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Local Courts, National Laws, and the Problem of Patriarchy in Meiji Japan: Reading “Records of Civil Rulings” from the Perspective of Gender History

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1. Introduction

In 1899, Ikegami Kura was named as the respondent in a civil suit filed in Tokyo on behalf of a young boy, Ikegami Seikichi.¹ Seikichi was not Kura’s biological child; rather, he was the son of Kura’s dead husband by his concubine, Sato, one of the plaintiffs who brought this suit. Sato, together with two of Seikichi’s uncles, an aunt, and two cousins sued to bring an end to Kura’s exercise of parental authority over Seikichi and to establish Sato’s authority in its place. In explaining their filing of this suit, Sato and the other plaintiffs sought to demonstrate that Kura had failed to fulfill her role as parent to the minor child, her husband’s heir. They charged that Kura had installed

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¹ Tokyo Kōsoin 東京控訴院, “Shūken teishi hanshobun shinsei jiken” 親權停止 反処分申請事件 10/20/1899. Minji Hanketsu Genpon Database, case number 10100581-00016.

her own biological daughter, Hana, as household head after marrying Hana to her own former lover, and that when Sato had protested this, Kura had removed her from the household registry. On top of all this, Sato and the others claimed, Kura was guilty of financial abuses: she had sold off property that had been left to Seikichi, as well as other assets of the family's metalworking business. Kura denied these charges, but in the end the judges found for the plaintiffs, with the result that Kura's authority over Seikichi came to an end.

I begin with this case because the legal doctrine that was its basis, that is, "parental rights" (*shinken* 親權), the kinship relations at the heart of its conflict, and its outcome are evidence of the rethinking of the parent-child relationship that occurred in the Meiji period through the writing, promulgation, and deployment in the new civil courts of what we have come to call "family law" (*kazokuhō* 家族法). The kinship relationships that order this suit—wife (*seisai* 正妻) and concubine (*mekake* 妾), legal wife/mother (*chakubo* 嫡母), legitimate child (*chakushi* 嫡子), and acknowledged illegitimate child (*shoshi* 庶子)—as well as the very concept of "parental rights" itself are in no way traditional. These are the traces and the products of the Meiji state's evolving concern to transform the family, a process that began as early as 1870, when the government first began to study European civil law. Family law took form gradually and in a distinctly nonlinear fashion, first through the promulgation of the "Temporary Rules for Civil Law for the Imperial Nation" (*Kōkoku minpō kari kisoku* 皇国民法仮規則) but also through the issuance of a multitude of administrative orders (*futatsu* 布達) that were revised and retracted at

at times dizzying speed as procedural problems became clear and as the government apparently rethought its position.² After much controversy, the process of constructing a system of family law culminated in 1898 with the promulgation of the revised Meiji civil code. The civil code institutionalized a new vision of the family by legitimating the patriarchal household structure, giving fathers broad rights over their children, including the right to profit from their labor, to confine them against their will, and to regulate their choice of reproductive partners.

The creation of the modern patriarchal family cannot, of course, be separated from the formation of the modern Japanese ideology of the nation-state. As is well known, from the late 1870s, ideologues such as Motoda Eifu 元田永孚 (1818-1891) were already linking respect for parents and loyalty to the emperor to define the proper nature of the Japanese political subject, and by the late Meiji period the "nation-state as family" (*kazoku kokka* 家族國家) had become the predominant metaphor for representing the Japanese nation-state.³ In this paper, the ideological deployment of the family is not my central concern, although I will return to this issue. Rather my aim is to

2 Tezuka Yutaka 手塚豊 discusses the significance of the *futatsu* in the articulation of family law in "Meiji minpō shikō izen" 明治民法施行以前 in Nakagawa Zenosuke 中川善之助, et al., eds., *Kazoku mondai to kazoku hō*, vol. 4: *Oyako* 家族問題と家族、第四卷：親子 (Saikai Shoten, 1974), pp. 131-132. The *futatsu* related to the family can be found in Tonooka Mōjūrō 外岡茂十郎, *Meiji zenki kazoku hō shiryō* 明治前期家族法資料 (11 vols.) (Waseda Daigaku, 1967).

3 On this, see Itō Mikiharu 伊藤幹治, *Kazoku kokkakan no jinruigaku* 家族國家觀の人類学 (Kyoto: Minerva Shobō, 1982).

problematic our understanding of the formation of modern family by looking more carefully at its social construction in the Meiji period before 1898. My analysis moves in two directions. First, I want to excavate some of debates, struggles, and negotiations that shaped attempts to codify and thereby create a normative parent-child relationship, focusing in particular on the attempts to define in legal terms the status of “child”, “mother”, and “father”. Secondly, I want to explore law as practice by looking at the engagement of ordinary Japanese citizens with the Meiji state’s attempts to define and regulate the family.

The fluidity of the laws themselves notwithstanding, a functioning legal system of local and appellate courts with the *Dai Shin'in* 大審院 or High Court of Review as its pinnacle was in place by 1873. And Japanese citizens soon began to flock to local courts to resolve all manner of disputes. In 1875 and 1876, for example, local civil courts heard more than 300,000 cases. This was highest annual number of cases for the Meiji period as a whole and surely reflective of the social dislocations that followed the Meiji Restoration, but over the next decade number of cases hovered around the 200,000 mark and fell below 100,000 only briefly between 1884-1887.⁴

In part, the extraordinarily large number of cases is evidence of the accessibility of the new civil courts. Legal historian Hayashiya Reiji has argued that newspapers were an important medium for

diffusing information about the changing statutes, laws and legal procedures. In addition, there were also a significant number of popular manuals that aimed to help citizens successfully utilize the legal system, works with titles such as *Know-how for People who will Appear in Civil or Criminal Court* (*Minkei saibanjo shuttōnin kokoro* 民刑裁判所出頭人心得, 1887) and *The Citizen's Portable Complete Collection of Laws and Regulations* (*Kokumin hikkei hōritsu kisoku zensho* 國民必携法律規則全書, 1885).⁵ Finally, legal expertise was cheap and readily available through the offices of so-called *sanbyaku daigennin* 三百代言人, the unlicensed but knowledgeable advocates who, for a price, would prepare the documents necessary to file a case.⁶

But accessibility alone does not explain the easy recourse of Japanese citizens to the courts in this period. Civil suits, unlike criminal cases, are of course initiated by private individuals. The large numbers of civil cases suggest that as early as the mid-1870s people began to look to the new civil courts for assistance to right perceived wrongs and settle disputes. Does this reflect simply the breakdown of “local” methods of settling disputes, or does it reflect the active engagement of ordinary citizens with the new concept of “rights”

5 Fukunaga Korekiyo 福永惟精, *Minkei saibanjo shuttōnin kokoro* 民刑裁判所出頭人心得 (Osaka: Shimshindō, 1887); Kajiwara Inomatsu 梶原猪之松, *Kokumin hikkei hōritsu kisoku zensho* 國民必携法律規則全書 (Nagoya: Keibunsha, 1885).

6 Hayashiya Reiji discusses the role of these “advocates” in *Meiji-ki minji saiban no kindai ka* 明治期民事裁判の近代化 (Tohoku Daigaku Shuppankai, 2006), pp. 134-139.

4 Hayashiya Reiji 林屋禮二, “Meiji shonen no minji soshō shin juken sū no kōsatsu” 明治初年訴訟受件数の考察, in Hayashiya Reiji et al., eds., *Meiji zenki no hō to saiban* 明治前期の法と裁判 (Shinsansha, 2003), pp. 91-115. See p. 90 for a very useful chart illustrating the number of civil cases by year.

(*kenri* 權利) and thus their embrace of a new kind of political agency? These questions require further interrogation, but in either case, the new civil courts became an important site where the authority of the new Japanese state was experienced directly. And, unlike schools or the army, social sites that have long been recognized as a point of contact, this relationship was voluntary, rather than coerced, with the result that judges were invested not only by the government, but also by the citizenry with the authority to reorder familial relationships (as well, of course, as a host of other kinds of social relations) by their rulings.

The traces of the engagement between Japanese citizens and their new government, in the form of the courts, can be found in the records known as "records of rulings" (*hanketsu genpon* 判決原本). These records, which constitute the most important sources for my study, were prepared by officials of the local court and had a fairly standard form.⁷ They generally begin by stating the case number, the date the ruling was issued, the name of the court and the judges that heard the case, the cause of action, the names of plaintiffs and respondents (and of their advocates, if any), their social status as commoner (*heimin* 平民) or gentry (*shizoku* 士族) and their ages. This is followed by a summary of the positions of the plaintiff and respondent, sometimes incorporating what are presented as direct quotations from the principles themselves and their witnesses. The final section of the

7 Ishii Shirō 石井紫郎 provides a careful analysis of the form of the civil *hanketsu genpon* in "Meiji zenki minji hanketsu genpon detabesuka no genba kara 明治前期民事判決原本 デタバエス化の現場から", in Hayashiya, *Meiji zenki no hō to saiban*, pp. 49-90.

record is the ruling and, in some cases, its justification.

In describing court dossiers, social theorist Michel Foucault has taken note of their distinctive nature, describing them as "a strange contest, a confrontation, a power relation, a battle among discourses, and through discourses."⁸ Writing on the Meiji courts' records of rulings Koizumi Terusaburo 小泉輝三郎 has taken note of the fact that the court officers who compiled the records apparently had great freedom to include or exclude information that may have come into play. Records of some cases, he argues, carefully take note of the defendant's psychological state, emotional maturity, and level of education, while others present only the briefest summary of the proceedings.⁹ The records of civil rulings are then by no means transparent and unproblematic accounts of what actually transpired in the early Meiji courts. Still, read with the awareness of the conditions of their production, it is possible to discern within them the multiple perspectives—of plaintiffs and respondents, their families, and the judges—that came into play in civil court proceedings.

2. Classifying Children

In the period before 1890, no single issue of family law more concerned Meiji policy makers than that of assigning children status

8 Michel Foucault, ed., *I, Pierre Riviere, Having Slaughtered My Mother, My Sister, and My Brother*, trans. Frank Jellinek (Lincoln: University of Nebraska Press, 1975), p. x.

9 Koizumi Terusaburō 小泉輝三郎, *Meiji reimeiki no hanzai to keihatsu* 明治初期の犯罪と刑罰, annotated by Koishikawa Zenji 磯川全次 校訂 (Hihyō-sha, 2000), pp. 61-65.

as legitimate or illegitimate, with legitimacy here meaning that the child possessed a father who acknowledged paternity. The first criminal code of the Meiji era, the *Shinritsu Kōryō* 新律綱領 of 1871, initiated the practice of classifying children according to conjugal status of their mother. It made a distinction between *chakushi* (children born of a wife) and *shoshi* (children born of a concubine). Then, in January 1873, the Council of State (Daijōkan 太政官), the highest organ of the early Meiji government, issued administrative order no. 21, which created a third legal classification for children:

Any child who is born to a woman who is neither a wife nor a concubine is to be considered illegitimate (*shisei*) and the woman will assume [responsibility] for it. However, if the man acknowledges the child as his, he should make a request to the household head of the woman's residence... then the child can have that man as his father.¹⁰

This order did two things: it created the new legal distinction of unacknowledged illegitimate child (*shiseiji* 私生児) and also established the principle that illegitimate children acknowledged by the father would have the status of *shoshi* rather than *chakushi*. The term *shiseiji* was in fact a neologism coined by the early Meiji legal official Mitsukuri Rinshō 箕作麟祥 (1846-1897) as a translation for the French term *enfant naturel*. The term was of course open to other interpretations, and in fact it came to be understood as signaling that a child born was born as the result of an illicit sexual relationship

(*shitsū* 私通). In 1882, Mitsukuri himself acknowledged this popular interpretation of the new term when he stated publicly that “I now cannot but regret this translation” since in his estimation it encouraged desperate women to seek out abortions in order to avoid the shame of bearing a child that would be stigmatized as *shiseiji*.¹¹

What then was the intent behind administrative order no. 21? The creation of a new word to categorize children in this way signals clearly that the edict departed from Edo period practice. In 1877, the Meiji government, in preparation for the compilation of a civil code, ordered local officials to compile the customary laws of their regions. This work, published as *The compilation of customary civil practice* (*Minji kanrei ruishū* 民事慣例類集), reveals that there was tremendous regional variation in how families and communities dealt with children born outside of recognized conjugal relationships. Three patterns seem to have prevailed. Children born to unmarried women were often adopted by relatives or acquaintances (usually with a gift of support money) and registered as the child of the adopted parent or were registered as the sibling of its biological mother. However, in cases where a man was socially recognized as the father by relatives or neighbors, the expectation was that he would take responsibility for the child. In contrast, it was uncommon for an unmarried woman to retain custody of the child as her child.¹²

¹¹ Murakami Kazuhiro 村上 一博, *Nihon kindai kon'in hō shiron* 日本近代婚姻法史論 (Kyoto: Hōritsu Bunkasha, 2003), p. 39.

¹² Tezuka Yuaka 手塚豊 and Rikō Mitsu 利光三津夫, eds., *Minji kanrei ruishū* 民事慣例類集 (Keiō Gijuku Daigaku Hōgaku Kenkyūkai, 1969), pp. 117-128. See also Murakami Kazuhiro, “Meiji 6-nen Daijōkan dai 21-gō futatsu to shiseiji

¹⁰ Tonooka, vol. 1, p. 157.

One explanation for the creation for the category of *shiseiji*, as well as the new legal obligation for mothers to register children as their own, comes in the form of a statement from the Ministry of Law (*Shihōsho* 司法部): “women who are neither wives nor concubines of their own volition engage in illicit sexual relations and then give birth. Because of this evil practice, there are many illegitimate boys and girls. Fathers do not know who their children are and children do not know who their fathers are.”¹³ In other words, from the perspective of the Ministry, feminine licentiousness was creating a social problem, in the form of children whose true paternity was unknown. Mitsukuri echoed the Ministry’s statement with one of his own. It too faulted female behavior and positioned the law as the protector of male interests: “there was the bad practice whereby a woman would give birth to a child and then try to pass it off to a man of wealth, and so we aimed to correct it in this way.”¹⁴ As both these statements suggest, women were held solely responsible for the sexual relationships that resulted in what were now designated as *shiseiji* and paternity itself was newly valorized as both personally and socially important.

Over the course of the next twenty-five years, the categories of *chakushi*, *shoshi*, and *shiseiji* were subject to repeated attempts at clarification and refinement on the part of the Meiji government.¹⁵ In

1873, it was ordered that a child born within 300 days of a marriage would be considered the child of the husband, and based upon this principle, women were forbidden to remarry after being widowed or divorced until three hundred days had passed. The intent of the latter rule, of course, was to forestall questions about the paternity of a child born after the mother’s remarriage. In 1875, the Meiji government established the primacy of so-called *hōteikon* 法廷婚, or “legal marriage”, that is, marriage that were registered in the household registry, over customary marriage practices, and declared that only children born within “legal marriages” would be considered *chakushi*. Children born to couples who did not follow the marriage registration procedures would be considered *shoshi*, not *chakushi*, but only if their fathers acknowledged them. In 1878, another administrative order stated that a child conceived before marriage but born after it should be considered *chakushi*. However, orders from 1881 and 1887 established that husbands could challenge the legitimacy of a child born to their wives by proving the existence of an adulterous relationship or by establishing that they had been absent during the period when conception must have occurred. Following the abolition of the legal position of concubines in 1882, another series of edicts sought to define the status of their children. In 1885, a new administrative order stated that children born of concubines (those who had been entered into family registers before 1882 were allowed

ninchi seikyū” 明治六年太政官第二一號布達之私生兒認知請求, *Hōritsu ronsō* 法律論叢, vol. 67: nos. 2-3: p. 542.

¹³ Quoted in Tezuka, “Meiji minpō shikō izen”, p. 139.

¹⁴ Quoted in Murakami, *Nihon kindai kon in hō shiron*, p. 34.

¹⁵ A number of works summarize the pre-1898 administrative orders that addressed

the parent-child relationship. I have relied on the following works: Kakuda Kōkichi 角田幸吉, *Nihon oyakohōron* 日本親子法論 (Yūhikaku, 1941), pp. 206-323 and Tezuka, “Meiji minpō shikō izen”, pp. 132-140.

to remain within them) now would have to be legally acknowledged to have the status of *shoshi*. If their putative fathers declined to acknowledge them, they would be considered *shiseiji*.

Clearly, the delineation of the categories of *chakushi*, *shoshi*, and *shiseiji* had the aim of encouraging, if not coercing, the creation of a new kind of family—it was to be founded on a monogamous relationship between a man and a woman sanctioned by the state for the purpose of producing legitimate children. Children bore the weight of their parents' failure to conform to this new idea of the family. Status as *shoshi* meant that the child had a secondary status vis-à-vis *chakushi* in matters of succession and inheritance, while failure to obtain acknowledgement of paternity meant that a child as *shiseiji* had no right to inherit and no right to financial support from his or her father.¹⁶

The delineation of these categories set the stage for an explosion of litigation in the 1870s and 80s as the civil courts became the site where the state's emergent new vision of familial morality came into conflict with the private interests of men, women, and their families. I want to look at several of the more than four hundred civil cases involving the issue of paternity that I have identified to this point in order to explore how ordinary citizens negotiated the new web of family law and how the decisions of judges at the local level

conflicted or intersected with the state's attempt to remake the family. These cases arose out of two situations: the first involves children who were born just before or soon after the breakdown of a conjugal relationship, while the second involves children born of sexual relationships outside such socially recognized unions.

The Council of State's administrative order no. 21 made the acknowledgment of paternity a matter that could only be initiated voluntarily by the putative father and was then to be negotiated between the father and the (presumably) male household head of the woman. At the level of the statute then women were assumed to be passive, if not powerless, in relation to their sexual partners and their male relatives. But the civil records reveal that women, acting alone or in conjunction with their father, mother, or another relative, did initiate cases to compel the acknowledgement of paternity. A case in point is the suit brought by Morikawa Tora against Atonomiya Hanbei in the Kyoto civil court in 1881.¹⁷ At issue was her desire to turn over to Hanbei the child she claimed had been born to the two of them. According to Hanbei's statement, Tora had become his concubine in June 1879 in exchange for the sum of 2 *yen* 50 *sen* per month. However, in August 1880 he had ended their relationship after becoming aware that Tora had a lover, although by this time, Tora had given birth to a child. After Hanbei ended the relationship, he refused to acknowledge the child, stating that he was not the father. Tora,

¹⁶ For a discussion of the inheritance rights of illegitimate children, see Kawakami Fusako 川上房子, "Chakushutsu de nai ko ni tsuite no ikkōsatsu 嫡出でない子についての一考察", in Arichi Tōru 有地亨 et al., *Kazoku no hō to rekishi: Aoyama Michio Hakushi tsuitō ronshū* 家族の法と歴史: 青山道夫博士追悼論集 (Hōritsu Bunkasha, 1981), pp. 212-232.

¹⁷ Kyōto Chihō Saibanjo 京都地方裁判所, "Shōni hikiwatashi no soshō" 小児引渡ノ訴訟, 5/16/1881. Minji Hanketsu Genpon Database, case number 1880-00764.

however, disputed this account, stating that Hanbei had ended the relationship because of discord within his family over their relationship and that his payment of support for the child after its birth was evidence that he had acknowledged paternity. The judges of the Kyoto court agreed and ordered Hanbei to take possession of the child in question.

A ruling by a civil court did not always bring to an end a dispute over a child's legal status. There are many cases in which a dispute involving a child's paternity was heard by more than one court, as litigants, unhappy with a ruling, sought redress in a higher court. For example, in 1887, Takahashi Moto and his son Takahashi Fusaji filed an appeal in Sendai Superior Court after the lower court in Yamagata had ordered him to take possession of a child born to Inoue Toe, his former wife.¹⁸ In this appeal, Toe and her father Junta, who presumably had initiated the earlier suit, were named as respondents. At issue in this case was whether Fusaji was in fact the father of Toe's child. Fusaji claimed to have been working in another prefecture during the period when the child was conceived and argued that he therefore could not be the father. Junta and Toe disputed this stating that although Fusaji had been working in Niigata, he had returned home to Yamagata several times and thus was the child's father. In the end, the Sendai court affirmed the lower court ruling and ordered Fusaji to take possession of the child.

Both these cases involved women who were in conjugal

relationships that were legally recognized. However, women who bore children outside of such relationships also sought through the civil courts to compel the acknowledgment of paternity. One such case was filed by a woman named Midorigawa Kuni in the Shirakawa Branch of the Fukushima Regional Court, seeking to force Asakawa Ietoshi to take custody of her child, which she said he had fathered.¹⁹ According to Kuni's statement, she was a widow when she began a sexual relationship with Ietoshi. Soon they were "together like husband and wife day in and day out." When Kuni became pregnant, she told Ietoshi who, she claimed, was "extremely happy." However, after the child's birth, Ietoshi refused to register the child in his household registry. According to Kuni, it was detrimental for the child to remain *shiseiji*, and she, as a widow, had no money to support it. Kuni seems to have been trying to establish that a relationship of de facto marriage existed, but Ietoshi presented their relationship in completely different terms. He stated that Kuni was well-known for her "shameful behavior" and that her relatives had repeatedly reprimanded her for it. Given this, he argued, there was no telling whose child she had borne. In its ruling, the court responded by citing administrative order no. 21 word for word and stating that in light of this there was no basis to rule for Kuni.

The widow Kuni may have been particularly vulnerable to charges of promiscuity because of the pervasive stereotype of the

¹⁹ Fukushima Chihō Saibanjo Shirakawa Shibu 福島地方裁判所白川支部, "Shoni hikiwatasu no soshō" 小児引渡ノ訴訟, 08/13/1888. Minji Hanketsu Genpon Database, case number 1887-27.

¹⁸ Sendai Kōtō Saibanjo 仙台高等裁判所, "Shoni hikiwatashi no shishō" 小児引渡ノ訴訟, Minji Hanketsu Genpon Database, case number 1887-76.

lascivious young widow, but in fact the disputation of her case was typical. A case from Kochi in 1887 suggests that even the most proactive of arguments made little difference.²⁰ The plaintiff, the father of a young woman named Cho who had given birth to a baby boy, explicitly laid claim to local custom, stating that Cho's infant was generally acknowledged to be the child of Tsuneji and since Tsuneji could present no evidence that Cho had another lover, "the customs of the land of Japan" required Tsuneji to take possession of the infant. The response of the judges was to quote administrative order no. 21 and to point out that custom carried no weight against the law.

These four cases are revealing of a pattern in the adjudication of civil cases involving paternity. First, in the case of female plaintiffs who had the status of wife or concubine, courts almost without exception ruled in their favor, interpreting what little evidence was available in these most private of disputes in ways favorable to the establishment of paternity. For example, in a ruling from 1895, the judges of the Tokyo court ruled in favor of a woman who had born an apparently full-term child only seven months after marriage, over the objections of her former husband who insisted that he could not be the father. In their statement the judges noted mildly that it was not unheard of for even a child born at six months to be well developed, and they ordered the father to take possession of the child.²¹ As this

suggests, the court's concern for paternity was as an ideological value rather than a real biological fact, and it was promotion of a set of social institutions—marriage and the family—that was the guiding force in judicial decisions.

As a result, women who conceived children as a result of "illicit sexual relations" (*shitsū* or *mitsū* 密通) fared less well. In the absence of persuasive evidence from relatives and neighbors that a state of marriage had been socially recognized, they were vulnerable to the claim that they were promiscuous and thus that establishment of paternity was impossible. Secondly, although women like Kuni frequently evoked their inability to care for their child in their statements, as well as the stigma that *shiseiji* status carried, judges made no reference to such concerns in their rulings. As we shall see, the notion of the "interest of the child" (*ko no rieki* 子の利益) was taking form in legal discourse, but in these rulings the decisive factor seems to have been concern for unregulated female sexuality. Women who bore children as a result of "illicit sexual relations" were almost always judged to be promiscuous with the result that courts refused to make a ruling regarding paternity.

3. Parental Rights

While the issue of paternity dominated the discourse of family law in the 1870s and 1880s, in the 1890s, it was the notion of "parental authority" that became a heated topic of debate. The term "parental authority" was another Meiji neologism and appears to have been coined by Gustave Emil Boissonade (1825-1910), the French legal

²⁰ Kōchi Chihō Saibanjo 高知地方裁判所, "Akago torihiki no soshō" 赤子取引之訴訟, 1887, Minji Hanketsu Genpon Database.

²¹ Tōkyō Kōtō Saibanjo 東京高等裁判所, "Yōji hikiwatashi no soshō" 幼児引渡ノ訴訟, 1892, Minji Hanketsu Genpon Database.

advisor employed by the government, and his Japanese associates as they worked to draft the civil code. In articulating the notion of “parental authority”, Boissonade and his associates sought explicitly to distance it from what they identified as customary practice. According to the 1879 “Justification of the Human Affairs Sections of Draft Civil Code” (*Mimpō sōan jinjihen riyū shō*) 民法草案人事編理由書:

Since the law commands that parents have a duty to raise their children, then it must give them the means to fulfill that duty... [But] it is important not to misunderstand the nature of this authority. Parental authority is not for the benefit of the parents; it is granted to insure that children will be reared... Although this concept is at odds with our country’s customary practice, it is not possible to maintain the old customs. If parental authority is understood to be for the benefits of the parents, then ... just as in former times, parents would be free to abandon their children, sell them, and kill them.²²

As this suggests, the concept of “parental authority” had the aim of establishing the obligation of parents to care for their children and was explicitly opposed to what is represented as the “custom” of parental autonomy, which allowed parents to dispose of children as

they saw fit. The authors of this text described the raising of children as a civic duty, in furtherance of which the state granted parents a certain amount of authority, including the right to discipline children as they saw fit, to manage their property, and to take possession of any wages they received.

An interesting if unusual case from 1887 suggests how this new conception of “parental rights” was evoked in relation to the pressing problem of the disposition of children when their parents’ divorced. We have already seen evidence of the fluidity of marriage in the early Meiji period, but it is useful to recall Harald Fuess’ observation that, “even by today’s standards, the prevalence of divorce in the late nineteenth century appears extraordinary”, with 1.9 million cases of divorce between 1882 and 1898.²³ As a result, in cases of divorce, Meiji courts were confronted with the need to assign (or in some cases, the term “award” may apply) custody of the children to one parent or the other. *The compilation of customary civil practice* reveals that in the Edo period there were two patterns of handling the care of children after the dissolution of a marriage: 1) the father retained custody of the children and assumed sole responsibility for their upbringing 2) if the mother retained custody, the father offered a financial settlement to provide for their care.

The 1887 case involved an American woman, Pauline, and her Japanese husband, Iitsuka Osamu, who had met and married in Geneva in 1877. Ten years later, by this time living in Japan and the

²² Ishii Ryōsuke, ed. 石井良助 “Mimpō sōan jinjihen riyū shō 民法草案人事編理由書”, in *Meiji bunka shiryō sōsho*, vol. 3 明治文化資料叢書第三卷: 法律編上: (Fūkan Shobō, 1959), p. 183.

²³ Harald Fuess, *Divorce in Japan: Family, Gender, and the State, 1600-2000* (Stanford: Stanford University Press, 2004), pp. 3-5, *passim*.

mother of two children, Pauline sued for divorce and sought to custody of the two children born during the marriage, over the objection of Osamu. She argued that she had assumed sole financial responsibility for their support (as a translator and English teacher), after Osamu proved himself unable or unwilling to find employment after their return to Japan. The judges, who noted approvingly that Pauline had expressed her intention to say in Japan, not only acknowledged that she was better able to care for the children, but also took note of the need to “maintain the affection of a loving mother”.²⁴ The latter is the only example I have located to this point in which judges reference parental sentiment in their ruling.

Whether similar rulings would have been possible in cases involving Japanese mothers is unclear, because the interpretation of “parental authority” that allowed women to retain custody of their children after divorce soon became controversial. According to article 49 of the 1890 code (the so-called *kyūminpō* 旧民法), “parental authority will be exercised by the father. When the father is deceased or is unable to exercise parental authority, the mother will exercise it.”²⁵ This delineation of the maternal role, while both qualified and contingent, proved to be the most contested aspect of the “family law” section of the civil code. In a famous editorial published in *Jurisprudence News* (*Hōgaku shinpō* 法学新報) in 1891 entitled “The

civil code appears and loyalty and filial piety are destroyed”, law professor and conservative ideologue Hozumi Yatsuka 穗積八束 (1860–1912) expressed the perspective of critics of the 1890 code.²⁶ According to Hozumi, in Japan according to custom, “the household (*ie*) is the man’s, it is not the woman’s”, so it is the father alone who has authority over children.

This notion of the “household”, which Hozumi represents as traditional, was of course patriarchal in nature. And he deployed this notion of the “household” to reject the 1890 civil code’s conception of “parental authority” and to insist that within the Japanese context one should only speak of “paternal authority”. A mother, according to Hozumi, had no legal claim to authority over her child other than that which the father granted her. The parental rights of women were, he argued, wholly derivative of and dependent upon paternal authority. According to Hozumi, to blindly follow the customs of “Christian countries” that made marriage a contract between two individuals and lacked a notion of the “household” was to reject the very foundation of the Japanese nation. Another editorial from the same journal published in 1892 echoed Hozumi’s ideological objections to the code’s articulation of maternal authority, however limited, but also went on to offer a series of “case studies” that had the aim of illuminating the dangers of recognizing maternal authority.²⁷ For

²⁴ A transcript of the case can be found in Murakami Kazuhiro 村上博一, *Meiji rikon saiban shiron* 明治離婚裁判史論 (Kyoto: Hōritsu Bunkasha, 2001), pp. 201–203.

²⁵ For this section of the 1890 Civil Code, see <http://family.main.jp/shinken/page/minpou/kyuminpou.htm>.

²⁶ Hozumi Yatsuka 穗積八束, “Minpō idete chūkō horobu 民法出て忠孝滅ぶ”, (1891) in Hoshino Tōru 星野通, ed., *Minpōten ronsō shiryōshū* 民法典論争史 (Nihon Hyōronsha, 1969), pp. 82–85.

²⁷ “Hōten jissai enki iken 法典實施延期意見”, in Hoshino, pp. 171–185. Jointly signed by Hozumi and ten other legal experts, this document appeared in *Hōgaku*

example, the authors raised the case of women who remarried after the death of their husband. Could such a woman be trusted to act in her child's interest over that of her new husband's? The answer, by inference, was of course "no".

Ueno Chizuko has taken note of the "newness" of the patriarchal household, terming it "an invention of tradition" in service to the modern nation-state.²⁸ This is certainly true: as we have seen, modern legal conceptions of familial relations departed radically from Edo period practices. They required the creation of a new vocabulary and new social norms. But this "invention" was not an event, but a complicated and lengthy process. In this regard, Judith Butler's famous conceptualization of the performative nature of gender is instructive, as is historian Julie Hardwick's discussion of patriarchy as "practice".²⁹ The local Meiji courts were, I suggest, a crucial site for the invention of modern patriarchy. Within the local civil courts, new conceptions of patriarchal authority were "performed" and "practiced"—and thereby enacted—in a multitude of cases all around the country as ordinary men and women, perhaps by choice, perhaps out of desperation, gave the new state the access to and power over the intimate issues of their everyday life. As a result, the local courts had

the opportunity to enforce a new set of values, sanctioning female sexuality outside of marriage and avidly protecting the value of paternity (even against the will of men who sought to escape it). It might be said that Hozumi and his compatriots were able to evoke patriarchy convincingly as a timeless Japanese custom, precisely because this new ethos had been deployed for over two decades within the charged social arena of the new civil courts.

As the 1898 civil code was refashioned in light of the criticism of Hozumi and others, the language on parental authority was revised further to give greater weight to the interests of the patriarchal household, itself a product of the legal discourse. Article 877 states, "a child must submit to the parental authority of the father who is in the household... When the father is unknown, deceased, has left the household, or is unable to exercise his parental authority, the mother who remains in the household will exercise authority."³⁰ Here, maternal authority is still defined as secondary to paternal authority, but both are made dependent upon affiliation with the household. In addition, the 1898 code contained new provisions that made the termination of parental authority possible. Articles 896 and 897 state that when a father or mother engages in blatantly immoral conduct or mismanages the property of a child the relatives or the district attorney can request a court to terminate the offending parent's rights. Thus, both the patriarchal family and the district attorney as the representative of the state were given the right to intervene in the

shinjō no. 14 (May 25th, 1992).

²⁸ Ueno Chizuko, "Modern Patriarchy and the Formation of the Japanese Nation State", in Donald Denoon et al., *Multicultural Japan: Paleolithic to Postmodern* (Cambridge: Cambridge University Press, 2001), p. 213.

²⁹ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990). Julie Hardwick, *The Practice of Patriarchy: Gender and the Politics of Household Authority in Early Modern France* (University Park, Pa.: Pennsylvania State University, 1998).

³⁰ For this section of the 1898 Civil Code, see <http://family.main.jp/shinken/page/minpou/kyuminpou.htm>.

parent-child relationship.

If the enforcement of a new system of patriarchy was the aim the statutes, what do the records of civil rulings suggest about how the 1898 codes on "parental authority" functioned to define relations within the individual family? Here, the case of Ikegami Kura with which I began this paper is instructive. Within Meiji courts, it continued to be the necessary to negotiate the disjuncture between the messiness of real families, shaped as they were by complex personal motivations, by local practices and norms, and by the fluctuation in earlier policies, and the normative fictive family newly envisioned in the 1898 Code. In the Ikegami case, we find two kinds of mothers, the legal and the biological, in contention with each other, with the former having the legally privileged position. Sato, the concubine who remained within the household registry, was by 1899 a remnant of a discarded conception of legitimate conjugal relations. Yet even so, Sato and her allies were able to make their case against Kura by referencing official anxieties about female sexuality and its potential impact on the household as an economic and ethical unit. By portraying Kura as a sexually debauched woman who was selfishly appropriating family assets, Sato and the other plaintiffs provided a justification for judicial intervention, making it possible for the court to ignore the contradictions between this real family and the patriarchal family imagined in the civil code.

4. Conclusion

The local courts cases involving paternity and parental rights reveal that the performance and practice of modern patriarchy was a contentious, fractured, and incomplete process. Our review of the records of rulings suggests the diverse set of motives that came into play in the legal resolution of family issues and offered a glimpse of the agency of all of those who stood, figuratively or literally, within the space of the new modern courts, petitioners and respondents no less than judges. We discover that the terms that shaped the legal discussions of the family were, in practice, flexible and fluid, open to interpretation by those who sought redress in the courts. Thus, for example, speaking four years before Hozumi Yatsuka declared in his famous essay that patriarchy was the foundation of the Japanese family and of the Japanese nation, the father of the young woman Cho, addressing the court in Kōchi, made a similar formulation, for his own purposes, declaring that "the customs of the land of Japan" required his daughter's lover to take responsibility for their child, a formulation that exposed the "newness" of the designation of *shiseiji*. Similarly, if more successfully, the former concubine Sato was able to make the household a porous, rather than rigid institution by evoking the cultural tensions that surrounded female sexuality. The perspective offered by the records of rulings thus complicates our understanding of the relationship between family law and gender, revealing it to be dynamic rather than simply oppressive.