [the area] was an extension of such actions. Chieftains preserved the legitimacy of their rule by maintaining the order of the community. Over time chieftains would also gain the right to implement punishments, such as imposing a caning or lashing on subordinates or banishing criminals for the purpose of maintaining order. That local chieftains were going beyond purification and using trials to maintain order and resolve disputes between individuals reflects the fact that this was a period of transition.

B. The Taika-era Abolition of Specialized Worker Groups and *Ritsuryō* Officialdom

A similar developmental trajectory can be seen in the central ruling class [based in the Home Provinces (Kinai)].

> Document 4: *Nihon shoki* Taika 2 (646 08/14 CE)
> Autumn, 8th month, 14th day. An edict was issued, ordering: "Going back to the origin of things, we find that it is Heaven and Earth with the male and female principles of nature that keep the four seasons from mutual confusion. We find, moreover, that it is this Heaven and Earth that produces the ten thousand things. Among these ten thousand things, Man is the most miraculously gifted. Among the most miraculously gifted beings, the sage takes the position of ruler. Therefore the Sage Rulers, viz. the *tennō*, take Heaven as their exemplar in ruling the world, and never for a moment dismiss from their breasts the thought of how men shall gain their right place.
>
> Now as to the names of the early princes with their titles of *omi*, *muraji*, *tomo no miyakko* and *kuni no miyakko*, they have divided up various worker groups (*be*) and allotted them surnames. And afterwards they took them and had them reside in the provinces and districts, where they mixed together. The consequence has been to make father and child bear different surnames, and brothers to be reckoned as of distinct families, while husbands and wives have different names from one another. One family is divided into five or split up into six, and both court and country are filled with contentious suits. No settlement has been come to, and mutual confusion grows worse and worse.
>
> So let the various worker groups, beginning with those of the reigning *tennō* and those of the *omi* and *muraji*, be abolished, without exception; and let them become subjects of the realm. Those who have become *tomo no miyakko* by borrowing the names of princes, and those who have become *omi* or *muraji* on the strength of ancestral names, may not fully apprehend our purport: they might think, if they heard this announcement without warning, that the names borrowed by their ancestors would

become extinct. We therefore make this announcement beforehand, so that they may understand our intentions. The children of rulers succeed one another in the government of the realm, and it is well known that the names of the actual *tennō* and of his royal ancestors will not be forgotten by the world. But the names of sovereigns are thoughtlessly given to rivers and plains, or common people are called by them. This is a truly fearful state of things. The appellations of sovereigns, like the sun and moon, will float afar [i.e. the names of those of the royal line will last for ever, like unto Heaven and Earth].

Such being our opinion, we announce as follows: ' Do ye all, from those of the royal line down to the ministers, the *daibu*, *omi*, *muraji*, and *tomo no miyakko*, who do Us service, (in short) all persons of whatever lineage (*uji*) ' [One book has 'royal subjects of whatever name'], give ear to what We say. With regard to the form of your service, We now abolish the former offices and constitute afresh the hundred bureaus. We shall, moreover, grant grades of rank and confer official dignities.'
(cf. Aston, *Nihongi*, p. 223-225)

This Taika edict abolishing specialized workers groups (*be*) is a bit abstruse, but by comparing it to another source that depicts the same situation, it becomes easier to understand.

Document 5: *Nihon shoki* Taika 3 (647 04/26 CE)
An edict was issued as follows: - "The realm was entrusted (bv the Sun-Goddess to her descendants, with the words) 'My children, in their capacity as deities, shall rule it.' [The phrase 惟神 means ‘to follow the way of the gods,’ or again, ‘to possess in oneself the way of the gods.’] For this reason, this country, since Heaven and Earth began, has been a monarchy. From the time when our royal ancestor first ruled the land, there has been great concord in the realm, and there has never been any factiousness. In recent times, however, the names, first of the gods and then of the *tennō*, have in some cases been separated (from their proper application) and made into [those of] the lineages of *omi* or *muraji*, or of the *miyakko*, etc. In consequence, the minds of the people of the whole country take a strong partisan bias, and conceiving a deep sense of the me and thee, each holds firmly to his name. Moreover the feeble and incompetent *omi*, *muraji*, *tomo no miyakko* and *kuni no miyakko* make such names their family names, and so the names of gods and the names of sovereigns are applied to persons and places in an unauthorized manner, in accordance with their own feelings. Now, by using the names of gods and the names of sovereigns as bribes, they draw to themselves the slaves of others, and so bring dishonour upon unblemished names. The consequence is that the minds of the people have become unsettled and the government of the country cannot be carried on. The duty has therefore now devolved on Us in Our capacity as Celestial Divinity to regulate and settle these things. In order to make them understood, and thereby to order the realm

and order the people, We shall issue, one after another, a succession of edicts, one earlier, another later, one today and another tomorrow. But the people, who have always trusted in the civilizing influence exercised by the *tennō*, and who are accustomed to old customs, will certainly find it hard to wait until these edicts are made..."
(cf. Aston, who gives the day as the 29th, p. 226-227)

The *omi* and *muraji*, and the *tomo* and *kuni no miyatsuko,* were consolidated groups that bore the names of sovereigns and divine ancestors (i.e. deities). The right to give their names to people and places was exclusive to them. On the surface, their names derived from people's service [to the *tennō*] and were expected to be permanent. But in reality, the use represented group efforts to pursue and expand their own interests. In the above passage, this is referred to as "people being used to old customs." There was awareness that 'old customs' were being used as a justification for pursuing [individual] interests; and again, the Taika government criticized not the pursuit of [individual] profit, but 'old customs.' Now names were to be managed by the government, which declared: "We now abolish the former offices and constitute afresh the hundred bureaus. We shall, moreover, grant grades of rank and confer official dignities" (Aston, *Nihongi*, p. 225).

The system of officialdom in which people would be promoted in rank according to the regular evaluations of their work and receive remuneration after being appointed to official posts that corresponded to those ranks was put in place under the monarchs known as Tenji (668-71 CE) and Tenmu (673- 86 CE). In the fourteenth year of Tenmu's reign (685 CE), a new system of cap ranks that differed in origin and construction from earlier systems was initiated. The names [of the new cap ranks] — Bright明, Pure浄, True正, Straight直, Diligent勤, Earnest務, Following追, and Advancing進— were taken from the phrase "If you work with integrity and a pure and clear spirit, it follows that you will advance**明**き**浄**き心をもって**正直**に**勤務**すれば**追**って**進**あり." [They also echo Mencius' 6 virtues.] In this sense, the [cap ranks] symbolized the essence of the *ritsuryō* system of officialdom, which attempted to turn individual profit- seeking into official service.

2. Characteristics of the Japanese *Ritsuryō* Trial System: District Official Trials and Council of State Trials

A. District Official Trials and Provincial Official Trials: Defendants and Officials of the Original Place of Registration

The *ritsuryō* laws cover many divergent topics, but here we will examine details of how trials were to be conducted according to provisions of the administrative code.

Document 6: *Yōrō* Administrative Law on Judging Crimes, Imprisonment, and Pardons—Article [Clause] 1, Crimes
When a crime is committed, it should be investigated and judged by officials of the place where it originated.

This article, which sets a standard for *ritsuryō* trials, prescribes the process for deciding and implementing punishment in criminal matters. Elsewhere in the administrative code, Article 63 on Litigation in the Laws on Documentation and Article 17 on Litigation in the Miscellaneous Laws [all in the Administrative Code, *ryō*令] define the processes for civil suits 民事concerning status and property. The phrase "the officials of the place where the crime originated" was previously understood to refer to officials of the place where the crime took place. In recent years, however, it has been interpreted to refer to the place where a complaint or accusation was made, thereby making it apparent that a crime had occurred.

In any event, there were two types of trials—criminal and civil—and there was one system for investigating reported claims of wrongdoing.

The general agreement among scholars today is that the Laws on Documentation and Miscellaneous Laws regulated the time frame and procedure for presenting a civil case: the complaint was to be reported to officials of the defendant's original place of registration. Accordingly, an assessment of the complaint was to be conducted by officials of the home place of the accused, whether by officials in the capital or by district officials in the provinces. Those officials were to reach a decision on [the nature of the crime], and which of five punishments — beating with a light stick, beating with a heavy stick, imprisonment, exile, or death —was therefore appropriate. [In the penal code *ritsu* 律, each crime was matched with a punishment, so deciding the crime decided the punishment.]

There was also a law regarding confirmation and implementation of punishment.

Document 7: *Yōrō* Laws on Judging Crimes, Imprisonment, and Pardons獄令, Article 2 - District Judgments
When a crime is committed, those to be punished by the light stick should be judged at the district level. For those to be punished by the heavy stick or more, let the district officials forward their decision to the provincial headquarters. Once the provincial governor's office has completed its investigation, carry out the punishment and collect payment (redemptions) for crimes to be punished by imprisonment and exile, cases in which exile is to be commuted to punishment by heavy stick,[1] and cases for which a

[1] See Yōrō Penal Law, General Principles, Articles 27 and 28

redemption is to be paid.[2] {Cases [in the capital] in which the Ministry of Justice (刑部省) sentences someone to imprisonment should be dealt with in the same way.} And if the Ministry of Justice or the various provinces reach a judgment of imprisonment or more, or of stripping someone of their name, post, or official rank, all [officials involved in the decision] should sign their names on the copy of the decision and memorialize the Council of State. If the investigation by the Council of State finds that the report is reasonable, [they will] memorialize the *tennō*. If investigation shows that the matter has not yet been made clear, and if it is a matter [outside the capital] in the provinces, send an envoy to re-investigate and report back. If it was [a matter] in the capital, the Ministry of Justice will re-investigate.[3]

Here it is clear that district officials could only carry out punishments with the light stick. Crimes to be punished by the heavy stick as well as more severe punishments [such as imprisonment, exile, or execution] were to be re-investigated by officials at the provincial headquarters. Provincial officials could carry out beating with the heavy stick and imprisonment, and they could collect redemptions in copper cash. For exile and capital punishment, however, as well as for cases in which an official was to lose their family name, post, or official rank, it was necessary to forward the cases to the Council of State, which would reinvestigate and memorialize the throne with their report.

For residents of the capital, the punishments that central officials [i.e. officials in the Capital Office *Kyōshiki]* could carry out were limited to beating with the light and heavy stick. Crimes to be punished by imprisonment, exile, or death were to be re-investigated by the Ministry of Justice, which would carry out the punishment and collect redemptions in copper cash. As in the case of provincial crimes, the Council of State would reinvestigate when the punishment was exile or capital punishment, or when an official would lose their name, post, or official rank. Therefore, provisions for confirming or reinvestigating decisions for serious crime and punishment were parallel in the capital and the provinces: provincial governors had a role corresponding to that of the Ministry of Justice, the only difference being whether or not they had the right to apply punishment by the heavy stick. District and local officials only carried out physical punishment by beating, while provincial governors and the Ministry of Justice saw to imprisonment with hard labor. Major punishments, exile and execution, were overseen by the Council of State and the monarch.

Reform edicts of the 640s recognized the traditional rights of chieftains to judge their people. Under the *ritsuryō* system imposed in the early eighth century, however, provincial governors who were sent out from the capital [as the monarch's representatives increasingly] asserted

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[2] See Yōrō Penal Law, General Principles, Articles 11 and 12

[3] Translation by Nadia Kanagawa, relying the readings and interpretations in Inoue Mitsusada et al., eds. *Ritsuryō*. *Nihon Shisō Taikei* vol. 3, (Iwanami shoten: 1976), 453-454.

their status over district officials. [After 728] if a district official held a higher rank than a lower ranking provincial official, the district official was expected to dismount from his horse when they met on a road—even district officials of the fifth rank had to lead their horses to the side of the road for provincial officials of the sixth rank. Post trumped rank. In addition, district officials' ability to carry out even lesser physical punishments decreased. Article 11 (Redemptions) of the penal code chapter on General Principles states that, as a principle, officials who had the right to decide and implement a caning should be those who were not eligible for caning. So when the order of 728 stated that district officials of the sixth rank and below who failed to dismount should be subjected to punishment with the light stick— the majority of district officials held the sixth rank or lower—they could no longer carry out physical punishment.

Another special characteristic of the *ritsuryō* system of justice in Japan was that the defendant's everyday hierarchical relationship with the officials of his original place of registration influenced the trial process.

> Document 8: *Yōrō* Laws on Official Documentation, Article 63, on Litigation
> Regarding litigation
> Begin with lower [officials]: report the matter to the officials of the defendant's original place of registration. If they are far away or if there is some obstruction, report it to the nearest official so that he can make a decision. Once the decision has been made, if the plaintiff does not accept it and, wishing to appeal, requests a Rejection Document,[4] then forward it to the appropriate superior officials. If the [the Rejection Document] is not produced within three days, the plaintiff is permitted to record the full name of the official who has not produced it and to file a complaint. [...][5]

If we compare this to the Tang law on which it was based, there are some intriguing additions to the Japanese version.

> Document 9: Tang Laws on Official Documentation, Article 40 on Litigation
> Regarding litigation
> It should begin with lower officials. All should go through the officials of the original place of registration. If that place is far away or if there is some obstruction, nearby officials should make the judgment. If the complainant does not agree, he or she should immediately request a Rejection Document.[6]

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[4] 不理状, literally a "document of illogic" indicating that a party in the trial did not accept the logic of the decision.

[5] Translation by Nadia Kanagawa, relying on Inoue, *Ritsuryō*, 399.

[6] Translation by Nadia Kanagawa. The reconstruction of the Tang law here is based on a summary in the *T'ang Liu Tien* (Tang Six Classics, 唐六典).

As we see in the latter half of this Tang law, regulations for the request of the Rejection Document are all from the perspective of the plaintiff, and thus we can conclude that the phrase "officials of the original place of registration" also refers to the plaintiff's position, and that this is where a complaint (suit) should begin. In the Japanese law, however, the text says: "Report the matter to the officials of the defendant's original place [of registration]." In the Japanese version, the law has been revised to stress that the complaint should be reported to the place with which the defendant had affiliation. There was an enduring tradition [in Japan] that defendants should be judged by officials who had a regular relationship with them, like the chieftain of their home place..

B. Trial by the Council of State and the Ministry of Justice

The authority of the Council of State in the Japanese *ritsuryō* system of justice was both broader and stronger than that in Tang China. The functions of the Tang Grand Court of Revision were absorbed into the Japanese Ministry of Justice, while the Tang Justice Ministry's ability to re-investigate was absorbed by the Council of State. This was perhaps the reason that as the function of the Ministry of Justice declined (from the tenth century on), that of the Council of State increased.

Punishments mandating exile and capital punishment, as well as punishments that involved cancelling name, office, or official rank, were all to be re-investigated by the Council of State and then reported to the *tennō*. However from the beginning of the tenth century, the *Engi Protocols* for the Ministry of Justice stipulated that in the tenth month of the year the Ministry of Justice would create a document [listing] all decisions and crimes from the year and submit it to the Council of State. The Council of State would then submit it to the *tennō*, using the solemn memorial format.[7] This same protocol appeared in the *Kōnin Protocols* of the early ninth century, and sources like the following confirm that it dates back to the eighth century.

> Document 10: Council of State directive, Kōnin 6 (815)11/20 CE
>
> Council of State directive: On the need to modify the time period in which capital punishment is announced
>
> Regarding this matter, a Council of State directive to the Ministry of Justice dated Enryaku 14 (785) 08/14 CE states:
>
> On the conviction of prisoners, the regulations of the administrative code are correct. Consider the time of the year: convictions of capital crimes must not be announced

[7] The *ronsō keishiki*, regulated by the Laws on Official Documentation, Article 3, was the format used when the Council of State presented its deliberations to the monarch and requested an order or decision about them from him.

improperly. Reflecting on past practice, we find that either [the officials responsible] let the autumn season pass by and postpone [their duties] until the beginning of spring; or the imprisonment of those convicted of lesser crimes continues for months and years. This is tantamount to disobeying the laws and protocols, as if no standards existed at all.

We ask that, in accord with the provisions of the administrative code, those convicted and to be sent into exile are not made to wait for their sentences to be announced; or that those who have committed capital crimes are made to wait for the end of the year for their sentences to be announced. We respectfully request [His Majesty's] decision."

[Concerning which, the Minister of the Right [Fujiwara no Tsugutada] received a royal order: let it be as requested.]

Now [in 815], we have received a declaration from the Minister of the Right [Fujiwara no Sonohito] saying he has received a royal order: "There is no harm in implementing the heavy punishments in autumn or winter, but in recent years the officials responsible have waited for the end of the year to report convictions. This means that, considering the calculation of delays on the road, arrivals at the place of distant exile take place in the spring.

From now on, all reports of convictions must be submitted by the beginning of the 10th month. From the 1st day of the 11th month to the 10th day of the 12th month, there are daily rites and events at court, and the officials of the capital shall not be authorized to pronounce death penalties during this time."

Kōnin 6 (815) 11.20[8]

According to the directive of the Council of State from 785, those convicted of crimes to be punished by exile or death were being reported to the throne as a list. Indeed Article 8 of the Laws on Judging Crimes, Imprisonment, and Pardons, which concerned fifth rankers and above, stated: "Decisions on capital crimes shall not be reported to His Majesty from the beginning of spring to the end of autumn." In 815, however, His Majesty's ministers recognized that punishments and notification thereof were frequently being delayed past the first day of spring. They ordered that decisions and reports be completed by year-end, so that the list could be memorialized to His Majesty before spring began, as the law required.[9]

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[8] *Supplementary Legislation from the Three Eras.* Translation by Nadia Kanagawa, relying on Sakamoto Tarō, *Ruiju sandai kyaku*, *Shintei zōho kokushi taikei*, vol 25, p. 514; and the French translation by Francine Hérail, *Recueil de Décrets de Trois Ères Méthodiquement Classés*, Vol II, p. 698-700.

[9] Issue of ritual purity—the monarch should not be sullied by death in spring or summer.

Over time, however, the process of evaluating crimes and pronouncing punishments changed. The last time we see reference to the year-end report on judgments of crimes is in 914. And according to a tenth-century ritual handbook's discussion for events in the tenth month, "A minister shall memorialize the report concerning the judgment of crimes.[10] Meanwhile a Council of State directive from Tenreki 4 (950)10/13 CE quotes from a Ministry of Justice report that declares: "The *Ryō no Gige* [compendium of commentaries] on the Laws on Judging Crimes, Imprisonment, and Pardons states that judgment of crimes is no longer the purview of the Ministry [of Justice]."[11] Instead a legal scholar was being consulted by the Council of State, and he produced a decision as to the type of crime and punishment.

There are also reports of officials who made mistakes in governance, or were accused of oppressing [the people]. For instance, a commentary on the administrative code compiled in the early eighth century says, "Current practice is that a controller (*ben*) accepts [accusations/ claims]."[12] And in the *Shoku nihongi* entry for Tenpyō 7 (735 09/28 CE), we find that the Senior Controller of the Right Ōtomo Michitari and six others were accused of failing to accept a report of a manslaughter suit against the Mimasaka provincial governor (Abe Obimaro). Therefore they were questioned on charges of unjust handling of an accusation. From early on, the controller's office was functioning as a kind of secretariat for the Council of State, accepting complaints and forwarding them to the Council, which would then create draft judgments and memorialize the throne to receive the tenno's approval.

In this regard the later annal *Shoku nihon kōki* has an entry for Jōwa 13 (846 11/14 CE) that states: "Litigation is forwarded by the controllers , as per an old custom —it is nothing new." The fact that lawsuits were accepted by the controllers, who as fifth rankers could seek a royal order easily, was connected to their direct service to the *tennō*.[13]

The framework for such deliberations (trials) by the Council of State continued after the tenth century. During the era when Northern Fujiwara regents led the court (especially by the elevenh century), however, it was replaced by the system of Council of State judgment by directive. Specifically, the "noble-in-charge" (shokei) to whom the matter was remanded received the tennō's directions, gave commands to controllers and recorders, and summoned

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[10] The source is the journal of Fujiwara no Tadahira, the *Teishinkōkishō,* entry for Engi 14 (914 12/22 CE). Trre is a partial translation by Piggott et al. *Teishinkōki, What Did a Heian Regent Do?* The ritual handbook is the *Saikyūki*, compiled in the tenth century.

[11] It is in the *Abstracted Compendium for Governance* (*Seiji yōryaku*), compiled in the eleventh century.

[12] This was the *Koki* commentary of Tenpyō 10 (738) on the Taihō administrative code. It is frequently quoted in the compendium of commentaries, *Ryō no Shūge*—the citation here is in its section on Laws on Official Documents, Article 65. The *Ryō no Shūge* was compiled between 859 and 868 CE.

[13] Only officials of certain ranks and statuses, those of the fifth rank or above, could serve the *tennō* directly (ie. have direct access to the monarch).

the suspect. After investigating the circumstances, controllers and inspectors of the Royal Police (*Kebiishi*) would conduct a trial, create a record of their thoughts and the questions asked and answered, and report back to the noble-in-charge. When it was determined that a crime had been committed, a doctor of law and a senior judge would be asked to submit a document naming the crime (and the punishment). Once the name of the crime had been decided, the *tennō* would send down his decision [to permit, or not permit] on the matter.

Cases handled by this process included serious crimes, such as those in which the defendant was an official of fifth rank or higher, an envoy or attendant of a noble house, a person with a connection to a great temple or shrine, or cases in which the crime was one of treason against the realm, a crime involving affairs of state or the gods, cases in which there was damage to royal property or a great temple, or to that of an official of fifth rank or higher, or a crime of fighting or other lawlessness. Punishments for such crimes were mainly those that fell in the broad category of exile, including exile outside of the capital, having one's registration moved, or banishment and demotion in rank. These sorts of trials also dealt with cases in which a legal scholar's opinion was not required, including imprisonment (by the royal police) without fetters; or being bound with rope, or leg shackles; or being removed from official duties, losuing one's post, and removal of one's name from the list of officials eligible for appointments.

As the core functions of governing were collected within a system known as "the Council Discussion and Report to the Throne" process,[14] legal scholars and judges also began to receive and respond to direct inquiries from the Council of State. As part of their deliberations, the Council of State would request a specialized opinion from experts in either Chinese humanities or Chinese classics, thereby replacing the activities of legal officials, legal teachers, and doctors of the law charged with the interpretation of the *ritsuryō* law in earlier times.

On the other hand, groups around the throne such as the royal intimates and attendants, as well as attendants in various extra-codal offices that were established in the ninth century, were also enabled to receive the monarch's judgments directly, as demonstrated by the phrase, "a royal secretary (*kurōdo*) presented the royal judgment." Royal attendants and secretaries handled less serious crimes, the submission of official apologies, admonitions and releases from custody, orders for confinement to the palace or house arrest, loss of courtier status, and removal from the list of those able to enter the royal presence.

And from the tenth century on, we see a disciplinary action known as 'reprimanding,' which came to be used by various offices and households—it took place in the context of patrimonial-style relations and punishments. For example, when the followers of a given

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[14] Such deliberations, known as "Guardroom Discussions" (*Jin no sadame)*, developed in the late ninth to early tenth centuries.

noble fought and behaved lawlessly, their master would be summoned to the office of the Royal Secretariat (*Kurōdodokoro*) for interrogation and punishment, and he would be required to pursue, capture, and turn over the accused miscreants. This was the seed from which the later medieval justice system, in which a master would have to turn over his subordinates accused of crimes, would emerge.

3. Trials by the Royal Police

Here I will introduce the Royal Police, who came to handle trials for commoners and officials of the sixth rank and lower, as well as for all common crimes that were not major offenses [in the capital]. The Royal Police Office (*Kebiishichō* 検非違使庁) was created in the Kōnin era (810-824 CE) to control 検 "oddities" 非違in the capital. Gradually it absorbed the duties of the Ministry of Justice, the Board of Censors (*Danjōdai*), and Left and Right Capital Offices (*Kyōshiki)*. From the tenth century on, the Royal Police became an important organization with both police authority and judicial functions.

There were two types of trials [over which they presided]: those held daily at the Office of the Royal Police, called *shuchōsei*; and those held in the East and West markets during the fifth and twelfth months of the year, called *chakudasei*. The daily trials dealt with miscellaneous and less serious crimes such as violations of prohibitions, use of prohibited goods, and crimes formerly handled by the provincial and district officials and punishable by the light or the heavy stick. The fifth- and twelfth-month trials dealt with crimes to be punished by hard labor, or by fastening leg chains and cangues to criminals and leading them in public procession through the West and East markets to prison. These trials were instituted by royal decree in Kōnin 9 (818 CE) as a means of punishing strong-arm robbery, and they made the severity of punishments by the Office of the Royal Police quite visible to all. According to fragments of the Jōgan 17 (875 CE) *Protocols of the Royal Police*, [15] the royal police acted in response to special royal directives (*senji)*, taking over the tasks of the Ministry of Justice and dealing with robberies in the capital. This created a situation whereby the director of the Royal Police, often a minister of the Council of State, could punish or imprison robbers directly. An order of the Council of State dated 822 CE set limits for the amount of time a criminal could be imprisoned.[16] This document, citing an earlier royal order (from 818), reads: "Thieves shall not be allowed to argue the relative seriousness [of their crime]. All shall be imprisoned." Since this seems to indicate an awareness that imprisonment for the crime of robbery might last until a criminal's death, the Protocols may have existed before 818.

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[15] Quoted in the early 11th century *Abstracted Compendium for Governance* (*Seiji yōryaku*).

[16] Council of State order from Kōnin 13 (822) 02/07, in the legal compendium *Supplementary Legislation from the Three Eras* (*Ruiju sandai kyaku*). There is a French translation by F. Herail: Recueil de dcrets de trois eres, 2 vols. Droz 2008-2011.

After the Bureau of Prisoners charged with the detention of plaintiffs and defendants in undecided cases was closed, it became common to use the Left and Right Prisons of the Royal Police for such detention[17] The Council of State edict of 818 aimed to reform the length of prison terms and the amount of time spent in detention for undecided cases. In reality, however, imprisonment of those who were not robbers continued; and it became increasingly common for armed robbers to remain in the prison after their trial. In the eleventh century, imprisonment based on the judgment of the director of the Royal Police (who was a high ranker in the Regent's family) became routine. So did customary laws— those of the Office of the Royal Police that were fundamentally different from *ritsuryō* codal laws— became the foundation from which later law flowed in the capital.

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[17] They had been managed by the Ministry of Justice.