

## CONFUCIAN JUSTICE

*Between 1709 and 1716, Arai Hakuseki (1657-1725) was close to the seat of power, as the mentor and advisor to Shōgun Ienobu and Shōgun Ietsugu. His relationship to Shōgun Ienobu was exceptionally close, dating back to the day when the latter was lord of the Kōfu-han. In the nineteen years they knew each other, Hakuseki gave a cumulative total of 1299 lectures for Ienobu. Hakuseki's power and influence were recaptured in his autobiographical account, Oritakushiba no ki. Document 7 is taken from that autobiography which shows how in a Solomon-like fashion, Hakuseki saved the life and reputation of a widow whose father and brother murdered her husband. There were differing legal concepts of the duties of a daughter toward her father,*

and toward her husband, and the two came into conflict in this case. The Confucian view of the position of women was also fully explicated.

Aside from his autobiography, Hakuseki left the following works: *The Koshitsū*, which treated ancient Japanese history; *Tokushi Yorōn*, which gave his views on Japanese history to the time of the founding of the Tokugawa bakufu, Hankanbu, which gave genealogical records of the daimyō from the time of the battle of Sekigahara to the end of the reign of the fourth Shōgun Ietsuna; and *Seiyō Kibun and Sairan Igen*, which described the geography of the West and conditions of foreign countries. These two works were based on his interviews with a Sicilian missionary named Giovanni Sidotti, who broke the law to come to Japan in 1708, and on the information received from the Dutch in Deshima. On account of this, some scholars credit Hakuseki with initiating a trend toward Dutch studies.

**7 Tokugawa Justice under Confucian Precepts<sup>10</sup>** In the year 1711, eighth month, 17th day, after my lecture for the *shōgun* was over, I was shown a very complex criminal case.

According to the document, there was a man from Matsushiro district in the province of Shinano who came to Edo to engage in trade. His wife came from the village of Kamabayashi in Kawagoe district in the province of Musashi. On the 16th day of the seventh month, an elder brother of the wife came and lured her husband to Kawagoe. On the 20th day of the same month, the brother again came, and informed the younger sister: "Your husband went to his home on business. It will not be long before he returns. Meanwhile why not come to the father's house, and wait for his return?" On the 21st day, he took the wife to his father's house. Many days passed and the husband was still absent. She inquired of her father when the husband might return, and the father answered: "He said he definitely would be home by the 28th." However, the first of the new month came and there was still no sight of the husband. Worried about her husband's safety, she heard someone saying that there was a dead body of a man who obviously was drowned in the river. With a foreboding she rushed to the river, but the body was lying face down, and she could not identify it. She begged the father and brother to let her see the face of the dead body, but was told not to worry about it. She could not hold the suspense too much longer and the next day, she asked the village head (*nanushi*) to retrieve the body, and it was indeed her husband's.

The village was in the territory held by Rōju Tajima no Kami Takatomo. The officers, in the absence of Lord Takatomo, questioned her father and brother and their servants, and finding some inconsistencies in their testimonies, searched their house. The clothing and miscellaneous items belonging to the son-in-law were discovered. They could not offer any word in their own defense and it became clear that on the night of the 18th day of the seventh month, the father and the brother had strangled the son-in-law and put his body in the water. There was no question about the guilt of the

two who had killed the son-in-law. However, there was a possibility that the wife was also culpable, since she was the one to expose her father's crime. Thus Lord Takatomo sent his report to ask our opinion.

I responded by saying: "This incident is at variance with the three basic principles [of Confucianism governing the relations between the ruler and the subject, the father and the son, and the husband and the wife], and cannot be dealt with in a normal manner. What I fear is that the incident not only touches on the relations between the father and the son, and the husband and the wife, but also has bearings on the important relations between the ruler and the subject."

The *shōgun* directed me to command the councillors (*hyōjōshu*) to search for precedents and report back to the *shōgun*. After I went home, I consulted privately with my friend Muro Kyusō (1658-1734). Next morning he sent me a letter which stated that "a clear-cut decision can be reached on the basis of these sentences" and cited passages from a section on deep mourning, Chapter on Mourning Cloth in the *Book of Etiquette (I-li)*. When I first discussed the case with Muro, I knew he and I were in agreement. I was grateful to him for providing me with this irrefutable reference.

On the 25th day, I was called into the presence of the *shōgun* and was given a copy of an opinion written by the Head of the University (*daigakunokami*) Hayashi Nobuatsu in response to the request made by the Council of Elders (*rōju*). The opinion cites the saying "Even though all men can become one's own husband, there is but one father." This saying was given by the Lady Ts'ai Chung of Cheng in response to her daughter's inquiry about who was closer to her—her husband or her father. In that instance, it was the daughter's exposure which made the crimes of her father evident. The *Analec*s states that "the son shall shield the crimes of his father." The Codes of Shu and T'ang state that "anyone who exposes the crimes of his father and mother shall be put to death." However, if she reported on the crime without knowing that it was her father who killed her husband, then the judgment would be different. The Code of Yōrō in this country says that "anyone who informs on the wrongdoings of his father and mother shall be banished." The footnote to that specific code states that the applicable penalty is death by hanging.

The *shōgun* commented that "The words of the wife to Ts'ai Chung need not be accepted in arriving at our judgment. . . . Confucius did not say that to conceal is the way of righteousness. . . ." He then asked for my opinion which was submitted to him on the 26th day. It was as follows.

" . . . The officers who investigated the incident thought that there was a basic similarity in this case to that of the daughter committing the crime of informing on her father. The councillors after due deliberation stated that she ought to be banished and her property confiscated. The Head of the University submitted an opinion that she ought to be punished as one who committed the crime of informing on her father. . . . In my humble opinion, there are three factors to be considered:

"First, the case must be dealt with in accordance with the fundamental principles governing human relations. The so-called three fundamental principles are that the ruler is the lord over his subject, the father is the lord over his son, and the husband is the lord over his wife. The ruler, the father, and the husband must be respected equally, and served with the same diligence.

"Second, the etiquette concerning the wearing of mourning cloth can be used as a guide in the present case. According to the regulations established by the former kings in China, at the time of the father's death if a daughter is betrothed to be married but is still at home, or if she is separated from her husband and is living at her father's house, she is to wear hemp mourning cloth for three years. If she is married and is living with her husband, she is to wear mourning cloth irregularly for a period of one year only. This discrepancy... is explained in the Chapter on Mourning Cloth in the *Book of Etiquette*: 'There are three followings for women, which are applicable to every woman. Therefore when the girl is yet to be married, she follows her father. After her marriage, she follows her husband. After the death of her husband, she follows her son. The father is the heaven for the daughter, the husband is the heaven for the wife. A woman cannot wear her hemp cloth twice in deep mournings [for her father and husband]. This is likened to the fact that there are not two heavens. A woman cannot pay her respect to two persons.' This clearly tells us... that a wife is to follow her husband and not her father.

"Third, flexibility must be our attitude in arriving at a decision. In everything there are constant elements and changing elements, and to bring about the way of heaven, we rely on both the principle (*kei*, in Chinese, *ch'ing*) and its application (*ken*, in Ch. *ch'uan*). Scholars of old say that 'application is a means of fulfilling the principle.' When a daughter is still with her father, she follows him. When she marries she follows her husband. This is the application which takes into account the changing circumstances, and is consistent with the system established by the former kings...

"There is no greater travesty of human relations than for one's father to kill one's husband. If she wishes to be true to her husband, she is unfilial to her father. No greater misfortune can befall an individual than this...

"According to the system established by the former kings, a daughter who is married can no longer have her father as her heaven. Therefore, even if she has informed on the crime of her father in killing her husband, she cannot be dealt with in the same manner as those who inform on the crimes of their parents. Furthermore she did not knowingly inform on her father and brother in this case. The end of justice cannot be served by punishing her. Some say that at the time the crime of her father and brother was exposed, she should have committed suicide immediately. In this way she could maintain her chastity toward her husband and her filial and sisterly obedience toward her

father and brother... This is an argument advanced to blame others for their slightest imperfection...

"According to the opinion of the councillors, the wife in this case is to be incarcerated for a period of one year, and thereafter she is to be condemned as a slave girl. According to the opinion of the Head of the University, 'If she knew that it was her father who killed her husband and informed on him, she must be put to death. If she did not know that it was her father who killed her husband and informed on her husband's death, she must still be condemned to become a slave girl.'

"If this woman can escape punishment as I am recommending, may I make another request of you. This poor widow has lost the man on whom she can depend. Being young there is no guarantee that she will be able to maintain her chastity. I am not only fearful of her inability to keep her chastity, but also of her breaking the law of the land. According to a well-established custom in our country, there are many who choose to become monks and nuns after the death of their fathers and husbands. We may subtly suggest to her that she become a nun for the sake of her father and husband, send her to a nunnery, shave off her hair, and let her enter a Buddhist order. The properties belonging to her father and husband are to be donated to the nunnery, which can in turn guarantee her livelihood for the rest of her life.<sup>11</sup> In this way not only the law of the land, but also her chastity can be preserved."