



The History of Law in Japan, Through Historical Sources

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Lecture 23: Inheritance in Classical Japan, the Clause on Inheritance
in the Laws on Residence Units 戸令応分条と古代日本の相続法

Translated and Interpreted by Nadia Kanagawa

Today [in Japan], legal heirs and shares of an inheritance are set by the civil code, and if there is no will, these laws are applied. Here, we will go back in time and use case studies and the legal system to consider Nara period (710-84) inheritance of property. Classical Japanese property was made up of moveable property like bound servants and livestock, as well as un-moveable property such as residential land and personally-held rice fields, but the limitations of the sources make it difficult to capture the actuality of how inheritance worked.

1. Property Inheritance in the Ritsuryō Codes

The Clause Concerning Inheritance in the Law on Residence Units – in the Tang Code, Taihō Code, and Yōrō Code

An important clue with which to begin our consideration of classical Japanese property inheritance is the *ritsuryō* article that dealt with inheritance: the Clause Concerning Inheritance in the Law on Residence Units. The only extant version of the clause is from the Yōrō code, compiled in 718 CE and promulgated in 757 CE. Nakada Kaoru (1877-1967), a major scholar of Japanese legal history, reconstructed the Taihō code (701 CE) clause using quotations of that text in the *Koki* legal commentary (738 CE) in the compilation of commentaries *Ryō no Shūge* (9th century). Furthermore, Nakada used fragments quoted in the Compendium of the Code of the Six Divisions of the Great Tang (*Tang liudian* 唐六典), and the Rites of the Kaiyuan Period of the Great Tang (*Da tang kaiyuan li* 大唐開元禮) to reconstruct the Tang-code version of this clause (the results were compiled by Nakada's student Niida Noboru (1904-66) in the *Tōrei shūi*, with later scholarship collected in the *Tōrei shūi ho*). Nakada then compared these three texts. This ground-breaking research continues to influence *ritsuryō* research today. Through comparative research it is possible to clarify what areas were amended in adopting the *ritsuryō*, to bring to light the conditions and existing laws of Japan, and to get a sense of changes in society that led to changes in the legal system reflected in revisions between the Taihō and Yōrō codes. Furthermore, the discovery of the Northern Song Tiansheng Statutes (*Tensei rei* 天聖令) at the Tianyi library in China in 1999 made it possible to reconstruct parts of the Tang code that had previously been difficult to clarify.¹

The contents of these three texts differ significantly. The differences between the Tang and the Taihō codes give us some sense that they reflect differences in customs between Tang and Japan at the time, but how we should think about the Yōrō codes, which were created only twenty years

¹ On the Tiansheng statutes from Northern Sung China, see Otsu Tōru's article in English in *Acta Asiatica* 99 (2010), 81-108.

after the Taihō codes, is a difficult problem. Let us start by comparing the relevant clauses of the codes.

Source 1: Tang Clause Concerning Inheritance in the Law on Residence Units

1. All fields, houses, and movable property involved in the family division should be divided equally among older and younger brothers.

Commentary: After the parents and grandparents have died, brothers who have been living separately with a separate stove for more than three years, or those who have run away for more than six years, even though they did not receive any of their parents' or grandparents' fields, houses, shops, mills, retainers, or slaves which are now being divided, may not [return and] request shares of the estate.

2. Property from the wife's family is not to be part of the division.

Commentary: If the wife has died, her natal family may not seek to dispose of any of her assets or slaves (*tzu-ts'ai chi nu-pi*).

3. If any one of the brothers has died, his sons inherit their father's portion.

Commentary: This also applies to an adopted heir.

4. If all of the brothers have died, the property is divided equally among all of their sons [i.e., grandsons of the head of household].

Commentary: The father's and grandfather's permanent lands and imperial gift lands should also be equally divided. The personal share lands should be distributed according to the age-status rules [of equal field distributions]. Even if the land is limited in quantity, it should be divided according to this rule.

5. Any sons who have not yet obtained wives should receive a separate portion for their betrothal gift. Any unmarried daughters or aunts [father's sisters] should receive portions equal to half the amount of the son's betrothal gift. Any widowed wives without sons should receive their husband's share. If all of the husband's brothers have died, the widow should receive the same portion as one of the sons.

Commentary: If the widow has a son, she does not get a separate portion, assuming she stays in her husband's house as a chaste widow. If she remarries, she may not dispose of the retainers, slaves, fields, and houses [of her husband], but [must leave them] to be divided equally among the remaining coparceners (*yingfen jen*).

Translation is Bettine Birge's in *Women, Property, and Confucian Reaction in Sung and Yüan China (960–1368)*, Cambridge University Press, 2002. For her translation with notes and discussion, see pages 54-55.

For an alternate English translation, see David Wakefield, Appendix I in *Fenja: Household Division and Inheritance in Qing and Republican China*, University of Hawai'i Press, 1998. See also: Niida Noboru [1933] 1964: 245-246.

Household property, made up of fields, residential land, and other goods, was in principle divided equally among brothers (unless there was still something left that could be divided from the father's fields, residential lands, and other goods, it was not generally allowed for people to request a revision of the division of property if someone had absconded for more than six years, or if someone had constructed a new residence with separate household finances for more than three years). The property brought by the wives of the inheriting brothers (their dowries) was not part of this division—on the other hand the wife's family was not permitted to demand the return of her property and bound servants in the event that she had died. In the case that there was a death of one of the brothers, that brother's son would receive his father's portion (the same applied for an heir designated posthumously). In the case that all of the brothers had died, the property was to be equally divided among their sons—the father's permanent lands and imperial gift lands were also equally divided; allotted fields would follow the age-based standards of allotment, unless the fields were insufficient, in which case they would follow this regulation). Furthermore, if there was a brother who had not yet obtained a wife, betrothal gift funds (a wedding loan) were to be allocated to him. The father's unmarried sisters and daughters would receive half the amount of the betrothal funds allocated to sons. In the case that brothers who had died did not have a son, the widows or concubines would receive his portion, and if all the brothers had died, they would receive the same portion as one of the children (there was no separate allocation for widowed wives and concubines in the case that there was a son. "Widowed wives and concubines" here refers only to those who did not remarry and who remained in the household; those who remarried were not allowed to use the bound servants, fields, or residential lands, which would be divided among those who received shares of the inheritance).

The clause examined here does not regulate inheritance by bequest (i.e. given by testament). In China, the fundamental principle for the family was living together and sharing property. Even if the patriarch as the head of household died, the remaining property was considered the joint property of the members of the household. As a result, it was only when someone changed residences due to marriage etc. that it became necessary to divide the household property evenly. Under the idea that parent and child were of one mind, it was thought that the sons would have inherited their father's personality in equal measure, and so together they took on responsibility for performing rites for the ancestors.

The next question is, what changes appeared when a law based on this Chinese notion of the family was adopted in Japan?

Source 2: Taihō Clause Concerning Inheritance in the Law on Residence Units

When dividing [property], the residence, hereditary household servants, and bound servants should all go to the heir. (Division of the bound servants according to a document by the heir is permitted). Half of the [other] property shall be shared equally among the other sons. Bound servants belonging to the wife are not part of the division. (They shall return to the original line [that sent them].) If one of the sons has died, his son shall inherit his portion. If all of the sons have died, divide everything equally among their sons [i.e. the grandsons]. If a widow does not have a son, she shall receive her husband's portion. (If all of the husbands have died, each widow shall receive one child's portion, whether they have a child or not. Those who remain in the husband's household are said to be maintaining their chastity.)

Translation: Nadia Kanagawa

Half of the heritable property as well as the residential land, household servants, and bound servants were to be inherited by the heir. The remaining half would be equally divided among the other sons. Bound servants in the possession of widowed wives and concubines were not part of this inheritance and would ultimately go back to the families from which they had come. If there was a death among the heir and other sons, that portion would go to the person's son. If all of the sons and the heir died, the property would be evenly divided and inherited by their sons. If a widowed wife or concubine had no son, she would inherit the portion that would have been her son's. If all of the sons had died, their widows would each receive the portion of one child—in this case, the portion was the same whether there was a child or not. This provision was, however, limited to women who did not remarry and remained in the household.

As Nakada pointed out, differences from the Tang law were as follows:

1. Fields were separate from the heritable property such as residential land, household servants and bound servants
2. There was a major difference in the share inherited by the heir and by the other sons, and all of the residential land, household servants, and bound servants would be inherited by the heir.
3. In principle, female children and widows were left out of the inheritance
4. In the case that all of the children had died, the portion that the widows would inherit was that of one male child, regardless of whether they had a son or not
5. The property of the wives that was to be exempt from division was limited to their bound servants, who would be returned to the original family from which they came

The second point is of particular importance - the principle of dividing property equally among the sons in the Tang law became a principle of dividing the property unequally between heir and other sons in the Taihō code of early eighth-century Japan.

The Yōrō code represents an even more dramatic shift. It is difficult to say which [Japanese code] reflected the customs of the time, but they clearly projected some notion of inheritance practices of the time.

Source 3: Yōrō Clause Concerning Inheritance in the Law on Residence Units

When dividing up the resources (*shizai*) [of the deceased], add up everything, including hereditary household servants (*ke'nin*), bound servants (*nuhi*), rice fields, and the residence with its storehouses (*yake*). Then divide the resources as follows. (However bound people (*senmin*) belonging to a royally titled clan (*uji*) are excepted. And the fields and benefices acquired [by an official] due to merit shall be passed on to his sons and daughters.)

The heir's lawful mother (*chakumo*), the heir's stepmother (*keimo*), and the heir (*chakushi*) shall all receive two portions, compared to a single portion for other [non-heir] sons. (Concubines shall receive the same portion as the other women [the daughters].) Non-heir sons shall receive one portion. However, all resources brought by a wife [from her home] are excepted from such dividing.

And should one of the sons [of the deceased] have died, then his son shall inherit the father's portion (and the same for an adopted son). Should all of a man's sons have died before him, then their sons — the grandsons of the deceased — shall share the resources [of the deceased] equally.

As for the sisters of the deceased as well as the unmarried daughters (i.e. the sisters of the heir), they shall receive one-half of the portion of a non-heir son. (Even if a sister or a daughter is married, if she has as yet received nothing of the deceased's resources, she should receive the same portion as if she were unmarried.)

If the wife (*sai* 妻) or concubine (*shō* 妾) of a son of the deceased has no son, she should still receive her husband's portion. The portion of a woman [that is, a granddaughter] is as above [that is, a one-half portion]. Should all the brothers [that is, the sons of the deceased] have died, their wives and concubines should receive the sons' portions if they do not remarry, whether or not they have sons.

Should the relatives of the deceased wish to remain living together while utilizing [collective] resources without dividing them up, or if resources have been apportioned to

someone by the deceased before his death and there is clear proof, then these statutes for the distribution of the resources of the deceased shall not apply.

Translation from Yoshie Akiko, Yōko Ijuin, and Joan R. Piggott. “Gender in the Administrative Code, Part 1: Laws on Residence Units.” *Teikyo Journal of History* 28 (February 2013): 116–122.

All of the heritable property—household and bound servants (other than those belonging to a royally-titled clan), rice fields, residential land, and movable property (merit rice fields and merit benefice units) —were to be aggregated and distributed according to this law. The mother and stepmother of the heir (or the widows of inheritors) in addition to the heir would each receive two portions (twice that of the other sons). A wife’s portion of the inheritance was the same as that of sisters of the heir, half that of non-heir sons. Non-heir sons would inherit one portion. The property of the widows of those who inherited was not part of the inheritance [because it was their dowry]. If there was a death among the heir and other sons, that person’s son would receive his portion (as would an adopted child). If the heir and other sons all died, their sons would split the property equally. Sisters and daughters of the father who were still in the household would receive half of what the male children received. (as would daughters if they had not already received a portion). If there were no sons, the widows and concubines would receive the inheritance their husbands would have received (the portion for sisters and daughters of the deceased followed the above; if the siblings of the husband had all died, their widows and concubines would each get the portion of one child. At these times, the portion was the same whether they had a son or not, unless they had remarried and left the household). Should however, remaining family members wished to continue sharing property and residence, or if portions based on the will of the patriarch had been distributed while the father was still alive, this clause did not apply.

Differences between the Taihō and Yōrō codes were:

1. Fields were added to heritable property, while house and bound servants belonging to royally-titled clans as well as merit rice fields and merit benefice units were to be inherited separately
2. More people were included in the inheritance - the daughters, mother, and step mother of the heir, and concubines all received property
3. The standards for dividing the inheritance were revised, with the mother and stepmother of the heir and the heir receiving two portions, the other sons one portion, while daughters and the concubines of the patriarch each received a half portion.
4. The property that was separated from the inheritance was not limited to the bound servants of the wife, but included all of her property, which would revert to her natal family.

In addition, this clause explains that if the various inheritors wished to continue to live together and share the property, or if the property had already been divided when the patriarch was alive, this clause would not apply.

Interpretations of the Clause Concerning Inheritance in the Law on Residence Units

Many researchers have put forward interpretations of major differences in the contents of these legal clauses. In particular, they have focused on what caused the differences between the Taihō and Yōrō codes, which codes reflected the real customs of the time, and what level of people they targeted. The major interpretations are below.

Nakada Kaoru argued that “the heir” in the Taihō-era clause was the same as that described in the Clause on Inheritance [elsewhere in the administrative code], in the Laws on Inheritance and Succession (Keishiryō), which took into consideration the “grace rank” benefit accorded to those of the eighth rank and above: “Regarding successors of eighth rank and above, the heir shall inherit. If there is no heir, or if there is some calamity, then the heir’s son shall be the successor. If the son does not have an heir, then make the next son of the same mother the successor. If the mother of the heir has no younger children, then another son. If there are no other sons, then the younger brother of the heir’s son. If that mother has no younger sons, then the grandson of another son. Regarding the head of a royally-recognized clan, follow the edict [of the sovereign].” Nakada also argued that the clause did not apply to commoners, and that these provisions reflected ancient customary law.

In response, Imae Hiromichi (1955) pointed out that the heir is designated in residence unit registers from Taihō 2 (701 CE), along with the wife and oldest son. He argued that Nakada’s reconstruction of the Taihō Laws on Inheritance was mistaken, in that [the registers proved that] commoner designation of successors was also regulated by the Taihō provisions. Furthermore, he argued that what the heir inherited was not grace rank privilege but rather household headship.

Taking all of this in, the historian of women’s history Sekiguchi Hiroko argued that the Taihō code was significantly different from the reality of the time: rather it was the result of trying to rapidly adopt an inheritance law based on patriarchal ideology.² She argued that by the time when the Yōrō rules were compiled, the government had relaxed that effort and that they reflected actual customs [at the time]. Still another response was that of Yoshie Akiko, who re-evaluated the Nakada theory and argued that the Taihō codes set the property inheritance of

² In English see Sekiguchi’s article, “The Patriarchal Family Paradigm,” in D. Ko et al. *Women and Confucian Cultures in Premodern China, Korea, and Japan*, U California Press 2003, 27-46. Two registers from the Taihō era are discussed: 30-33.

royally-recognized clans (*uji*), while the Yōrō codes dealt with everyone from commoners up. She unified “the heir of official post and rank” and “a commoner’s heir of a residence unit” as the “inheritor of the *ie* (father-led unit).” Furthermore, based on the Yōrō Laws on Inheritance and Succession, she stressed a hierarchy within the family group, including male/female, heir/non-heir, and wife/concubine. Still another view is that of Yoshikawa Toshiko, who thinks that the Yōrō code regulations reflected the thinking of Fujiwara no Fuhito. He did not have property passed down through the patriline and sought to dismantle the traditional royally-titled clans with their inheritance of massive amounts of property.

In this way, various scholars have put forward various theories, but no conclusion has been reached. At the current stage in research, we have no choice but to try to approach property inheritance by considering case studies.

2. The Reality of Property Inheritance

Filiality and the Custom of Equal Inheritance

Up until the tenth century, the practice of equally dividing inheritance among men and women was widely accepted, but recent research has shown that in the eleventh century local landholders came to possess various pieces of land as a result of their land opening efforts. Their main land holdings would pass to male children, and a tendency to pass everything to the heir emerged as inheritances for male and female children diverged and female children got shares of other kinds of personally held fields and gardens. Nevertheless, the custom of equally dividing inheritance between men and women also continued among private proprietors, monks, nuns, and cultivators, with equal inheritances for male and female children.

There are very few records that help us grasp the reality of property inheritance before the tenth century, but a woman named Tami Yasushimeko (民安占子) left a document dated 909 CE in which she divided her residential land and garden among her children – one son and four daughters.

Source 4: Tami Yasushimeko Residential Land Document of Distribution

Regarding the Distribution of One *Tan* of Residential Land

Daughter Abe Kusoko is granted 100 *bu*. Daughter Abe Akotoji is granted 100 *bu*.
Daughter Abe Otochoko is granted 160 *bu* (granted for the benefit of this daughter because of her magnanimous heart).

(location, property name)³

Deeds for the above land are held by the son, Abe Kuzumaru.

The above residential land has been divided and granted to the daughters. However, the son, Kuzumaru, and the daughter, Otojiko, shall mutually divide the garden and residential land according to the law on dividing [property].

Engi 9 (909) 11.15 Granted by Tami no Obito Yasushimeko
Signing Officials [of fourth rank or higher]
Yoshino no Muraji [Imasada]
Tami no Obito
Naka no Sukune [Otomai]⁴

One *tan* of residential land (360 *bu*, with one *bu* equal to 3.31 square meters) was split into 100 *bu*, 100 *bu*, and 160 *bu* to be inherited by three daughters: Kusoko 屎子, Akotoji 阿古刀自, and Otochoko 乙町子. The stated reason Otochoko received a larger portion was as follows:

“Granted for the benefit of this daughter because of her magnanimous heart.” The next in the series of documents says, “It is because of [her] filiality.”

Source 5: Tami Yasushimeko Residential Land Document of Distribution

Because of her filiality (care for the elderly) the aforementioned land has already been granted specially to the daughter Abe Otochoko. However, the original land proof documents are held by the son Abe Kuzumaru. From now on, all known sons and daughters should not cause disturbances.

Engi 9 (909) 11.15 Granted by Tami Yasushimeko

Regarding the above land, it has been granted to Otochoko
Yoshino Imasada
Nakatomo Otomai
Co-signed by the son Abe Kuzumaru

District seal Engi 14 (914) 3.25

Provincial representative (seal) Muneyuki

Temporary replacement,
third-level district official,

³ 在、上県二条給理里八道祖田坪中北辺子小南地者

⁴ Takeuchi Rizo, *Heian ibun* vol. 1, #202.

Right Capital Clerk (<i>ken</i> 県)	ritual attendant Temporary head, Chōshin
Investigator (<i>ken</i> 県) Toshisada	Hasebe
Temporary Chief District Magistrate Naka Arinami	
Junior Magistrate Munekata	

Regarding the above land, on Enchō 9 (931) 3.17, at a cost of 35 sheaves of rice given to ...⁵ In order to receive proof of the loan, roughly one *koku* two *to* should be presented.

There are some addenda by inheritors, but the assumption here is equal division of the inheritance. As it says in Source 4, “The deeds for the above land are held by the son, Abe Kuzumaru,” so we know that the document proving rights to the land was held by the oldest son, Kuzumaru. Furthermore, “The man Kuzumaru and the woman Otojiko shall divide the garden and residential land according to the laws on division.” Thus the garden and residential land was [probably] split according to the Yōrō code Clause Concerning Inheritance in the Law on Residence Units. We do not know if this was the same amount of land as the other female children received, but the name Otojiko makes it likely that this was the eldest daughter, in which case the inheritance for the oldest son and oldest daughter was set separately. In any case, we can confirm that this was close to equal division of the property. Furthermore, the Yōrō Clause Concerning Inheritance in the Law on Residence Units stated that the law would not apply when property was divided while the father was still alive. At the time, dividing property during one’s lifetime was the custom, meaning that in reality inheritance was decided quite freely from the administrative codes.

Lawsuits Concerning the Inheritance of Residential Land and Property

Examples from the Nara period (710-784 CE) are particularly few and far between, but there are some interesting if fragmentary cases in which there is a lively exchange among the younger sisters of a patriarch regarding inheritance. From these, we can tell that troubles regarding inheritance appeared early on. The following records from documents of Tōshōdaiji, entitled

⁵ 与於県扶実沽 Agata Fumiko? they received support from the province ??

“Reports on requesting the return of household property,” are one type of record that depict actual events.

Source 6: Draft Report on Requesting the Return of Household Property

Report: Submitted due to the seizure of parents’ property and residences

(No surname) Mukō Left Capital, Seventh Avenue, First Column, Outer Junior Fifth Rank Lower

Together there are four residences

•One has no goods Left Capital Column...

•One has 3 shingled storehouses 2 full of harvested rice, 1 holding misc. goods
1 threshing room thatched with cypress bark,
1 shingle-roofed building with goods.
1 thatched roof kitchen, 3 shingled buildings.

And the father’s property with miscellaneous goods, of which

•One is in the Right Capital, Seventh Avenue, Third Column shingled, 2 shingled buildings, thatched, 1 eastern threshing room

•One in the Right Capital, Seventh Avenue, Third Column thatched and shingled storehouse, shingled building, place
1 thatched building, 3 shingled buildings All empty
1 iron pot, 3 __, 2 horse-carrying ships

The above two residences were mutually held by father and mother

Previously, Muko’s father, who had been appointed provincial governor, retired. After some time, he passed away in the Hōji era (757-064). Then his three sisters agreed to seize several [of his properties]. Consequently, Muko lamented and suffered, saying he {had conducted funeral rites for his father} and that it was not long afterwards [that the sisters seized the properties]. Muko then petitioned that the properties should be returned, following his {late} father’s wishes, and that the sisters should not visit during Muko’s residency there. So is this document on [Muko’s]] rights to the land submitted.

An envoy should be dispatched without delay to the various places – residences, buildings, and storehouses with various goods. Furthermore, the official envoy.... The rice in the storehouses as well as the goods in the buildings must also⁶

Translation: Nadia Kanagawa

As seen here, the document records a claim submitted to the Capital Office (the equivalent of the provincial governor overseeing affairs of the capital residents). The claimant states that the residence and property that he should have inherited from his deceased father, who had served as a provincial governor, had been stolen through a conspiracy among his three younger sisters. It states that the father had passed away in the Hōji era, sometime between 757 CE and 764 CE, which would have been after the Yōrō codes were implemented. The document is important as a record that reflects the reality of households in the capital of Nara for mid-level officials as well as the inner reality of property held by provincial governors, who served as mid-level officials.

On what justification were the three sisters able to take the residence in the Fourth Ward? The note that this was carried out during the confusion of the period of mourning after the father's death is particularly vivid. Of the four residences, two were “mutually held by father and mother,” indicating that the father and mother acquired them after their marriage and that they were not inherited from the paternal grandfather. The remaining two residences are recorded as “residences of the father and mother,” so there is the possibility that the second was originally that of the mother's original registration or of the mother's parents.

From the perspective of the three people who were willing to risk using force in taking their deceased elder brother's residences, perhaps they thought that the inheritance of property when their father had died had not been conducted properly, and that Muko, the son, had taken the property for himself, thus creating dissatisfaction. As the Yōrō inheritance clause for residence units states, “As for the sisters of the deceased as well as the unmarried daughters (i.e. the sisters of the heir), they shall receive one-half of the portion of a non-heir son. (Even if a sister or a daughter is married, if she has as yet received nothing of the deceased's resources, she should receive the same portion as if she were unmarried.)” The code thus states that if one was an unmarried sister or daughter, she had the right to receive half of the portion of a non-heir son. Even if one was married, if she had not yet received a portion, she had the right to inherit something. With these Yōrō regulations in mind, they took the opportunity to make their move.

⁶ See Hashimoto Yoshinori, *Toshodaiji monjo, Ten no maki, Document No. 1*, *Nanto bukkyō* 57, 82-98, 1987. See also *Nara ibun* Vol. 2, 643; and *Dai Nihon Komonjo* (SHM) vol. 6, 118.

During the Heian period (794-1185) the custom of equally divided inheritance was widespread, but we do not yet know enough about practice in Nara times (710-84). It is clear, however, that [per the Yōrō rules] sons had a legal right to receive half of the property in inheritance. Even then, although laws on inheritance had been established, in social actuality, problems that could not be easily resolved arose, and in the end, they were resolved through the use of force.