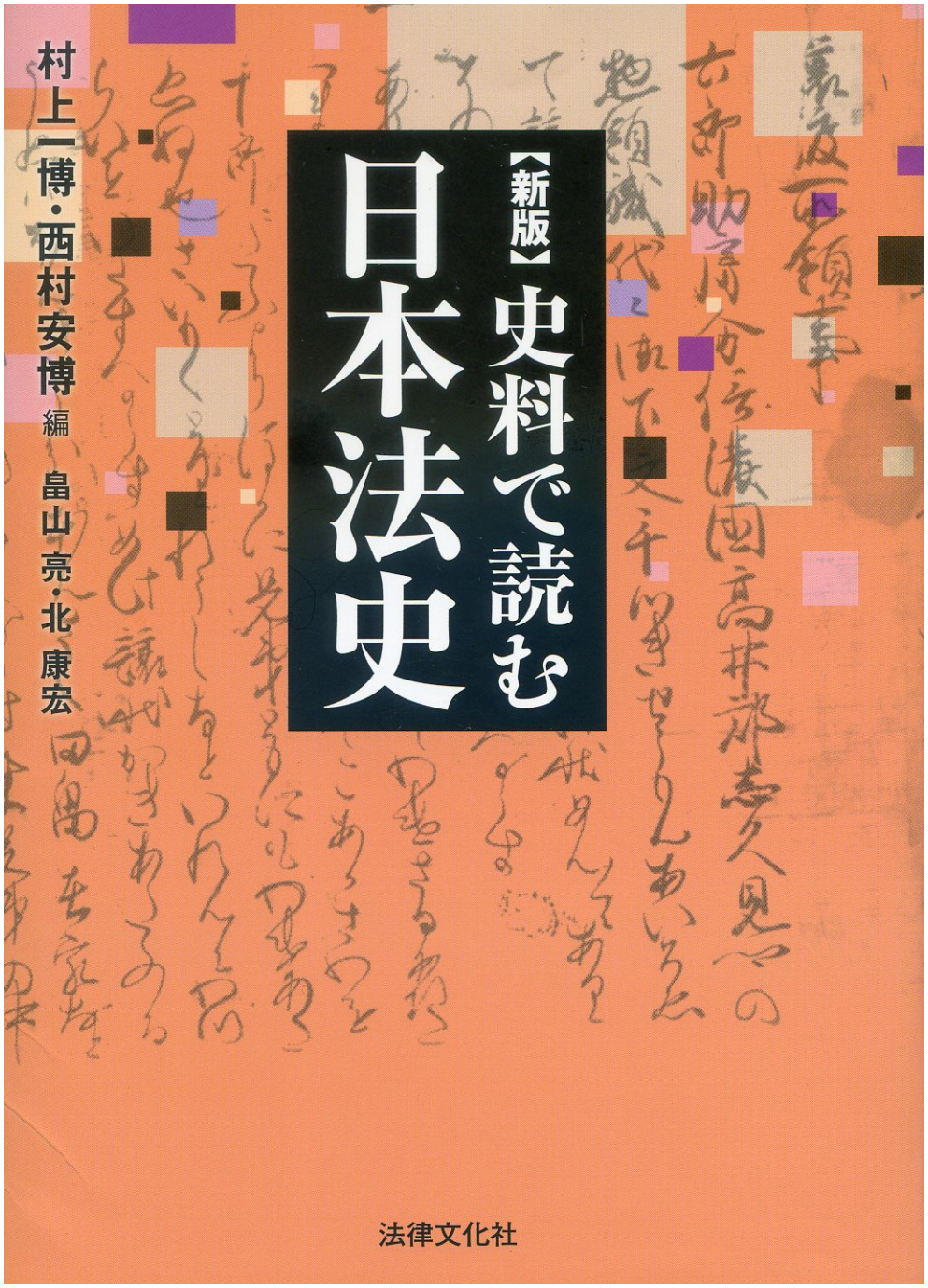

The History of Law in Japan, Through Historical Sources

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Lecture 2: Interpreting Ritsuryō Law and Legal Specialists 律令の解釈と明法家

After the foundation of [the Japanese] legal system was put in place with the early eighth century compilation of the Taihō *ritsuryō*, there was a need for legal specialists to help with the actual implementation of these laws. At the time specialists in the law were called *myōbōke*, literally "scholars of the Bright Law." The focus here will be to understand the kind of people that they were and the kinds of activities they were involved in.

1. Legal Specialists and the Training of *Ritsuryō* Jurists 律令法曹の養制と明法家

The *ritsuryō* codes were compiled in Japan as part of the process of laying a foundation for centralized government in the first half of the eighth century. The Taihō *ritsuryō* (completed in 701, after which they were distributed and promulgated; and later the Yōrō *ritsuryō*, compiled in the 720s and promulgated in the 750s) adopted the codes of the Sui and Tang dynasties, where principles of the codes had been systematically perfected. They came to be implemented as the fundamental written laws that supported the practical business of law thereafter.

To begin, the new codes had to create a detailed bureaucratic organization that would function efficiently, and the most important thing was to assure the education of excellent officials. In addition to creating the Royal University (Daigaku) overseen by the Ministry of Personnel (Shikibushō), they also established universities in the provinces. Would-be officials studied in one of four academic specialties. In Tenpyō 2 (730 CE), for example, the actual course for the study of *ritsuryō* law was established to educate excellent legal officials and scholars. Those who taught the students of *ritsuryō* were the doctors of law (*myōhō hakase*).[1] In Japan codal law continued the Tang *ritsuryō* principle that virtue is primary, while punishment is secondary. The doctors of the law held the upper seventh rank, lower step. The students of the law were chosen from the most promising of the guards and corvée laborers, or others of relatively low status.[2] By the last half of the ninth century, courses at the university called Myōhōdō (Law Track) and Sandō (Accounting Track) were created, although they were considered less prestigious than the other tracks in Composition (Kidendō) and Classics (Myōkyōdō).

From the middle of the eighth century on, the various offices of court government received questions asking for explanations of *ritsuryō* and its implementation. So in addition the usual administrative officials a new category of legal specialist appeared. They rendered "legal advisements" (*myōhōsōshi ge*) on basic legal principles as doctors of law or officials of the Ministry of Justice (*myōhōsoshi*) while also answering the specific questions they were asked. Such advisements were signed by a doctor of the law or by a group of specialists, and the office that had asked the question would then submit the advisement to the royal ministerial council, the Council of State (Daijōkan), for its decision. And still later, after the Kōnin era (810-824), references to *myōhōsōshi* came to be called jurists (*myōhōka*), and their discussions *myōhōka mondō*, juridical debates. These jurists created a written record of their explanations,

[1] This was the way they were referred to after Tenpyō shōhō 9 757, although earlier in 728 they had been called "doctors of penal law."
[2] That is, from laborers without rank or post called *hakuchō*, and from students of accounting called *zasshō*.

commentaries, concerning the difficult and unclear legal complexities being debated between officials and private individuals.

Who were these jurists? It has usually been supposed that from the ninth century on they came from the Royal Police Office (*Kebiishichō*), or that they were Council secretaries (*geki*) of the Council of State. As background, the Royal Police were created as an extralegal agency in the ninth century, and their authority continually expanded (See Lecture 1). They had to make judgments concerning appropriate punishment, and for that, they needed a straightforward and agile trial system (*saiban*). For this they needed good legal specialists, such as the doctors of law from the university. Some of those received rank promotions and appointments to the Royal Police Office. Members of the Nakahara and Sakanoue families, for instance, were frequently active as members of the Royal Police.

It is worth noting here that the Royal Police was a department created after the codes were promulgated, it was an extracodal unit (*ryōgekan*). Now according to the codes, rank, posts, and benefits were all to be organized according to the letter of the codes: people were granted a particular rank, and based on it, they were appointed to a post. For the officers of the extracodal Royal Police, this meant that they had to have a separate status and post in *ritsuryō* officialdom. Seconding was common in codal officialdom right from the eighth century on. As an example, Nagahara, who appeared in our account earlier, had the rank, post, and pay of a guard but he was also a doctor of the law.

2. Changes in the Work of Legal Specialists

In the eighth and ninth centuries legal specialists presented new ideas about understanding and implementing codal law based on the questions they received. From the tenth century onward, however, the increasingly aristocratic court society privileged precedent and protocol, changing the legal specialist's work. For aristocratic courtiers the most important thing was stability, which led them to follow precedent and protocol.

So legal advisements (*kanshin*) came to be products of research into precedents and past protocol. While the doctors of laws had once been charged with figuring out how to apply *ritsuryō* under new circumstances, they now turned to formalistic thinking—when administrative offices asked questions, they reported precedent. Their advisements might say, 'I cannot advise at all concerning any unprecedented matter.' At that point, the most important factor was whether a candidate for appointment to a legal post came from a family that had knowledge of precedents. Nevertheless between the ninth and twelfth centuries such advisors compiled the annotated commentaries on the *ritsuryō* codes that we still have extant today: the *Ryō no gige*, *Ryō no shuge*, and the *Ritsu shūge*. They compiled handbooks on court ways and document composition such as the *Seiji yōryaku, Hōsō shiyōshō,* and the *Saiban shiyōshō*, which are guides for administrators.[3] Moreover by the twelfth century members of two families, the Sakanoue and Nakahara, dominated the posts of doctor of law as well as officerships in the Royal Police. Indeed from the ninth century on, slots in the legal track at the university essentially became hereditary, as did posts in other extracodal units like the Royal Secretariat (Kurōdodokoro) that

[3] For descriptions of these texts and where they can be found, see Joan Piggott et al. *Dictionary of Sources of Classical Japan* (2006).

administered the monarch's palace and affairs. Such hereditization and specialization of aristocratic families higher and lower were trends in Heian-period courtier society.

A Legal Expert at Work

One facet of the activities of a doctor of law from the ninth century onward included question-and-answer sessions and resulting legal advisements categorizing crimes or on other public matters. To do such work, the legal scholar would look up and report on the appropriate section of the *ritsuryō* codes and subsequent legislation (supplementary laws and protocols, *kyaku* and *shiki*). Here, to see how litigation over disputed property rights proceeded, we will see how a legal specialist reacted to and judged the substance of the case and the form that judgment took—i.e. how a legal scholar dealt with legal materials and made a decision.

This litigation proceeded as follows. First, a venerable royal temple, Tōdaiji in the old capital at Nara, insisted on its rights as owner (*ryōshu*) of Nagasu Estate in Settsu Province (presentday Osaka). As background, it seems that at some point the Queen's Household had also been considered the owner of Nagasu, and it was asking for the return of the property (including land, houses, and other resources), even though it had once been donated to the Kamo Shrine, also a venerable religious institution in the vicinity of the Heian capital. The shrine argued, however, that it should continue to control households of residents (*zaike*) within Nagasu Estate. Doctor of Laws Nakahara Norimasa received the order of the Council of State to look into this trouble, and in response he carefully looked at the various claims of the Queen's Household and the Kamo Shrine administrator. Then he wrote an advisement on 1102.12.15 (Kōwa 4) reporting what he had learned and thought: that he accepted the claims of the shrine administrator. That report eventually made its way to the throne, and the eventual decision in 1106 by His Majesty, articulated in an order by the Left Controllers' Board, quoted Norimasa's advisement of 1102 frequently.

Here is how Norimasa summed up the claims of the Kamo Shrine Administrator:

•First, in 1089, Kamo Shrine authorities insisted that up to that point, Nagasu was a shrine property (mikuriya) that was protected by royal order (*senji*).

•Second, for the Kamo Shrine the Nagasu property represented its most important source of offering of fresh fish for its deity.

•Third, according to the transfer document of 1084, the arrangement was to be permanent.

•Fourth, on the twenty-second day of the twelfth month of 1092, there had been an oracle from the shrine deity to the effect that "there should be no improper takeover" of Nagasu. A record (of the oracle) is submitted (herewith), in which details of the oracle can be seen. It is clear that the Queen's Office claim that Nagasu belongs to Tōdaiji and should be returned to the temple is unreasonable. Indeed, when people engage in trade for goods, they cannot return the goods after several days have passed. How much more so should this be the case with the domain of a shrine after the passage of many years! How can there be a return now?

•Fifth, with the sale of horses or cattle, should they be sick, they can be returned to the seller within three days (cf. Miscellaneous Penal Laws #34). Thus horses and cattle that had pre-existing illnesses can be returned, but exchange of other goods is not possible.

Here in the advisement of the legal expert Nakahara of 1102 (itself known as quoted in the later Left Controllers' order of 1106.5.29), we see numerous quotes from the shrine administrator, Kamo no Koresuke, that reflect his interpretation of the law. These informed Nakahara's conclusions about the case.

Nakahara himself made the following legal points:

•First, a supplementary law of 795.4.27 forbade commoners from selling their rice fields, house plots, and dry field land.

•Second, if commoners did sell their house land, the administrative code Laws on Rice Fields Article 17 mandated that they do so only with the permission of the local district chieftain. The continuing influence of this law is seen in the ninth-century official legal commentary, the *Ryō no Gige*.
•Third, he quotes the administrative code (*ryō*) Miscellaneous Laws, Article 34, which stipulates that a bill of sale be issued, and that sick slaves or cattle could be returned to a seller only within three days.

Here, Nakahara revealed his process of investigating the codes and other legislation.

Next, he announced his conclusions on the case:

•First, he recognized that Tōdaiji was the proprietor of the land at Nagasu. But he also recognized that the households (*zaike*) there belonged to Kamo Shrine.

•Second, if it was true that there had been a royal order for the shrine to return the land to the Queen's Office, as that office argued, then the order needed to be submitted and considered.

Although the legal specialist cited some written laws in his advisement, much of his job was to consider the truth and applicability of claims made by the various litigants, which they submitted in written documents accompanied by evidentiary materials. The specialist might also call on the litigants to submit additional materials needed for him to make his decision. Furthermore the litigants might call on other legal specialists as well for advisement, if they asserted that the original advisement was "of no use" (furi 不利). When that happened, the original argument between litigants became an argument between legal specialists.

It is clear here that legal interpretations of codal law by specialists that appear in both the "question-and-answer compendia" (the commentars) and the advisements (*kanshin*), such as that of Nakahara Norimasa here, are detailed and logical.

3. Now we will turn to another episode that demonstrates the trial process and the issue of punishment, which required a high degree of accuracy.

The year 866, during the reign of Seiwa Tennô (850-80, r. 858-76), is well known because it was then that the main gate of the royal palace burned to the ground. In the midst of unsettling claims of conspiracy that followed this event, accused arsonists and conspirators were executed or banished. The Northern Fujiwara family of courtiers benefitted from the purge of political rivals, and thereafter they proved able to dominate court leadership as regents and viceroys (*sessho*, *kampaku*). The Otenmon Incident therefore marked an important moment when the Northern Fujiwara began to assert a new degree of prominence at the Heian court.

Meanwhile in the same year the court annal *Nihon sandai jitsuroku* describes a trial (*saiban*) on the twenty-fifth day of the tenth month. The record there includes a formal memorial by the Council of State to the throne that articulated their deliberations and request for the monarch's decision (*ronsō*). It shows in some detail how legal officials interpreted codal law, so the document is worth a close look.

> A solemn memorial to the throne from the Council of State states: "A wanderer in Sanuki, Enuma no Mitsuramaro, killed a commoner, Agata Harusada of Kagawa district. The victim's wife, one Hata no Kiyoko, complained as follows: 'Mitsuramaro was at Harusada's house drinking sake and they quarreled. Harusada called me and said, "I have been stabbed by Mitsuramaro!" I was shocked, and when I looked at him I saw blood flowing out of his left chest. He died soon after.' Furthermore other residents of the same district, including Hata Narikichi, were also drinking there. When the quarrel broke out, they scolded Mitsuramaro but failed to intervene.
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> On the basis of the wife's complaint, the Sanuki governor [eventually] made this judgment: "According to penal code law concerning a lawsuit due to fighting, if there is a fight and someone is killed, and if a blade has been used, then the punishment shall be death. Even if a soldier's weapon is used in the quarrel, it is still manslaughter." Given the crime, we should follow the penal code and the punishment shall be decapitation. And in addition, in the penal laws on pursuit of criminals and absconders it says, "If there is a murder in the neighborhood and the call for aid is ignored, there should be punishment of 100 blows of the heavy stick."
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> For its part [upon examining the case] the Ministry of Justice said: "There is a fault in the provincial judgment. If we look at the penal code, in a fight where a blade is used, if there is premeditation (to kill), then it should be punished by death. Manslaughter is not the same thing. Also, when we consult the section on the use of military weapons in a murder, the provincial governor has rendered a mistaken judgment. According to the wife Kiyoko's testimony, Narikichi and others were there when Harusada and Mitsuramaro fought. They said they scolded Mitsuramaro but did not intervene. Kiyoko heard Harusada's cry and knew about the stabbing, but the others were drunk and did not know about the wound to Harusada's heart. Though they heard the cries, it is not that they did not intervene. Even though they saw him stabbed they could not help. We cannot judge them guilty.
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> [And as for punishing the governor's faults in judgment], per the third-level manager of the Ministry of Justice, the penal code law on crimes punishable by imprisonment

(Dangoku ritsu) says, "If an official is found guilty of committing such a crime, then the punishment can be reduced by three degrees." In the law on general principles (*Meirei ritsu*), it says "Those of the fifth rank through seventh ranks can have their punishments reduced by one degree." So the senior seventh rank lower third-level manager, Takashina no Mahito Matahide, and senior sixth rank upper of the Left Inner Guard *cum* third-level manager [of Sanuki province] Fujiwara no Ason Fusao, were considered principals (to be judged). Now since Matahide was of the seventh rank, his punishment was reduced one degree and he got 60 blows of the big stick with a fine of six *kin* of copper. Fusao was determined to be uninvolved, so his punishment was forgiven. Junior Fifth Rank Fujiwara no Ason Aritoshi was an accomplice, and his punishment was reduced four degrees—he was to receive 60 blows of the heavy stick. Since he was of the fifth rank, however, his punishment was reduced an additional degree. He received 50 lashes and was fined one *kin* of copper.

Next Advisor cum Senior Fourth Rank Lower Captain of the Guards Fujiwara no Ason Yoshitada and Junior Fourth Rank Upper Head of the Queen Consort's Household *cum* Provincial Governor Fujiwara no Ason Yoshiyo were determined secondary accomplices, but since they never took part [likely they were not in the province at the time], they were put on leave and their punishments cancelled.

Senior sixth rank upper Hata no Imiki and Senior Seventh Rank Upper Akina no Omi Yasutsugu were considered tertiary accomplishments. Their punishments were reduced 6 degrees and they were to receive 40 strokes of the big stick. However since the latter was of sixth rank, his punishment was reduced one degree and he was given 30 strokes of the big stick plus a fine of 3 *kin* of copper.

So what do we learn from this case of 866? As far as the murder of Harusada, a commoner in Sanuki, the drifter Enuma was accused. Narikichi and others who were present were charged by provincial authorities for not doing anything to stop the murderer. Narikichi's wife reported it to the provincial governor. Provincial officials decided, based on the penal code section on murder and brawls, that Mitsuramaro should be beheaded. And based on the penal codes on pursuit of criminals and absconders, those who did not capture a murderer should be beaten with a stick.

In the trial system of that time, multiple investigations at various levels were conducted—by officials at the provincial headquarters, by the Ministry of Justice in the capital, and then by the Council of State. At the end it was the Council of State that recorded the final decision [and sent it on to the throne.]

Notably of the 950 provisions in the penal code, Sanuki provincial authorities referred to only two clauses.[4] In other words, they were not thorough in their study of the penal code to determine crime and punishment in this case. That lack of thoroughness led to the accusation of

[4] In English see Joseph Henry Longford's "A Summary of the Japanese Penal Codes," in the Archive of the Transactions of the Asiatic Society of Japan, https://archive.org/details/transactionsasi24japagoog

malfeasance against them by officials in the Ministry of Justice when they reviewed the case. And in their indictments of various principals, including provincial officials, they cited clauses from the penal law on imprisonment (*Dangokuritsu*) and associated supplementary laws, including clauses on death while fighting; the penal law on chasing criminals and absconders (i.e. when bystanders do not help to apprehend murderers and violent robbers); laws having to do with judging crimes (*danzai*); laws on naming crimes (*Meireiritsu*); and the administrative law on imprisonment (*Gokuryō*).