日本令にみるジェンダー ――その(1)戸令――
Gender in the Japanese Administrative Code Part 1: Laws on Residence Units

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はしがき

本稿は、日本古代女性史研究に関わりの深い日本令文をとりあげ、その現代訳および女性史研究において注目すべき要点を解説したものである。最終的には英訳テキストの刊行を目指している。「英語圏の日本前近代史研究における古代史研究および古代女性史研究の裾野を広げたい、そのために女性史関係法令のテキストが欲しい」との共著者J. R. Piggottの要請にもとづいて、２年ほど前から本企画は始まった。今回は、最初の試みとして、戸令についての日本文と対訳英文を示す。とりあえずは、個々の条文についての注釈の集積を行い、ゆくゆくは、篇目毎の特色および令文構成そのものにはらまれたジェンダー的特質についても考察を深めていきたい。行き届かぬ点や誤りの少なくないであろうことは、十分に承知している。是非、忌憚のないご批判・ご意見をお願いしたい。

1

古代日本の法典は、律令格式（りつりょうきゃくしき）と総称される。律と令は国家の基本法典、格は律令編纂後の改訂法令、式は律令の施行細則を定めた法令である。格と式は、随時に個別法令として出され、それを整理・集大成して法令集が編まれた。律は刑罰法、令は行政法で、どちらも古代中国で発達した体系

的法典である。中国では律の編纂が先行し、西晋の泰始律令（268年）で律と令が揃い、六世紀末から七世紀にかけて、隋・唐で律令格式の法体系が完成した。日本は七世紀後半以降、順次に中国の律令を取り入れて、中央集権的国家体制の形成をはかった。大宝元年～２年（701-702）に大宝律令、天平宝字元年（757）に大宝律令を改訂した養老律令が施行されて、いわゆる律令国家体制が完成する。写本として現存するのは養老律令である。

このように、古代日本は中国の法典を体系的に導入して国家法典としたが、両国は社会のしくみ、発展段階、親族体系、政治構造、宗教・思想等々、あらゆる面で根本的に異なる。日本律はほぼ唐律のままであり、そのためもあってか散逸し部分的にしか残存しない。令については、大宝令・養老令ともに、唐令を踏襲しつつも、編纂者は日本の実情にあわせるべく多大の工夫を重ねて、令文を作成した。それでも、個々の規定の随処に多くの矛盾とズレがはらまれ、それらは当時の法解釈の中にも露呈している。そこから、中国と日本の令文の相違点、養老令における改定点、法学者の解釈にうかがえる法規定と実情のギャップ、等々を手がかりに、古代日本の社会の実情および国家のめざした変革の方向を浮かび上がらせる研究手法が、日本古代史研究において精緻に発達することとなった。英文によるその最新の成果として、*ACTA ASIATICA* 99（2010年）所載の諸論文がある。

女性史研究に深く関わる婚姻慣習や親族体系、男女の社会的地位等は、日本と中国での相違が特にはなはだしい分野である。そのことは古くから注目されており、特に1980年代以降の家族史研究・女性史研究の新たな発展の中で、多くの論点が明かにされてきた。本稿は、これらの研究成果の集大成を、個々の条文に即してわかりやすく提示することを目指す。英語圏の研究者、および日本の初学者の学習上の便宜を第一の目的として、できるかぎり簡潔な説明を心がけるとともに、女性史関係の参考文献を多くあげるようにつとめた。

2

律令の注釈については、『律令』（日本思想大系、1976年）が、現時点における最良の基本テキストである。本稿は、『律令』の注釈・解説を出発点とし、そこに反映されていない、ないし同書刊行以降の女性史研究の成果を極力盛り込むことを心がけた。日本における律令編纂史および律令研究史とその意義・方法については、井上光貞「日本律令の成立とその注釈書」（『律令』解説）参照。大宝律令と養老律令の違い、および後者編纂の意義を指摘した近年の研究に榎本淳一「養老律令試論」（1993年）がある。日本令と唐令との比較には、『唐令拾遺』『唐令拾遺補』が基本テキストである。近年、中国の天一閣博物館（寧波）から「北宋天聖令」が発見され、これまでの唐令復原研究は大きく塗り替えられることとなった。天聖令全30巻のうち、天一閣に残存した10巻（12篇）の各篇毎に、唐令を改変した現行法（宋令）のあとに、「行われない法」として、宋令に取り入れられなかった唐令が列挙されていたのである。この発見を承けて、日唐令文の比較研究においても、すでに多くの新しい成果が生まれている。これらについては、大津透編『日唐律令比較研究の新段階』（2008年）および同『律令制研究入門』（2011年）参照。

なお、本稿は令の注釈テキストであるので、律には必要な限りで最小限ふれるにとどめた。

大宝令は写本の形では現存しないが、当時の明法家の諸注釈を集成した『令集解』中の「古記」は大宝令の注釈であるので、これによって断片的ではあるが大宝令文を復原することができる。『唐令拾遺補』附載の「唐日両令対照一覧」は、対応する唐令・日本令を対照して掲げるとともに、日本令には大宝令文復原箇所を示し、復原の典拠と参考文献を挙示する。

養老令は、1官位令（19条）、2職員令（80条）、3後宮職員令（18条）、4東宮職員令（11条）、5家令職員令（8条）、6神祇令（20条）、7僧尼令（27条）、8戸令（45条）、9田令（37条）、10賦役令（39条）、

11学令（22条）、12選叙令（38条）、13継嗣令（4条）、14考課令（75条）、15禄令（15条）、16宮衛令（28条）、17軍防令（76条）、18儀制令（26条）、19衣服令（14条）、20営繕令（17条）、21公式令（89条）、22倉庫令（16条）、23厩牧令（28条）、24医疾令（26条）、25仮寧令（13条）、26喪葬令（17条）、27関市令（20条）、28捕亡令（15条）、29獄令（63条）、30雑令（41条）、の30篇よりなる。

3

翻訳とは、それ自体が一つの研究活動である。例えば、「戸」という言葉一つをとっても、それをhouseholdと訳して良いかどうか、もっと適切な訳語としては何があるかは、複雑な「戸」研究史をふまえ、「戸」の内容を理解することなしには決定できない。「奴婢」についても同様である。これをslaveと訳した時点で、古代日本における奴婢の性格規定を行ったことになってしまう。ちなみに本稿では、「戸」はresidence unit、「奴婢」はbound servantと訳した。

したがって今回の作業にあたっては、日本文・英文ともに三名で緊密な討論を重ね、個々の文章・用語を確定していった。日本文原稿は、令篇目ごとに伊集院と義江で分担執筆をする予定である。今回の戸令については義江の文責、英訳はピジョーの文責で、日本文参考文献リストは伊集院が作成した。

なお、英訳にあたっては、特に英語圏読者に必要な補足説明および英訳テキスト等を、適宜、ピジョーの判断で補記した。なかでも、“The Introduction to the English Translation”は、日本語読者にとっても、英語圏における日本古代の律令研究およびジェンダー研究の歩みと現状、今後の発展に向けた大きな可能性と意義を理解する上で、きわめて有益と思われる。是非，一読をお願いしたい。

よく使う参照史料は、文中では下記の略称で示した。参考文献は巻末に一覧リストとして記す。訓読は、『律令』を基本にしつつ、適宜、 通常の漢文読みに近い形態にあらためた。

【凡例】

史料	略称

・『延喜式』〔新訂増補国史大系〕26、吉川弘文館、東京、1965年　『延喜式』

＊虎尾俊哉編『延喜式』〔訳注日本史料〕集英社、全３巻（既刊上・中巻）、東京、2000～に詳しい注釈がある。

・『続日本紀』〔新訂増補国史大系〕2、吉川弘文館、東京、1966年　『続紀』

＊青木和夫他校注『続日本紀』〔新日本古典文学大系〕12-16、岩波書店、東京、1989～98年に詳しい注釈がある。

・『大日本古文書　編年』全25巻、東京大学出版会、東京、1968年覆刻　『編年』

・『天一閣蔵明鈔本天聖令校證　附唐令復原研究』上下、中華書局出版、北京、2006年　『天聖令』

・仁井田陞『唐令拾遺』（東方文化学院東京研究所、1933年）東京大学出版会、東京、1964年覆刻　『拾遺』

・仁井田陞著・池田温編集代表『唐令拾遺補』東京大学出版会、1997年　『拾遺補』

・同上附載「唐日両令対照一覧」　「対照一覧」

・坂本太郎他校注『日本書紀』上下〔日本古典文学大系〕67・68、岩波書店、東京、1965～1967年　『書紀』

・井上光貞他校注『律令』〔日本思想大系〕3、岩波書店、東京、1976年　『律令』

・『令義解』〔新訂増補国史大系〕22、吉川弘文館、東京、1966年　『義解』

・『令集解』〔新訂増補国史大系〕23・24、吉川弘文館、東京、1966年　『集解』

・『類聚三代格』〔新訂増補国史大系〕25、吉川弘文館、東京、1965年　『三代格』

＊関晃他校注『類聚三代格』〔神道体系〕古典編10、神道大系

編纂会、東京、1993年には、狩野文庫本の類聚三代格もあわせ所収。
・律令研究会編『訳註日本律令』一〜十一、東京堂出版、東京、1978〜99年　『訳注』

戸令の注釈と解説

本稿でとりあげる戸令は、戸の編成・把握、戸内部の家族秩序、良賤の身分秩序、国司・郡司による人民教化などを規定する。全45条からなる条文構成の意義については、菊池英夫「唐令復原研究序説――特に戸令・田令にふれて――」（1973年）・大町健「戸令の構成と国郡制支配」（1986年）等参照。

以下、８項目にわたり、14条文をとりあげて、本文、語釈、解説の順で記す。解説は、条文全般の解説ではなく、女性史に関わる重要論点に焦点をあてた。

1　戸令５戸主条

本文

〔原文〕凡戸主。皆以家長為之。戸内有課口者。為課戸。無課口者。為不課戸。〈不課。謂。皇親。及八位以上。男年十六以下。并蔭子。耆。癈疾。篤疾。妻。妾。女。家人。奴婢。〉

〔訓読〕凡そ戸主には、皆家長を以て為よ。戸の内に課口有らば、課戸と為よ。課口無くば、不課戸と為よ。〈不課と謂うは、皇親、及び八位以上、男の年十六以下、并せて蔭子、耆、癈疾、篤疾、妻、妾、女、家人、奴婢をいう。〉

〔現代訳〕戸主を定めるにあたっては、家長を戸主とせよ。一つの戸の中に課役を負担する者がいれば、その戸は課戸とせよ。課役負担者が全くいなければ、不課戸とせよ。〈課役を負担しない者とは、天皇の四世代までの子孫、八位以上の位をもつ者、16歳以下の男性、蔭位の特権を持つ者、66歳以上の老人、中度・重度の病人ないし障害者、既婚・未婚の女性、私家の所有する賤民、である〉

語釈

戸……行政上の基礎単位。50戸で、1里（さと／り）を構成する。これを国郡里制という。里は霊亀（れいき）年間（715－717）に郷（さと／ごう）と改称され、その下に小行政区画として里（こざと／り）が複数設けられた。これにともない、戸の内部も２～３の房戸（ぼうこ）に分けられた。里（コザト）と房戸は天平12年（740）ころに廃止され、以後は国郡郷制となる。研究の上では本来の戸を郷戸（ごうこ）とよび、房戸と区別する。

戸主…郷戸の法的責任者。戸主は戸籍の筆頭に記載され、戸口（ここう）（戸内の成員。20～25人前後の公民）に対する田の収授、租税の貢納、徴兵等の末端業務を行う。

家長…家の統括者。通常は年長男性だが、ここの「家長」について、当時の法律注釈書の多くは、「嫡子」（継承者。通常は嫡妻の長子）のことだとする（解説参照）。

課口…賦役令（ふえきりょう）に規定する課役（国家に対する種々の貢納および労働義務）を負担する者。負担しない者が不課口（ふかく）。女性は全て不課口である。「口」は人間一人の意味。

皇親…天皇の子孫。継嗣令（けいしりょう）１条によれば、天皇から数えて４世代目までが皇親。慶雲（けいうん）3年（706）2月16日格（『続紀』）同日条）で、５世代目まで皇親に含むことに改められたが、延暦（えんりゃく）17年閏5月23日格でふたたび令制に復した（『三代格』p. 509）。

蔭子…律令では、父や祖父の位階に応じて、子・孫が最初に朝廷に仕える時に一定の位階を与えられる蔭位（おんい）の制度があり（選叙令（せんじょりょう）38条）、その対象者のこと。一般には五位以上の者の子だが、ここの「蔭子」には、三位以上の者の孫や兄弟等も含む。

耆……66歳以上の者。律令における年齢区分は、課役負担の義務と密接に関わる。2戸令６条参照。

癈疾・篤疾…身体障害や病気の程度によるランク。三段階にわかれ、癈疾は中ランクで、篤疾が最も重い（戸令７条）。段階に応じて、種々の負担免除や保護の規定があった。

女……中国の律令用語では、一般に、未婚女性は「女」、既婚女性は「婦」

で、両者の法的地位は大きく異なる。ところが、日本の律令用語としての「女」には、男性に対する女性の総称（オンナ）と、既婚女性に対する未婚女性（ムスメ）、の二つの用法がある。前者は、日本における女性全般の独立的地位、法的権利の存在を反映する概念として重要である（梅村恵子1997, p. 43）。本条の「女」は、「妻」「妾」以外の未婚女性の意味。なお、2の解説も参照。

家人・奴婢…律令が規定する五種の賤民のうち、官所有の官戸（かんこ）・官奴婢（かんぬひ）を除く、私有賤民。8戸令35条参照。陵戸（りょうこ）の扱いについては、『集解』35条諸説で解釈が分かれる。

解説〜戸主と家長の関係および戸主の継承〜

本条は、前半で戸主の決め方を述べ、後半で課戸・不課戸の区別と不課身分の範囲を列挙する。前半部分には、当時の家族の実態と公法上の「戸」とのズレが鋭くみられる。

八世紀頃までは、生活共同体としてのまとまりを持った家族は、庶民では明確な集団としては把握できない。別居の通い婚が多く、夫婦関係は流動的で、生産単位としても、村や親族のつながりが大きな意味をもち、家族が経済単位として自立できる段階にはなかったからである。

史料にみえる「家」という漢字は、古代の日本では、①親子・夫婦といった家族関係、②複数の建物と倉庫等からなる経営施設、③官位・官職の継承によって形成されるリニージ、の３種の意味をもつ。庶民は①の「家」（イヘ／イエ）しかもたず、これは上記のように集団としては流動的で、不安定である。②と③の意味の、安定した実態としての「家」をもつのは、貴族豪族層だけである。②は「宅」（ヤケ）という漢字でも表わされる。

八世紀末〜九世紀には、庶民上層で、①と②が重なった、経営単位としての「家」が形成されてくる。

「家長を戸主とせよ」というが、では、家長とは誰のことか。家長についての規定は、戸令5条と雑令（ぞうりょう）18条にある。雑令18条は、「家長の許可なく、年少の親族が勝手に、奴婢や田・宅等の財産を売買してはならない」というもので、家産の所有主体・処分主体としての家長である。一方、

『集解』の諸説はみな、雑令の「家長」は家を統率する尊長（年長男性）だが、本条の家長は「嫡子」のことであり、雑令の「家長」とは異なる、とする。そのため、雑令の「家長」と戸令の「家長」の違いをめぐる議論がこれまでなされてきた。

唐令の該当条文も「戸主には家長をもってせよ」とあり（『拾遺』222頁、戸令5）、日本令はその引き写しである。ただし、中国では年長男性が家族員を統率する家父長制家族が実態として広範に存在していたので、律令も、実態家族の長としての家長をそのまま戸主とした（滋賀秀三1967, pp. 58–68）。ところが、日本では家父長制家族が未成立で、少なくとも庶民レベルでは社会的存在としての「家長」ははっきりしていなかった（吉田孝1983a, pp. 148–51）。

そのため、法的地位として設定された「戸主」には、「戸主」の地位継承者として定められた「嫡子」をあてる、という解釈しかできなかったのである（河音能平2002, pp. 207–13）。有位者の嫡子は継嗣令２条に規定され、庶民の嫡子は養老５年（721）に定められた籍式（戸籍作成の詳細規定）による（『集解』戸令23条「古記」）。正倉院に現存する養老５年の下総国戸籍（『編年』1、pp. 219–303）には、戸主の地位継承者としての「嫡子」の記載がある。

『集解』諸説は、嫡子が幼少だった場合は「母を戸主とする」と述べる（「古記」）。幼少では行政上の責任が果たせないからである（「令釈」）。しかし現存する戸籍に女性戸主の実例は皆無で、養老5年下総国戸籍に女性房戸主が2例だけある（『編年』1、pp. 266–269）。他方で、19歳以下の戸主もわずかに2例しかなく、実際には兄弟等の傍系親が継承した場合が多かったと推定される（南部昇1992a, p. 318）。ただし、戸籍以外の史料には八世紀の女性郷戸主が三例みられるので、女性が実際に戸の運営責任（「戸政」）を担った可能性を、さらによく考える必要がある（荒井秀規2012, p. 226）。

九世紀初頭成立の仏教説話集『霊異記』には、地方豪族ないし上層農民階層では、「家長」（イエギミ）「家室」（イエトジ）と呼ばれる夫妻が、男女一組で家の経営を行っている話がしばしばみられる。のちの時代のよ

うな家父長による経営ではない（Yoshie Akiko 2005. pp. 453–54）公法上の地位である戸主は嫡子ないし男性傍系親が継承するが、現実の経営単位である「家」は、「戸」とは別に存在し、その経営主には男も女もいた、というのが八～九世紀の実態だったのである。

2　戸令 6 三歳以下条・13為戸条

本文

〔原文〕6　凡男女。三歳以下為黄。十六以下為小。廿以下為中。其男廿一為丁。六十一為老。六十六為耆。無夫者。為寡妻妾。

13　凡戸内欲折出口為戸者。非成中男。及寡妻妾者。並不合折。応分者。不用此令。

〔訓読〕6　凡そ男女は、三歳以下を黄とせよ。十六以下を小とせよ。廿以下を中とせよ。其れ男は、廿一を丁とせよ。六十一を老とせよ。六十六を耆とせよ。夫無くは寡妻妾とせよ。

13　凡そ戸の内に口を折ち出して戸と為んと欲わば、中男に成れるに非ず、及び寡妻妾は、並に折つべからず。分つべくは、此令を用いざれ。

〔現代訳〕6　年齢区分については、男女とも 3 歳以下を「黄」、16歳以下を「小」、20歳以下を「中」とせよ。男は、21歳以上を「丁」、61歳以上を「老」、66歳以上を「耆」とせよ。夫のいない女は「寡妻妾」とせよ。

13　一つの戸から成員を分けて新しい戸を作る場合、中男になっていない、つまり16歳以下の男、および夫のいない女性（を戸主とする戸）の新設は認めない。ただし、戸を分けることができる場合は、本条の規定は適用しない（分けて良い）。

語釈

黄・小…唐令の用語も同じ。 3 歳以下の幼児を「黄」というのは、肌の色が黄色いからという（『集解』「令釈」）。大宝令では「緑」で、正倉院戸籍の実例でも男は「緑児」、女は「緑女」。幼児をミドリコという和語によるらしい。『万葉集』4122番に万葉仮名で「弥騰里

兒」（ミドリコ）の表記がみえる（角谷英子1999, pp. 75–76）。古代の年齢表記は、満年齢ではなく、生まれた時を１歳とし、正月を迎える毎に１歳を加える「数え年」である。

丁……課役負担者。21歳から60歳の男性は、調・庸・雑徭の一人前の負担をになう「正丁」である。

※2012年6月に福岡県太宰府市国分松本遺跡から、庚寅年籍（690年）後の戸口変動を記録した木簡がみつかった（毎日新聞2012年6月13日朝刊）。そこには、「正丁」にあたる年齢区分が「政丁」と記されていて、読みが「せいちょう」であること、「正丁」の原義が“政を担う者”であることが明確になった。この場合の「政」は、公民としての貢納・奉仕を意味する（吉村武彦1996, p. 195）。

17歳～20歳の男性は「中男」（大宝令では「少丁」）で、負担は正丁の4分の1（ただし庸は免除）、61歳から64歳の男性は「老丁」で、負担は正丁の2分の1である（賦役令4条・14条）。なお、身体障害者を３等級に区分し（戸令7目盲条）、もっとも軽度のものを「残疾」といい、正丁の2分の1の調を負担する。「老丁」と「残疾」をあわせて「次丁」という（戸令８老残条）。負担軽減のため、天平勝宝9年（757）4月4日勅により、中男は18歳以上、正丁は22歳以上に、それぞれ１年引き上げられた（『続紀』同日条、中男と丁については勝浦令子1977, 参照）。

耆……66歳以上の男性で、負担を免除される。天平宝字2年（758）７月３日勅により、上述の中男・正丁の１年引き上げにならって、老丁は60歳以上、耆は65歳以上に、それぞれ開始年齢が１年引き下げられた（『三代格』巻17、p. 520）。

寡妻妾…寡は夫を失った女性。死別と離別の両方を含む。大宝令のこの部分は「寡婦」とあって、妻と妾の区別はない（13為戸条も同様）。「寡」の年令範囲について、『集解』の「古記」・「令釈」は「50才以上」とするが、『義解』は「年令にかかわらず夫と死別または離別した女性すべて」とする。

口……戸の成員のこと。「一口」「二口」と数える。

解説～年齢区分と課役負担における男女～

6条に対応する唐令（『拾遺』pp. 224-25, 戸令8）は日本令とほぼ同文だが、「小」は15歳以下、「老」は60歳以上とし、「耆」の規定はない。中国では、国家的負担を定めることを目的とする年齢区分制度が発達した。唐令では、21歳から59歳が「丁」である。課役負担者を「丁」（正丁）だけでなく、正丁・老丁（次丁）・少丁の三者としたのは、隋唐以前の晋の制度に近く、その影響を受けているとされる（『律令』同条補注、p. 551）。

本条は課役負担者の範囲を定めることを目的とするので、男性には丁・老・耆の区分が必要だが、負担義務のない女性は本来、この区分は不要である。そのため「其れ男は」との限定句がある。ただし日本では、戸籍計帳に載せる際には女性にも丁老耆の区分を準用する（『義解』）。現存する戸籍計帳にも、丁女（丁妻）・次女・老女（老妻）・耆女等の記載がある。それに対して、唐代の敦煌戸籍では、21歳以上でも未婚女性は「中女」と記載されたらしい（『律令』同条補注）。日本の戸籍が女性も「丁」と記載するのは、女性の労働が実際には重要であり、年齢区分による把握を必要としたためかもしれない。ちなみに、前述の晋の制度では、「正丁」「次丁」ともに男女を含む。

中国では、女性の社会的身分・法的権利は未婚と既婚とで大きく異なる。唐令では、寡妻妾だけが給田の対象となるので、「寡妻妾」であることを

戸令13条　戸の新設と年令・性別・課不課

	課口：　戸の新設を認める	不課口：　戸の新設を認めない
唐	「丁」　21歳以上	「非成丁」　20歳以下
日本	「正丁」21歳以上 ＋ 「中男」〔養老令〕←「少丁」〔大宝令〕 17-20歳	「非成中男」〔養老令〕←「非成少丁」〔大宝令〕 16歳以下
		「寡妻妾」〔養老令〕←「寡婦」〔大宝令〕

戸籍に明記する必要があった。一般の既婚女性は夫と一体とみなされ、独自の給田対象とはならない。それに対して、日本では婚姻が女性の社会的身分変化をもたらさず、独立した「女」（オンナ）としての地位を保持しつづけた。班田対象も6歳以上の「男女」である（田令3条）。したがって、本条末尾の「寡妻妾」（「寡婦」）規定は、唐令のたんなる引き写しであって、日本令では実質的な意味をもたない（梅村恵子1997, pp. 44–52）。

なお、戸籍には妻と妾の記載があるが、これは造籍上の処理にすぎず、社会的な妻妾区分は八世紀には未成立だった。大宝令の「寡婦」の語が、養老令で「寡妻妾」に変更されたのも、実態の変化ではなく、法的な家族イデオロギーのあり方と関わるのだろう（関口裕子1993b, p. 210）。

13条は、戸の新設にあたって、課口が一人もいない戸（不課戸）の新設を制限することを目的とする規定である。唐と日本では課役負担開始年齢に違いがあり、唐では「丁」（21歳以上）だが、日本では「中男／少丁」（17歳以上）だった。そのため、本条に対応する唐令（『拾遺』pp. 235–36, 戸令16）の「非成丁」（丁に成らず）の部分を「非成中男／少丁（中男／少丁に成らず）」と書き改めたのである（図参照）。

「非成中男／少丁」および「寡妻妾／寡婦」の戸新設を認めないのは、「戸政」（戸として課役を担う責任）が果たせないからである（『集解』同条「朱説」、p. 273）。ただし、末尾の「応分者、不用此令」（分かつべくは此令を用いざれ）規定により、16歳以下あるいは「寡妻妾／寡婦」であっても、「戸主としての責任が果たせるのであれば新たに戸を作っても良い」というのが、『集解』諸説の一致した見解である。大宝令の規定では、この「応分者」の部分が、「堪為別戸」（別の戸と為すに堪うれば）となっていて（「古記」）、法意はより明確である。

女性には課役負担なし、というのが唐令にならった日本令の基本原則だが、課役負担のない女性も「戸政」（戸の統率者としての責任）は担えるとみなされていたことが、ここから推定できる。

3　戸令14新附条

本文

〔原文〕凡新附戸。皆取保証。本問元由。知非逃亡詐冒。然後聴之。其先有両貫者。従本国為定。唯大宰部内。及三越。陸奥。石城。石背等国者。従見住為定。若有両貫者。従先貫為定。其於法不合分折。而因失郷。分貫。応合戸者。亦如之。

〔訓読〕凡そ新に戸に附かば、皆、保証を取りて、元の由を本づけ問え。逃亡・詐冒に非ざることを知りて、然る後に聴せ。其れ先に両貫有らば、本国に従いて定めとせよ。唯し大宰の部内、及び三越、陸奥、石城、石背等の国は、見住に従いて定めとせよ。若し両貫有らば、先貫に従いて定めとせよ。其れ法に於いて分ち折ぐべからざるに、失郷に因りて、貫を分ちて、合戸すべくは、亦之の如くせよ。

〔現代訳〕新たに戸籍に付す場合は、皆、保人と証人の証明を取り、戸籍未登載の原因・理由を問いただせ。逃亡や課役逃れのための偽りでないことを確認した後に、付籍を許せ。すでに二つの戸籍に記載されていた場合は、本来の国（父の戸籍のある国）の方にせよ。ただし、二つの戸籍の片方が、大宰府の管内諸国、越前・越中・越後の三国、陸奥国、石城国、石背国のいずれかである場合は、（母の戸籍であっても）現在住んでいる上記の国の戸籍にせよ。もしこれらの国々の中の二国の戸籍に記載されていた場合は、先に登録された方にせよ。法の規定によって戸を分けることができないのに、郷里を離れバラバラになってしまった戸を（ふたたび）合わせる場合も、上記の基準で行え。

語釈

保証…保人と証人。証人は事実の有無を証明するだけであるのに対して、保人は事実であることに責任を負う（詐偽律25・26条）。実際には両者を区別しないことも多い。

元由…原因・理由。

逃亡…戸籍に登録された場所を離れ、課役負担を逃れること（捕亡律12

条)。

詐冒…「詐」は、課役を免除されたと嘘をつき（詐わる）、課役逃れをすること。「冒」は、「有蔭之人」（有位者の子孫で種々の優遇資格がある人間）の名を騙り（冒す）、優遇を得ようとすること。

貫……戸籍に登録すること。両貫は二重戸籍。

本国…本来、戸籍に登録されているべき国。ここでは、父の戸籍のある国。「国」は、武蔵国・陸奥国等、日本国内の行政地域。戸籍は国毎にまとめ、朝廷に提出した。

大宰部内…大宰府管内の諸国。現在の九州地方。中国大陸・朝鮮半島に近く、外交・軍事上の重要地域。

三越…越前・越中・越後の三国。日本海に面した外交・軍事上の重要地域。渤海との交通拠点。

石城・石背…養老2年（718）5月に陸奥国から分かれて、新たにこの二国が設置された。したがって、大宝令の本条にはこの二国名はなかったろう。陸奥国は、対蝦夷戦略上の重要拠点。

於法不合分析…法によって戸の分割が禁止されている場合。例えば名例律6八虐条では、祖父母・父母が生きているうちに戸籍を分けることを「不孝」として禁じる。

解説〜戸籍の二重登録と夫婦別籍・母方居住の慣習〜

本条は、①新たに戸籍に登録するについての規定、②二重登録されていた場合の処置、③離散した戸の再統合、の三つの内容を含み、重点は②にある。「石城・石背」の両国名を除き、大宝令もほぼ同文であったらしい。唐令（『拾遺』pp. 236-37, 戸令17）にもとづくが、唐令に①の部分はない。この規定については、個人の登録をいっているのか（その場合の読みは「戸に附す」）、戸そのものの登録をいっているのか（その場合の読みは「戸を附す」）、両方の解釈があり得るが、『集解』の諸説は個人の登録と理解している。ここでは、個人の登録とする通説にしたがった。

②も、唐令は、本貫地と流浪先での「戸」（集団）の二重登録の処理に関わる規定である。それに対して、同じ「両貫」の文字を使いながら、日本令では、「口」（個人）が父の戸籍と母の戸籍の両方に二重登録された場

合の処理のみが、現実的な問題であった（『集解』同条諸説）。

③についても、唐令では、争乱などで家族が本貫を離れて他郷をさすらう、という事態が想定されている。それに対して、日本では、「口」（個人）がばらばらに離散するのであって、「戸」としてのまとまりを保ったまま流浪するという事態は想定されていない。

つまり、中国の「戸」は家族としてのまとまりを現実にもつのに対して、日本の「戸」はそのような現実的まとまりを持たず、戸主との関係で登録されただけ、という違いが読み取れるのである（杉本一樹2001, pp. 574–75）。前述した①の規定のあいまいさも、このような日中の戸のありかたの違いと関わるのだろう。

②では、唐令にない、日本令だけの文言として「本国」がある。これは、「父の国」のことである（『集解』「古記」・『義解』）。本条の『集解』諸説は、「両貫」を父貫・母貫のことと理解し、夫婦が別籍で、子が両方の籍に記載されるという事態を、ごく普通にあり得ることとみている。『義解』によれば、「父母がそれぞれ別の国にいて、子が両方で戸籍に記載されていることが判明したならば、父の国の戸籍を定めとする」というのが、この条文の意味なのである。ただし、大宰府以下の重要拠点国に母の戸籍があり、そこに子が登録されていた場合は、母の国の戸籍を定めとする。つまり、現実には、「戸」の編成に際して父・母両系のどちらかをたどって登録がなされるのである。ここからは、③について述べた特色とあわせて、日本古代の基幹的な親族組織が双系的なものであったこと、別居婚の広範な存在、家族はまだごく不安定な単位でしかなかったこと、「戸」の構成員は流動的であったこと、が実態としてみえてくる（吉田孝1983b, pp. 147–53）。

ただし、「本国」＝父国の戸籍につけることが原則であり、例え父の死後であっても、母と一緒に生活していても、戸籍は「父子同貫」とする（『集解』同条「穴記」）。また、女子は母の戸籍のままでも良い（『同』「古記」）。つまり、国家は、「父と子（特に男子）は同じ戸籍に付くべき」という造籍上の父系原則を求めているだけで、夫婦別居・母方居住等の家族実態については何も問題とせず、変更を加えようともしていない（南部昇

1992b, pp. 426-30)。本条は、日本古代の家族実態と編戸方針の接点が垣間見える、きわめて興味深い条文といえよう。

4 戸令23応分条

本文

〔原文〕凡応分者。家人。奴婢。〈氏賤。不在此限。〉田宅。資財。〈其功田功封。唯入男女。〉摠計作法。嫡母。継母。及嫡子。各二分。〈妾同女子之分。〉庶子一分。妻家所得。不在分限。兄弟亡者。子承父分。〈養子亦同。〉兄弟俱亡。則諸子均分。其姑姉妹在室者。各減男子之半。〈雖已出嫁。未経分財者。亦同。〉寡妻妾無男者。承夫分。〈女分同上。若夫兄弟皆亡。各同一子之分。有男無男等。謂。在夫家守志者。〉若欲同財共居。及亡人存日処分。証拠灼然者。不用此令。

〔訓読〕凡そ分す応くは、家人、奴婢、〈氏賤は此の限に在らず。〉田宅、資財、〈其れ功田功封は唯し男女に入れよ。〉摠計して法を作れ。嫡母、継母、及び嫡子に、各二分。〈妾は女子の分に同じ。〉庶子に一分。妻家の所得は、分する限に在らず。兄弟亡じなば、子、父の分を承けよ。〈養子も亦同じ。〉兄弟倶に亡じなば、則ち諸子均分せよ。其れ姑姉妹、室に在らば、各男子の半を減ぜよ。〈已に出嫁すと雖も、未だ分財を経ずば、亦同じ。〉寡妻妾、男無くば、夫の分を承けよ。〈女の分は上に同じ。若し夫の兄弟皆亡じなば、各一子の分に同じ。男有り、男無し、等し。謂は、夫家に在りて志を守る者なり。〉若し同財共居せんと欲せらん、及び亡人の存日に処分して、証拠灼然たらば、此の令を用いざれ。

〔現代訳〕財産を分ける際には、家人・奴婢・田・宅・資財を総計して、規定通りに分けよ。〈氏の所有する賤民は除く。功績によって賜った田・封戸は、直系の息子・娘たちが相続せよ。〉相続人からみた嫡母・継母、つまり被相続人の妻と、嫡子はそれぞれ2、庶子は1、の割合で分けよ。〈妾は娘と同じ割合。〉妻が生家から得たものは

除く。息子たちの一人が死亡したならば、その子が、父の相続するはずだった分を相続する。〈養子も同じ。〉息子たちが全員死亡してしまったならば、その子たち（被相続人の孫息子たち）全員で等しく分けよ。被相続人の姉妹および娘で未婚のものは、息子の半分。〈既婚であっても、それまでに財産分与されていなければ、未婚の場合と同じ。〉相続人たる息子が死亡し、その妻妾に息子がいなかった場合は、夫の分を相続せよ。〈娘については、上記の被相続人の姉妹・娘の場合と同じ。もし夫の兄弟たちが全員死亡してしまったならば、その妻妾はそれぞれ息子一人分と同じ。息子がいる場合もいない場合も、妻妾の取り分は同じ。ただしこれは、夫の死後も再婚しない妻妾についてのみである。〉被相続人の死亡後も、分割せずに共財同居の生活をつづけることを相続人たちが望む場合、および被相続人が生前に財産処分をして、その証拠が明白な場合は、この条文の分割規定は用いない。

語釈

氏賤…氏（支配層の政治的族組織）に属する賤民（奴婢と家人）で、氏上（族長）が管理する。律令身分制は良人と賤民よりなる。良人・賤民および奴婢・家人については、8戸令35・37・42・43条の語釈参照。史料の残る実例は「高階氏賤」の１例のみで、天武天皇の息子である高市皇子が母方の宗像氏から相続した氏賤が、高市の子孫である高階真人氏によって約200年の後まで族長管理のもとに所有されていた（『三代格』巻1、寛平５〔893〕年10月29日太政官符、pp. 8–9）。

功田・功封…功田は特別の功績のあった者に与えられる田で、功績の程度に応じて子孫に伝えられる（田令６功田条）。功封は五位以上の功績者に与えられる封戸で、同じく功績に応じて子孫が継承する（禄令13功封条）。どちらも、「子孫」には男女を含む。

嫡母・継母…相続人たる息子からみた父の嫡妻が嫡母、前妻の子からみた父の後妻が継母。

嫡子・庶子…令の「嫡子・庶子」には、①嫡妻の息子とそれ以外の妻妾の

息子たち、②跡取りの息子とそれ以外の息子たち、の二通りの用法があり、①の場合が多いが、ここの嫡子・庶子は②の用法。ただし、日本の古代社会の実態としては、妻と妾の区別は不分明で（2戸令６三歳以下条解説参照）、跡取りとしての嫡子の社会的地位も未確立だった（継嗣令２継嗣条参照）。

妻家所得…妻が生家から得た持参財。大宝令には「妻家所得奴婢」とあり、「奴婢」に限定されていた。大宝２年（702）の筑前国戸籍の肥君猪手戸には「戸主母奴婢」との注記があり（『編年』１、pp. 102-3）、「妻家所得奴婢」の実例と考えられている。

姑・姉妹…「姑」は父の姉妹をさす親族用語。相続人たる息子のオバにあたる。「姉妹」は相続人たる息子の姉妹、つまり被相続人の娘。

在室（ざいしつ）・出嫁…「在室」は、嫁入り前で、父家にいること。「出嫁」は父家を出て夫家に嫁入りすること。令文は、嫁入婚を前提とする唐令の用語をそのまま用いたのでこうした表現になるが、当時の日本は通い婚ないし妻方居住婚が優勢だったので、「在室」は未婚、「出嫁」は既婚を意味する。娘が父家を出る嫁入り婚が、実際に行われていたのではない。「夫家に在りて志を守る者」も同じで、実際に〝夫家にいつづけた〟のではなく、〝再婚しなかった〟という意味。

解説～三令の相違と女子相続権をめぐって～

本条は財産相続規定で、古代の財産相続を研究するための基本史料である。ただし。日本と中国の財産所有形態・親族形態の違いを反映して、日本令応分条は、唐令応分条の枠組みと用語を受け継ぎながら、内容的には大きく書き換えた。また、大宝令と養老令にも大きな違いがある。女子の相続権をめぐる規定は、そうした大きな相違の一つである。

本条と密接に関連する規定に、戸の成員が絶えた場合の財産処理を定めた、喪葬令13身喪戸絶条があり、下記養老令応分条の特色⑤と同様に、生前の任意処分を認めている。

唐令（『拾遺』pp. 245-47、戸令27）との本質的違いとして、唐令応分条が家産分割法であるのに対し、日本令応分条は遺産相続法に組み替えられた。その結果、「妻家所得」の「妻」は、唐令では相続人たる息子たち

の妻だが、日本令では被相続人たる父の妻をさす（中田薫1943, pp. 1351–52）。

中国では、同居共財が家族生活の基本原理なので、家長たる父が死んでも、残された家族はそのまま共財の生活をつづける。「共財」とは、共有ではなく、各自の持ち分を一つにあわせて運用すること。息子たちが分かれて生活する段階になって、共財だった家産を兄弟で均等に分割するのである。こうした慣行の基底には、息子たちは平等に父の人格を継承するという中国の家族観念がある（滋賀秀三1967, pp. 66–85）。

日本には、中国のような父系で同居共財の家は存在せず、八世紀には家産も明瞭な形では存在しなかった。そのため、唐令の応分条の枠組み・用語をそのまま利用しながら、家産分割の法ではなく、遺産相続の法へと変えざるを得なかったのである。

唐令と大宝令の応分条の復元は中田薫によって行われた（中田薫1926, pp. 54–56）。各応分条の相違の主要な点は次の通りである（「対照一覧」pp. 1027–29、なお成清弘和2001、第二章参照）。

唐令は、①田宅奴婢を含む全ての家産を分割、②兄弟で均分、③原則として女子の得分はなし、④「妻家所得奴婢」は分割せず夫財に含む、⑤家長による生前の任意処分規定は無い。

大宝令では、①宅・家人奴婢と一般財物を区別し、田は含まない（おそらく、これらは八世紀初にはまだ私有財産となりきっていなかったからだろう）、②嫡子が宅・家人奴婢の全部と財物の半分を得る、極端な嫡庶異分、③原則として女子の得分はなし、④「妻家所得」は妻方に返還、⑤嫡子による奴婢等の任意処分を認める。

※ここでいう「ヤケ＝宅」（居住用の建物および倉・井戸から構成され、垣で囲まれた1区画。豪族の経営拠点）は、日本古代社会の特質を理解するための重要概念である（吉田孝1983a, pp. 112–14）。

養老令では、①田宅・奴婢・資財の全てを総計して分けるが、氏賤は分割せず、功田・功封は別扱い、②嫡子2、庶子1の割合の嫡庶異分　③庶子の半分の女子相続権を認める、④「妻家所得」の返還規定を削除、⑤被相続者の生前任意処分を認める。

これらの相違の意味については、膨大な研究史があり、諸説が対立している。特に大宝令の極端な嫡庶異分については、日本の伝統的相続慣行の反映とみる説（中田薫1926）、実際の慣行ではなく、「嫡子」の制度的創出という八世紀前半の政治状況によるとする説（井上辰雄1962・関口裕子2004）、ここの「嫡子」概念は氏的所有の統括者を含意しており、女子相続権も氏的所有の分有として認められていたとする説（義江明子1986）、それに対する批判（森田悌1985・吉川敏子2006）などがある。

養老令での修正についても、唐令への復帰、庶民の相続慣行を一部取り入れた、等の議論がある。日本古代において奴婢・田は純粋な財産となりきっていないこと、任意処分規定の付記によって令規定にとらわれない相続慣行の実施が可能なこと、等も考え合わせる必要があろう。なお、売買・相続史料の示すところによれば、古代の相続実態としては、明らかに女子にも相続権があった（服藤早苗1991，p. 192）。

5　戸令24聴婚嫁条・25嫁女条

本文

〔原文〕24　凡男年十五。女年十三以上。聴婚嫁。

25　凡嫁女。皆先由祖父母。父母。伯叔父姑。兄弟。外祖父母。次及舅従母。従父兄弟。若舅従母。従父兄弟。不同居共財。及無此親者。並任女所欲。為婚主。

〔訓読〕24　凡そ男の年十五、女の年十三以上は、婚嫁を聴せ。

25　凡そ女を嫁すには、皆、先ず祖父母、父母、伯叔父姑、兄弟、外祖父母に由れよ。次に舅・従母、従父兄弟に及ぼせ。若し舅・従母、従父兄弟、同居共財せず、及び此の親無くば、並に女の欲せん所に任せて、婚主と為よ。

〔現代訳〕24　男は15歳以上、女は13歳以上で、結婚を許す。

25　女を結婚させるには、まず父方の祖父母、父母、父の兄弟姉妹、兄弟、母方の祖父母に告げよ。（上記の親族がいない場合は）つぎに、母の兄弟姉妹、父方イトコに告げよ。（母の兄弟姉妹、父方イトコが）女と同居共財でない場合、および上記に列

挙した親族がいない場合は、女の希望する者を婚姻主宰者とせよ。

語釈

婚嫁…「婚」は男が妻を娶ること。「嫁」は女が夫家に入ること。どちらも中国流の嫁入り婚にもとづく語。古代日本においては、要するに「婚姻」のこと。

嫁女…女を結婚させること。令写本の古訓では「女にヲフトアハセム」（女に夫を添わせる）であり、日本古代の婚姻実態が「ヨメイリ」ではなかったことが示されている（関口裕子2004, p. 382）。

伯叔父姑…「伯父」は父の兄、「叔父」は父の弟、「姑」は父の姉妹。それに対して、母の兄弟姉妹は「舅・従母」である。おなじ「オジ」でも、父方と母方で全く用字が違うのは、漢字の成り立ちが中国の父系制によっているため。父方母方を区別しない古代日本の親族名称体系とは、さまざまな点で齟齬が生じた（儀制令25五等親条参照）。

同居共財…4戸令23応分条の解説参照。

婚主…婚姻の主宰者。唐令では「主婚」。婚姻は、男女当事者でなく男家と女家の契約による、とする中国の婚姻観念にもとづく用語。日本の実態にはなじまなかった。

解説〜婚姻の主体をめぐって〜

24条は男女の結婚が許される年令の規定。25条は、婚姻主宰者について女側の親族の範囲・順序を定めたもの。以下32条まで、結婚・離婚関連の条文がつづく。戸令29条・30条は、離婚にあたっての婚姻主宰者の関わりを定めたもので、25条の規定と対応する。戸婚律46条逸文は、律に違反して婚姻をなした場合に婚姻主宰者を処罰する規定で、唐戸婚律とほぼ同文（『訳註』2, 戸婚律46, pp, 417-20）。

24条は、唐令とほぼ同文。25条の母法となった唐令は不完全にしか復元できていない（「対照一覧」1030頁）。唐令の冒頭が男家を主体とする「嫁娶」だったとして、日本令冒頭が「嫁女」なのは、婚姻がもっぱら女家の重要事だったからとみる説（伊東すみ子1954, pp4-5）がある。唐令の「外祖父母」の句の有無をめぐっても諸説があり（中田薫1943, p. 1359、

武田佐知子1984, p. 37〜44、成清弘和1999a, pp. 15-16)、日本令が女系親族を特に重視したか否かがその主要論点である。日唐令文のわかりやすい比較整理は成清弘和2001, pp. 145-57参照。

現在復元されている唐令と比較する限りでは、日本令は、①「主婚」語を略し、②「由」の実質的語義を読み替え、③「外祖父母」「舅・従母」を加え、④女本人が「婚主」を定めることを認める例外規定を設けた、という違いが見いだせる。これらはいずれも、中国と日本との婚姻慣行の大きな違いを反映したものと推定される。

①「主婚」について。中国では、婚姻は男女両家が「主婚」(婚姻主宰者)を立て、契約する。結婚の当事者男女は、契約の主体ではない。一方、日本の実態は、婚姻は男女の合意に始まり、女の親の承諾によって成立する。25条末尾に「婚主と為せ」とあるので、日本令も「主婚」順位の規定を意図している(中田薫、同上)。しかし、唐令が繰りかえし強調する「主婚」語を略し、「由」(告知)すべき女側の親族を列挙する点に、「主婚」を要しない日本の婚姻実態がみえる。

②「由」の語義も、実質的に唐令とは違う。唐令の「由」は「よる・もとづく」、つまり責任主体を示す言葉である。日本令も、戸婚律46条逸文からみて、令文制定の意図としては同様。ところが『集解』諸説は、「先ず、祖父母父母に申す」とし、「由」を「告知し承諾を得る」という意味に解している。令写本の古訓も「ふれよ」(告知せよ)である。

③「外祖父母」(母方の祖父母)、「舅・従母」(母の兄弟姉妹)を、告知すべき親族に加えたことも、別居婚・妻方居住婚を主とし、子と母方親族とのつながりが密接な、日本古代の婚姻形態と関わるであろう。

④末尾の「(上記の親族がいなければ)女の希望する者を婚姻主宰者とせよ」によって、本条は、実質的には当事者である女性の主体性を認めている。『集解』同条「令釈」の「媒人が女のもとに行き、女が祖父母父母につげる……女の行事なり」(p. 300)というのが、当時の実態に近いのだろう(高群逸枝1966, p. 267)。「媒人(なかだち)」は、上層階層や富裕層において男女の意向をとりつぐ使者のことで、『日本書紀』『日本霊異記』等にみえる(小林茂文1994, p. 136)。

6　戸令26結婚条・27先姧条

本文

〔原文〕26　凡結婚已定。無故三月不成。及逃亡一月不還。若没落外蕃。一年不還。及犯徒罪以上。女家欲離者。聴之。雖已成。其夫没落外蕃。有子五年。無子三年不帰。及逃亡。有子三年。無子二年不出者。並聴改嫁。

27　凡先姧。後娶為妻妾。雖会赦。猶離之。

〔訓読〕26　凡そ結婚已に定まり、故無くして三月まで成らず、及び逃亡して一月までに還らず、若しくは外蕃に没落して一年還らず、及び徒罪以上を犯せらんは、女家離れんと欲せば、聴せ。已に成ると雖も、其れ夫外蕃に没落して、子有るは五年、子無きは三年までに帰らず、及び逃亡して、子有るは三年、子無きは二年までに出こずば、並に改嫁を聴せ。

27　凡そ先ず姧して、後に娶りて妻妾と為らば、赦に会うと雖も、猶、離せ。

〔現代訳〕26　結婚の約束後、理由なく３カ月たっても結婚しない場合、男が逃亡して1カ月しても戻らない場合、外国にさらわれたり漂流して1年たっても戻らない場合、労役刑以上の罪を犯した場合は、女家が結婚解消を願えば許せ。結婚後、夫が外国にさらわれたり漂流して戻らない場合（子があれば5年、なければ3年）、逃亡して出頭しない場合（子があれば3年、なければ2年）は、再婚を許せ。

27　男女がまず性関係を結び、その後に結婚した場合は、（罪が）赦で免じられても、離婚させよ。

語釈

逃亡…戸籍に登載された本貫地を離れて、賦役を納めないこと。ただ本貫地を離れるだけの「浮浪」とは、法制上で区別される。

没落外蕃…さらわれたり（「没」）、漂流したり（「落」）して、外国（「外蕃」）にとどまること。「外蕃」は、周辺諸国を自国より劣る「蕃国」とみなす中国の中華思想を、日本の律令もとりいれたもの。た

だし、八世紀の日本が現実に蕃国とみなそうとしたのは、新羅・渤海等の朝鮮諸国に限られる。『集解』同条「穴記」(p. 302)は、毛人(蝦夷。東北日本に居住した人々)にさらわれた場合も、本条の「外蕃」に準じるとする。

徒罪以上…徒は労役刑。律は唐律にならって笞・杖・徒・流・死の五刑を定める(『律令』p. 15、名例律2・3条)。「徒罪以上」とは、徒刑・流刑・死刑のこと。

姦……正規の結婚手つづきによらない性関係。いわゆる密通や強姦に限定されない。

解説〜通い婚の実態と「姦」について〜

26条は、婚約解消・離婚を女家側から請求できる法的条件を定める。27条は、「礼」(道義)に背く男女関係の強制離婚規定。26条に対応する唐令は不詳だが、27条はほぼ同文(「対照一覧」p. 1031)。

古代中国における婚姻は、男家女家の婚姻主宰者による婚姻契約(戸令25嫁女条)と、その後に女を男家に迎える儀式の2段階を経て、正式に成立する。日本令も基本的にその理念を取り入れた。解消については、男は女家から受け取った財物を返還すれば、任意に婚約解消でき(『訳注』2、pp. 389-92、唐戸婚律26条)、28条に定める7カ条のどれかに妻が該当すれば、一方的に離婚できる。これに対して女家は、26条に規定する場合のみ、婚約解消・離婚が認められる。男女できわめて不均等な規定であった。

ただし、古代日本の実態としては、男女両家による婚姻契約の存在は疑わしい(5戸令25嫁女条解説参照)。「古記」は、26条について、当時(八世紀前半)の実態をふまえたと思われる興味深い解釈を展開している。すなわち、「婚約後3ヶ月たっても結婚に至らない」というのは、「男が理由もないのに通ってこない」状態のことである(『集解』p. 302)。つまり、〝男女が結婚の約束をしたのち、まもなく男が女のもとに通いはじめる〟というのが、当時の法律家が想定するもっとも普通の結婚開始状況であったらしい。

離婚について、養老令の公定注釈書である「義解」は、「夫婦が同じ里(50戸。近隣の数集落からなる行政単位)にいて、互いに往き来しない場

合は、婚約解消の場合と同様に離婚を認める」と述べる。男女が互いに〝通いつづける〟という事実の積み重ねが結婚の継続を保証し、継続意志がなくなれば離婚にいたる、流動的な婚姻形態である（関口裕子1993c, p. 383、吉田孝1983b, pp. 138–39）。「里」を通婚範囲とすることも、徒歩で夜行き朝帰る通い婚を考えると、自然である。「里」は戸籍作成の単位でもあり（一里＝一巻。戸令19造戸籍条）、里内での戸口の変動は、行政的にも比較的容易に掌握されたと考えられる。

『伊勢物語』24段には、「３年来なかった」ので女が新しい男を迎えたという話があり、３年ほどを目安として婚姻解消とみなす通念があったのかもしれない（栗原弘1999, p. 57）。

「姧」（姦）観念をめぐる日中の相違は、極めて大きかった。中国では、伝統的な礼（社会的な規範・道徳）の観念にもとづく正式の手続きを経た結婚以外は、すべての性関係が「姦」であり、処罰される。日本律もそれを継承し、雑律22条逸文は「姧は徒一年」とする（『訳注』3、p. 748）。婚姻主宰者（戸令25嫁女条に規定）によらない結婚は「姧」であり、たとえ処罰は赦により免じられても、27条により強制離婚となるのである。

ところが、日本の婚姻の実態は、男女当事者の同意による性関係の開始が普通だった。つまり、ほぼ全ての婚姻が27条の「姧」に相当し、強制離婚の対象となってしまう。よって、27条は実効性をもたなかったと考えられ、『集解』同条諸説も、26条とは対照的に、実態と関連づけた解釈は何も展開しない。日本令は戸令43条でも、賤民と主人との間に限定して「姧」概念を採用しており、良民間での「姧」という観念が古代日本では成立し難かったことを示す（関口裕子1993a, pp. 204–06）。なお8戸令43条解説参照。

7 戸令28七出（しちしゅつ）条

本文

〔原文〕凡棄妻。須有七出之状。一無子。二淫泆。三不事舅姑。四口舌。五盗竊。六妬忌。七悪疾。皆夫手書棄之。与尊属近親同署。若不解書。画指為記。妻雖有棄状。有三不去。一経持舅姑之喪。二娶

時賤後貴。三有所受無所帰。即犯義絶。淫泆。悪疾。不拘此令。

〔訓読〕凡そ妻を棄つるには、七出の状有るべし。一には子無し。二には淫泆。三には舅姑に事えず。四には口舌。五には盗竊。六には妬忌。七には悪疾。皆、夫、手書して棄てよ。尊属、近親と同じく署せよ。若し書を解せずば、指を画きて記と為よ。妻、棄つる状有りと雖も、三の去てざること有り。一には舅姑の喪を持け経たる。二には娶りし時に賤しくして後に貴き。三には受けし所有りて帰す所無き。即ち義絶、淫泆、悪疾を犯せらば、此の令に拘らざれ。

〔現代訳〕夫が妻を（一方的に）離別できるのは、以下の七つの場合である。①子がない。②淫乱。③夫の父母に仕えない。④おしゃべり。⑤盗癖。⑥嫉妬深い。⑦悪い病気。これらの場合には、夫は離別の書類を書き、目上の親族や近親とともに署名せよ。文字がわからない場合は、指の長さを画いて署名の代わりとせよ。

妻が上記の七つのどれかにあてはまる場合であっても、以下の三つの場合には離別してはならない。①夫の父母の喪を助けつとめた。②貧しい時に結婚し、のちに夫が出世した。③結婚の時には実家があったが、今は帰るべき家がない。

ただし、31条に定める「義絶」、および上記の②淫乱、⑦悪い病気の場合には、本条の「三不去」規定を適用しない。

語釈

棄妻…妻を棄てる、つまり、夫の一方的意志による離婚。ただしその場合も、近親および婚姻主宰者に知らせ、また、妻の持参財を返還しなければならない（29・30条）。

無子…子が生まれないこと。「子」に女子も含むか、男子がいない場合だけかは、『集解』諸説で解釈が分かれる（p. 304）。令文には妻の年令規定がないが、戸婚律40条逸文によれば、50歳以上で子がない場合、とする（『訳注』2、p. 409）。

舅姑…夫の父母のこと。25嫁女条の「舅姑」がオジ・オバを指したのとは、異なる。

手書…夫が自らの手で作成した書類。「古記」は、里長に送るとする(p. 306)。ただし、離別書の実例は存在せず、実際に古代日本で作成されたかは疑問。

画指(かくし)…自署の代わりに、指の長さを描く署名方法。通常、人指し指を紙の上に置き、指先と関節の位置に短い横線を引いて寸法を示す。敦煌の唐代文書に実例が残る。日本でも、奈良時代から鎌倉初ごろまで行われた(『国史大辞典』「画指」図版、p. 184参照)。

義絶…夫婦の結合を絶つこと。戸令31義絶条に規定され、夫と妻が、互いに相手の父母・親族を傷つけたり殺した場合、親族どうしが殺し合ったりした場合には、大赦で罪はゆるされても、強制離婚させる。

解説〜古代の離婚について〜

唐代の家族法では、離婚には、(1) 協議離婚、(2) 夫の意志による離婚、(3) 法的強制離婚、の三種がある。(1) は両家の協議にまかされ、法は関わらない(『訳注』2、p. 410、戸婚律41条)。(2) の規定が本条である。戸婚律40条逸文は、本条に違反した場合の処罰規定である。(3) は戸令31条に義絶として規定される。戸令27条の「奸」による結婚も、強制離婚の対象となる。

日本令文は、離別書の署名者にやや違いがあるほかは、唐令とほぼ同じである(「対照一覧」p. 1032)。日本では離婚は当事者の意志により、しかも曖昧に終わることが多かったので、本条の実効性は疑問。だからこそ、唐令のままで差し支えなかったともいえる(成清弘和2001, 164〜73頁)。一方、奈良時代にはすでに男性主導の離婚だったとみて、本条受容の背景をそこにもとめる説もある(栗原弘1999, p. 59-62)。「古記」によると、大宝令では離婚条件は「六出」で、⑦悪疾がなかったらしい(『集解』p. 304. 戸令28条)。

貴族・歌人の大伴家持(おおとものやかもち)は、本条の「七出」「三不去」や重婚禁止規定をあげて、部下の浮気をとがめた歌を詠んだ(『万葉集』4105〜4110番)。そこからは、中国の家父長的家族道徳にもとづく律令規定を、奈良時代の官人たちが理念的に学び受け入れようとしていたことがわかる。ただし他方で家持は、部下が任地先の芸能女性と持った一時的性関係を「結婚」と同

一視し、部下が都に残した妻を「先妻」としている。そこには、結婚も離婚も男女当事者の意志によるとする、当時の人々の流動的な結婚・離婚観が露呈しており、理念と現実とはかけ離れていた（関口裕子1993c, p. 382）。

なお、唐代の離別書としては、敦煌文書の中に「放妻書」の文例案が８通、下書きが２通ある。それらをみると、「七出」の語はなく、離婚原因をなるべく明かにせず、妻の再婚を願う文言を含み、協議離婚の形をとる。律令の定める離婚条件は圧倒的に妻に不利だが、現実には、双方の親族や近隣の長老の口利きによる調停がなされ、妻の立場も、少なくとも敦煌社会では相当に強いものであったらしい（梅村恵子2007, p. 14–30）。

古代の日本においては、離婚に際しての書類作成は知られていない。そうした書類を実際に夫が作成して妻に手渡すようになるのは、儒教道徳が広く庶民にも浸透する江戸時代になってからである。江戸時代の離縁状は、夫にのみ離婚権を付与する幕府法のもとで、まさに唐代敦煌の「放妻書」と同様に、離婚原因を明記せず、妻の再婚の自由を保障する、離婚証明書の機能を果たした（高木侃1987）。

8　戸令35当色為婚条・37良人家人条・42為夫妻条・43奴姦主条

本文

〔原文〕35　凡陵戸。官戸。家人。公私奴婢。皆当色為婚。

37　凡良人及家人、被壓略充賤。配奴婢而生男女者。後訴得免。所生男女。並従良人及家人。

42　凡官戸。陵戸。家人。公私奴婢。与良人為夫妻。所生男女。不知情者。従良。皆離之。其逃亡所生男女。皆従賤。

43　凡家人奴。姦主及主五等以上親。所生男女。各没官。

〔訓読〕35　凡そ陵戸、官戸、家人、公私の奴婢は、皆、当色に婚することを為よ。

37　凡そ良人及び家人、圧略せられて賤に充てられて、奴婢に配して男女を生めらば、後に訴して免すこと得たらば、生む所の男女は、並に良人及び家人に従えよ。

42　凡そ官戸、陵戸、家人、公私奴婢。良人と夫妻と為て、生む所の男女、情を知らずは、良に従えよ。皆、離て。其れ逃亡して生む所の男女は、皆、賤に従えよ。

43　凡そ家人、奴、主及び主の五等以上の親を奸して生む所の男女は、各、没官。

〔現代訳〕35　陵戸・官戸・家人・公奴婢・私奴婢は、それぞれ、同じ種類の賤民どうしで婚姻せよ。

37　良人と家人が、不法にあるいは誘拐によって身分を落とされて（良人が賤に、家人が奴婢にされ）、奴婢と結婚させられて子を生み、後に訴えて身分を（良人または家人に）もどすことができたならば、（奴婢との間に）生んだ子は、ともに（親の本来の身分である）良人あるいは家人とせよ。

42　官戸、陵戸、家人、公奴婢、私奴婢が良人と結婚し、生んだ子は、相手が異身分であることを知らなかった場合は、良人身分とせよ。（知っていた場合も知らなかった場合も）どちらも、離婚させよ。（賤民が）逃亡して生んだ子は、（賤民であることを相手が知っていた場合も知らなかった場合も）どちらも、子は賤民身分とせよ。

43　家人と奴（男）が、主人および主人の五等以上の親族（女）との性関係で生んだ子は、朝廷が没収して、官有の賤民（官戸または公奴婢）とする。

語釈

陵戸・官戸・家人・公私奴婢…律令の定める賤民には、陵戸・官戸・家人・公奴婢・私奴婢の5種類があった。陵戸は天皇・皇后等の墓を守衛する。大宝令では賤民身分ではなかったらしく、戸令35条の古記には「陵戸」の文字がない。なお、大宝令施行期間に相当する時期の平城宮出土木簡に、戸令35条と戸令38条の習書とみられるものがあり、ここにも「陵戸」の文字はない（『木簡研究』10、1988、p. 90）。官戸と公奴婢（官奴婢ともいう）は朝廷所有の賤民、家人と私奴婢は、私家所有の賤民。官戸と家人は上級賤民で、家族の形

成を認められた。家人は譜第の隷属民で、売買されず、家族全員を所有者が意のままにこき使うことは禁止された（戸令40家人所生条。同条『集解』によると、家族員の3分の1は、使役を免除されて私業に従事する）。ただし、官戸と家人は、法制上でだけ設けられた身分であった可能性が高く、実質的には、奴婢が官戸・家人に近い存在、すなわち、家族を形成する譜第隷属民であったとみられる（吉田晶1963, pp. 30–33 ）。

当色…「色」とは種類のこと。五種類の賤民は「五色賤（ごしきのせん）」といわれ、同じ種類＝身分内でのみ婚姻を認められた。ほぼ同等とされる官戸と家人、公奴婢と私奴婢の間で婚姻を認めるかどうかは、古代の法律家の間でも説が分かれる（『集解』pp. 333–34, 戸令35）。

良人…律令身分制の二大区分における、賤民以外の一般身分。官人と庶民を含む。天皇は「良・賤」身分を超越する存在。

主……奴婢の所有者。唐律令では、奴婢は家の所有物なので、家産の分配権を持つ家内の良人全てが「主」にあたる。日本律令の財産規定もほぼ同様だが、奴婢の解放手続きを定めた戸令39放家人奴婢為良及家人条では、日本令は唐令の「家長による解放手続き」規定を削除している。実例をみても、八世紀の戸籍では、奴婢は「戸」全体あるいは「戸主」の所有ではなく、個人の所有であり、戸主の奴婢も「戸主私奴婢」と記載されている。また、戸主が奴婢を所有していないのに戸主母が13名の奴婢を所有するなど（『編年』1, p. 64）、女性の奴婢所有者例も多い。現実に奴婢を所有できたのは、ほぼ豪族クラスに限られる。

五等以上親…儀制令25五等条に規定する範囲の親族。高祖父母・外祖父母からマタイトコ、娘ムコまで、幅広い親族を含む。

没官…人や物を国家が没収すること。ここでは、官戸・官奴婢とすること。

解説〜異身分間の婚姻と姦概念について〜

これら4条は、異なる身分間での婚姻を禁止し、違反した通婚によって生まれた子の帰属を定めた規定である。関連する罰則規定が戸婚律にある（日本律では残存しない。『訳注』6、pp. 203–312、唐戸婚律参照）。中国

と比べた場合、①日本における良賤身分の区分のあいまいさ、②正式の婚姻と姦（奸）とを区別する観念の乏しさ、という２点の問題がみえてくる。

①について、令の規定としては、戸令23応分条に「家人、奴婢、田宅、資財」、捕亡令4亡失家人条に「家人、奴婢、雑蓄」と列挙されるように、奴婢は法制上は基本的に物として扱われた。捕亡令には他にも14両家奴婢条など、奴婢関連規定が多い。他方で、唐令とは異なり、官戸・公奴婢は良人と同額の口分田、家人・奴婢も３分の１を支給され（田令27官戸奴婢条）、最低限の自給自足生活を営むべきものと想定されている（榎本淳一2003，p. 7）。現実の奴婢も、家族を形成し、村落生活を営み、法規定上の家人に近い存在だった。官奴婢を書き上げた天平勝宝２（750）年の文書では、「広瀬村常奴」「春日村常婢」など、村落に常住して生産生活を営む奴婢の姿が知られる（『編年』3、p. 359、石上英一1971，p. 11-21）。日本古代の奴婢は、売買される奴隷というよりは、豪族の譜第隷属民としての性格が強く、社会的な卑賤視も乏しかったのである（義江明子1986，pp. 109-11）。

異身分間に生まれた子の帰属規定は、大化元年（645）8月の「男女の法」が最初で、「良人男女の間の子は父、良男と婢の間の子は母、良女と奴の間の子は父、両家の奴婢の間の子は母につけよ」とされた（『日本書紀』）。良人と奴婢の２区分だけで、賤民の細かい等級区分はない。良人間の子は父、良賤間の子は母、賤民間の子は母につける、という簡単な規定である。「良人間の子は父につける」とは、この場合、父の身分をうける、つまり、母姓ではなく父姓を継承することである。別居婚を主とする当時の婚姻の実態を考えると、「子は母につける」、つまり、母方で成長し、場合によっては母姓を継承することもある、というのが普通に行われていたあり方だったと推定される。「男女の法」では、良賤間の通婚自体は当然の前提とされており、良人間での父系原則を初めて公的に定めたところに意義がある（成清弘和1999b，p. 258）。

そもそも唐令では、賤民間の事実的性関係は「婚」ではなく、所有者が行う強制的「配偶」にすぎない。

※『唐令拾遺』戸令39条（p. 258）では、日本令を参考にして賤民間

の性関係について「婚」字を推定復元したが、その後の研究の進展により、『拾遺補』(p. 545) では「婚」字を削除した。新出の北宋天聖令附載不行唐令雑令の関連条文によっても、後者の正しさが裏づけられた（榎本淳一2002, pp. 127–28)。天聖令については、大津透編2008・2011、参照。

ところが日本令では、戸令35条で賤民間の性関係を「婚」とし、42条で良賤間の男女関係を「夫妻」と規定する。他方で、強制配偶を規定した唐雑令15条に相当する条文は、日本雑令には存在しない。こうしたところに、日本における良賤区分のあいまいさが自ずから表れている（榎本淳一2002, pp. 130–32)。

②については、中国の「礼」制では、正式な手続きによる婚姻（戸令25嫁女条）だけが「婚」で、それ以外の事実婚は「姦」(「奸」) である。ところが、日本古代の婚姻関係は、男女当事者の合意と性交ではじまる事実婚だったから、こうした「姦」観念は社会的には受容されず、逆に賤民の事実的性関係までもが「婚」観念に包摂されることとなったのである（関口裕子1993a, pp. 205–06)。

良賤間に生まれた子は賤民とする、というのが律令の基本原則だが、その例外として、戸令42条では、事情を知らなかった場合は良民とするのである。戸令43条では、主人および主人の親族を「姦」して生まれた子は「没官」だが、『集解』の諸注釈によると、「和姦」（合意の上の性関係）と「強姦」（不合意の性関係）を区別し、後者の場合は子は良人とする。また、犯行（通婚）時に互いが主従関係にあることを知らなかった場合も子は良人とするなど、例外規定を適用する傾向が強い。

実態として、良賤区分があいまいで、賤民への卑賤視が乏しかったため、賤民との通婚によって子孫の課役逃れをはかる良民も多かった。奴婢・家人は課役を負担しないからである（戸令5戸主条)。良民の課役逃れを防止する意味もあって、延暦8年（789）5月18日に、「良賤が通婚して生まれた子はすべて良とせよ」という命令が出された（『三代格』17、p. 522)。そこでも、上層身分を含む良民男女が、ためらいなく賤民と通婚する状況が記されている。この法令によって、戸令の良賤通婚禁止規定は意味を失い、

律令賤民制は、一〇世紀にはほぼ解体する。

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Gender in the Japanese Administrative Code
Part 1: Laws on Residence Units

Yoshie Akiko
Ijuin Yôko
Joan R. Piggott

Introduction, by Yoshie Akiko

Our intention in preparing and publishing this annotated translation of the Yôrô-era (717-24) Laws on Residence Units 戸令 from the Yôrô administrative code 養老令 in both Japanese and English is to interpret this important chapter of administrative codal law (令 *ryô*) in light of new perspectives and knowledge from recent research, particularly concerning the history of women and gender during Japan's classical age. This is but the first stage in a longer and more ambitious project. In future we plan to produce a complete translation of all relevant sections of the Yôrô administrative code that bear on the history of women and gender. By considering the character and structure of eighth-century administrative codal law and through careful analysis of each relevant clause, we plan to tease out conceptions and historical actualities of gender and gender relations revealed therein.

An important spur to this work has been our growing sense that researchers outside of Japan are eager to broaden their research into issues of gender and family history in premodern Japan, and that an English rendering and analysis of relevant sections of administrative law will serve that end. The project began some two years ago, and this annotated translation of clauses from a particularly significant chapter, the Laws on

Residence Units, represents the initial publication of what we have done to date. While we recognize that there will be difficulties to face and misunderstandings to rectify, we look forward to the thoughts and opinions of readers. We know that the resulting discussion will increase understanding of both the codes and the society in which they operated.

1

Classical Japanese law consisted of four types. *Ritsu* 律 (penal law, including punishments) and *ryô* 令 (administrative law) that comprised the codes themselves were the foundation. Later *kyaku* 格 (supplementary regulations) were issued as individual decrees to emend and elaborate codal law. Still later such decrees were compiled in legal compendia like *Ruijû sandai kyaku* (11 c.). Meanwhile *shiki* 式 (protocols) were also issued and compiled to routinize the processes of government, including various rites and ceremonies.

In China penal law emerged first. Then Western Jin (265–318) dynasts ordered compilation of the first combined penal and administrative codes, known as the *Taishi ritsurei* 泰始律令, in 268. Still later, from the sixth century onward, monarchs of the Sui (581–618) and Tang (618–907) dynasties ordered promulgation of the full panoply of penal and administrative laws including compendia of supplemental regulations and protocols.[1]

And in Japan from the late seventh century onward Chinese codal law was adopted by state builders as a means of fashioning a more centralized political structure. The *Taihô ritsuryô* 大宝律令—the penal and administrative codes of the Taihô era (701–704)—were compiled and promulgated in 701 and 702; and in 757, they were replaced by promulgation of the *Yôrô ritsuryô* that had been compiled in the Yôrô era (717–24). Fortunately today we actually have a manuscript copy of the almost complete Yôrô

administrative code as well as part of the penal code extant.

While it is said that the classical Japanese polity itself was fashioned around the imported *ritsuryô* codes, we have to take into careful consideration the fact that the two societies—eighth-century Japan and Tang China—were fundamentally different in terms of their stages of historical development, familial and political structures, and religious ideas. Consideration of such differences is critically important for studying *ritsuryô* law in Japan, as we shall demonstrate here. The Japanese penal code (*ritsu*) seems to have been very similar to that of Tang China, which may be why only fragments of it are extant. In contrast, extant sections of the administrative code evidence replicated elements from the Tang original as well as changed elements that represent compilers' attempts to match provisions to conditions on the ground in the archipelago. Even so, contradictions and lapses become clear when we study the early commentaries such as the early ninth-century *Ryônogige* 令義解 (Commentary on the Administrative Code, 833) and the other commentaries cited in the later ninth-century *Ryônoshûge* 令集解 (Collected Commentaries on the Administrative Code, 859-76). Indeed by identifying differences between the Chinese and Japanese administrative codes and the gaps that early commentators pointed to in their questions and comments, researchers have been uncovering clues to actual conditions in Japanese classical society as well as gaining better understanding of the trajectories of reform envisioned by eighth-century state-builders. Fortunately for English readers, a recent series of essays in the journal *Acta Asiatica* (vol. 99, 2010) has made some of this new research accessible.

Aspects of life in which there were substantial differences between Tang China and eighth-century Japan include marriage customs, family structure, and the relative social status of men and women, all of which are deeply connected with the history of women and gender relations. Since the 1980s researchers in the fields of women's and family history have made tremendous advances in identifying new areas and problems for study, and

we want to bring the results of that important research to readers both in Japan and in the English-reading world. Relying on that research here, we have attempted to make each relevant clause of the Laws on Residence Units easy to understand. We have also provided bibliographic suggestions so that readers can continue to study more deeply on their own.

2

As for basic texts and scholarship, the fully annotated and glossed *Ritsuryô* edited by Inoue Mitsusada in 1976 remains the best published version of the Yôrô code. For readers who want to know more about compilation of the codes and previous scholarship on them, explanatory sections therein remain the fundamental reference. On the subject of comparison between the Japanese and Chinese administrative codes, Niida Noboru's *Tôrei shûi* (Gathered Remnants of the Tang Administrative Code) published in 1933 and the expanded *Tôrei shûi ho* (Addenda to Gathered Remnants of the Tang Administrative Code) published in 1997 are key resources. Of great moment too is a manuscript containing ten out of thirty volumes of the Northern Sung Dynasty Tensei administrative code 天聖令 that was discovered in 1999 inside the Ten'ichikaku museum in Ningbo. It includes sections of the Tang code that were not selected for the new Sung code that replaced it. That discovery has added greatly to what we know about the earlier Tang code, and it has enabled significant advances in research comparing the development of codal law in both China and Japan.[2] Our work here in particular reflects new knowledge and research since Inoue's *Ritsuryô* was published. Given that our focus is on the administrative code, however, references to the penal code are limited.

A manuscript copy of the codes of the Taihô era is not extant, but fortunately the later ninth-century legal scholar who compiled the compendium of commentaries known as the *Ryônoshûge* included frequent

citations from the *Koki* commentary on the Taihô administrative code. His text therefore allows partial reconstruction. Furthermore a chart entitled "The Tang and Japanese Codes Compared at a Glance"（唐日両令対照一覧）in the *Tôrei shûi ho*（pp. 863–1484）provides helpful comparisons of elements of the Tang and Japanese codes, as well as a listing of which parts of the Taihô codes have been reconstructed and notes as to which sources have been utilized for the process. The research of Enomoto Jun'ichi also provides insights into differences between the codes of the Taihô and Yôrô eras and the thinking of compilers（Enomoto 1993）.

3

This rendering of the Yôrô Laws on Residence Units in two modern languages demonstrates special modes of research that bridge vast linguistic and social chasms, between those of the classical Chinese text of the Tang dynasty during the seventh and eighth centuries, the text promulgated in Japan in the eighth century, early commentaries of the eighth and ninth centuries, and contemporary English. To give just two examples, for the English translation the three translators debated how to render the basic term *ko*: was "household" an appropriate translation? Before making a decision, careful reading and discussion of the extensive and difficult research on the subject was needed. In the end the group decided that the best English translation for *ko* was "residence unit," given that the weight of evidence now indicates that in eighth-century Japan a *ko* was a prescriptive legal entity rather than a co-resident kin group. Similarly the term *nuhi* 奴婢, sometimes translated as "slave," occasioned substantial debate. In that case the weight of current evidence led us to translate *nuhi* as "bound servant." These are but two of many terms with which we have struggled to determine and then reflect upon the insights of new research in our interpretations.

Herein the Japanese text glossing and analyzing the Koryô laws was

written by Akiko Yoshie and interpreted in English by Joan Piggott. The Japanese bibliography was prepared by Yôko Ijuin. Additional explanation needed for English readers as well as bibliography in various languages was added by Joan Piggott. Future plans call for Yoshie and Ijuin to alternate as lead commentators on various chapters of the administrative code, while Piggott will continue to bring additional comparative perspectives to the project. In preparing this rendering into modern Japanese and English, the three editors have discussed and debated the texts in both languages.

The bibliography following this translation presents a list of primary sources frequently cited in our interpretations as well as secondary sources that will provide readers with useful resources for further study. And while readings for characters and terms are generally based on those in *Ritsuryô*, our readings of the Sino-Japanese (*kanbun*) text adhere as closely as possible to current Sino-Japanese reading practices. Finally, in the following English translations, parentheses ( ) represent actual parenthetical entries in the clauses of the Laws. Square brackets [ ] indicate editorial interpolations deemed necessary for meaning.

Introduction to the English Translation, by Joan R. Piggott

Little has been written in English about the Japanese *ritsuryô* codes in general, or about the Laws on Residential Units in particular. Sir George Sansom gave us an overview in his early two-part article published in 1932 and 1934. After that, Cornelius Kiley's entry in the *Kodansha Encyclopedia of Japan* (1983) and Carl Steenstrup's chapter on *ritsuryô* law in *A History of Law in Japan until 1868* (1991) have been the best sources for information on the Chinese-style Taihô and Yôrô codes that eighth-century lawmakers compiled in Japan.

Historians of classical Japan have generally seen the *ritsuryô* codes as

the scaffolding for the *tennô*-centerered state. This approach concerns itself mostly with the structures and procedures set up by the codes as mechanisms of state formation, "the *ritsuryô* system." To take my own analysis of the emergence of Japanese kingship in the late seventh and early eighth centuries as one example, I described therein how the codes put in place three integrative networks—officialdom, administrative places, and ritual places—that joined center and periphery and established a "*ritsuryô* process" that advanced state formation in the *tennô*-centered polity (Piggott 1997, p. 167-70). I argued that these three networks provided for political organization, social control, and taxation while establishing an All Under Heaven on the archipelago in which elites from every part of the realm were eager to serve as officials and ritualists in the *tennô's* government. Such an approach treats the codes at a macro-level, which is helpful for analyzing their role in kingship and state formation. But I have always thought that we needed to know more about the actual laws of the codes: how they came to be, what they meant, and how they were applied in capital and countryside. Working on this project with my research partners Yoshie Akiko and Ijuin Yôko has advanced that objective beyond expectations, while also advancing another critical goal, that of getting more of the *ritsuryô* codes interpreted, annotated, and analyzed in English.[3]

In describing the relationship of the Japanese codes to their Tang models, terms like "selective adaptation" are frequently used, but to date there has been no scholarship in English to flesh out details of the codal mandates, and to describe how such adaptation actually worked in the making of the administrative or penal codes. English textbooks in Japanese history mention the codes, but it has been impossible for English readers to get any real sense of what the laws were like, or of their relationship with specific social conditions on the ground across the archipelago. Here we aim to change that situation by focusing on issues of gender and gender relations in choosing selections from the Laws on Residence Units for translation and

analysis in English.

Another vector driving our enthusiasm for this project is the dynamism of current *ritsuryô* studies in Japan, the fruits of which we are eager to share with English readers. Many researchers in Japan, including members of the Ritsuryô Kenkyûkai, see Chinese-style law as one of four key elements of Chinese culture that diffused to produce the cultural zone that Joshua Fogel has termed the "Sinosphere" of East Asia, but wherein varying regional contexts and conditions of reception created quite different end products (Joan Piggott 1997, 207-8; Enomoto Jun'ichi 2011; Joshua Fogel 2009). This makes contemporary scholarship on "the *ritsuryô* system" (*ritsuryôsei*) in Japan strongly comparative, putting particular focus on attempts to reconstruct Tang law as well as on tracing the changing historical context on the archipelago that produced first the *Taihô* and then the *Yôrô ritsuryô* codes. Today scholars are also studying a longer span, as they consider the full development of *ritsuryo* law to have extended well beyond the eighth century, to include the ongoing issuing of supplementary regulations (*kyaku*) and protocols (*shiki*) during the ninth and early tenth centuries. The Engi era (901-23), rather than the Yôrô era (717-24), is the finale, and the products at each subsequent stage are seen to have been quite variant from Tang models. Ôtsu Tôru has put it this way: "While the government system of the Japanese classical state relied on the Tang codes, the fact is that much of the Japanese codes were different from the Tang model" (Ôtsu Tôru 2011, p. 299). Here we have taken selections from one chapter of the administrative code to translate, annotate, and analyze, fleshing out Ôtsu's conclusion for the Laws on Residence Units in terms of gender history.

Moreover as readers will see in our interpretations and explanations that follow, close study of legal commentaries such as the early ninth-century *Ryônogige* and of the various commentaries cited in the later ninth-century compendium of commentaries, the *Ryônoshûge*, together with

new finds such as the Northern Sung Tensei administrative code with parts of the outdated Tang code, and inscribed wooden documents (*mokkan*) in Japan itself, have provided many clues to aid in the reconstruction of the administrative codes. The new evidence has also made gaps, inconsistencies, and points of confusion between the Tang models, adapted Japanese laws, and actual social practices on the classical archipelago more visible.[4]

The specialized translation work engaged in here presents difficult challenges in what I have called "naming things" (Joan Piggott 2001). For instance, what to call the ko, a focal point for any attempt to discuss the chapter of laws devoted to that unit in the codes. In 1966 John Whitney Hall wrote about them in his magisterial *Japan and Local Power in Japan, 500 to 1700* as "small natural communities" and "local residential groups" that were "theoretically based on family organization (John Whitney Hall, 1966, pp. 81–82)." No part of Hall's explanation is negated by our current knowledge from either written records or archaeological finds, but in translating codal laws on *ko* we longed to do better. Conrad Totman has rendered them "statutory households" (Conrad Totman 2005, pp. 76–81), while Carl Steenstrup uses "artificial extended families" (Carl Steenstrup 1991, p. 49). Here we follow the consensus in recent research by avoiding such terms as "household" and "family," while emphasizing the statutory quality of this "residence unit" (Joan Piggott 1997, pp. 199, 207, 316). Furthermore as Yoshie Akiko has written, "It appears that the *ko* were constructed by selecting 50 prominent persons from within a locality (*sato*) to serve as residence unit heads (*koshu*), and each of them, along with 20 or 30 relatives, made up one *ko*." (Yoshie Akiko 2005, p. 12).

Our work here also continues discussions on facets of gender history in classical Japan that were initiated by Sekiguchi Hiroko and Yoshie Akiko in their important English articles of 2003 and 2005, respectively. Sekiguchi provided a good sense of the very gradual development of the Chinese-style patriarchal family paradigm in Nara times. She also demonstrated how

evidence from residence unit registers casts strong doubt on the actual existence of the patriarchal family in Nara times, attenuating assumptions and mandates of the *ritsuryô* codes based on that paradigm. Yoshie's essay gives readers a broad overview of what is known today about concepts and practices of gender relations in early classical times, including the roles of women as wives, mothers, and elites at various levels of the social hierarchy. In our work here, we are fleshing out the foundation of both scholars' research by considering what the Yôrô-era (717-24) Laws on Residence Units actually had to say about women's positions from various perspectives, as well as what is known about how the Laws' mandates affected the lives of women, men, families, and communities at the time.

In 1994 Professor Susan Mann, then of the History Department at the University of California at Davis, queried me as to which primary sources should receive priority for translation from Japanese in order to advance the study of gender history in East Asian and world history. My unequivocable answer then was, "We should start with the *ritsuryô* codes." It has taken a long time to take this exciting first step toward that goal. I am delighted that my courageous and committed research partners and I have found each other, and that in future we look forward to working together across time, space, and languages to continue advancing our joint project of translating more sections of the Yôrô administrative code that will help us understand the history of gender in early classical Japan.

Translation and Analysis—Laws on Residence Units

The Laws on Residence Units, from which relevant clauses have been translated here into modern Japanese and English, is one of the thirty chapters in the Yôrô administrative code, for which a full list of the chapters is appended at the end of this English section. The forty-five clauses comprising the Laws on Residence Units concern such issues as the

composition of residence units, their control by authorities, the hierarchy of members in kin units within residence units, the hierarchy of lowborn versus freeborn persons, and rules for how district chieftains and provincial governors were to educate subjects while ruling them.[5]

Clause 5

Heads of Residence Units and Heads of Households

In deciding on the head of the residence unit (*koshu*), let the head of the household (*kachô*) serve in that capacity in every instance. Also if there is anyone who should pay taxes in a residence unit, then that unit shall be considered a tax-paying residence unit (*kako*). If there are no members who pay taxes, that unit shall be considered a tax-exempt residence unit (*fukako*). (Tax-exempt persons include royal family members up to and including the fourth generation; those with the eighth or higher rank; males of the age of sixteen or younger; those eligible for a grace rank (*on'i*); the elderly of 66 years of age or older; those who are moderately or severely infirm or disabled; all women, married or unmarried; and lowborn hereditary servants as well as bound servants.)

Explanation of Terms

戸　*ko*　a residence unit, the basic administrative unit for managing the population in *ritsuryô* times. There were 50 residence units in a larger unit called a *sato* (alt. *ri* 里), which might be termed "the locality" in the early administrative hierarchy made up of provinces (*koku* 国), districts (*gun* 郡), and localities. However in the Reiki era (715-17), the *sato* was replaced by the *gô* 郷, or township. At the same time, a township was made up of still smaller units called *kozato* (alt. *ri* 里), "small localities." Meanwhile within the residence unit there might be two or three small kin units called *bôko* 房

戸. But the use of both terms, *kozato* and *bôko*, was abolished in Tenpyô 12 (740), when a new administrative hierarchy of provinces, districts, and townships was put in place. In contemporary historiography, the larger residence units are distinguished from the smaller *bôko* units when they are called *gôko* 郷戸.

戸主　*koshu*　the legal head of a residence unit. The head was responsible for registering members (*kokô* 戸口)—averaging about 20-25—for the residence unit register (*koseki* 戸籍), for overseeing rice field distribution (*handen* 班田), for collecting and sending in taxes, and for assembling the men of the residence unit for military duty.

家長　*kachô*　the head of a household (家). In the early legal commentaries, it is often assumed that the household head was the eldest son born of the senior wife (*chakusai* 嫡妻) of the previous house head, that is to say, his heir (*chakushi* 嫡子, about which see the explanation below).

課口　*kaku*　an individual subject to taxes, as stipulated in the Laws on Taxes (Fuekiryô). An individual exempt from taxes was categorized as a non-taxpayer *fukaku* 不課口. Females were all tax-exempt.

皇親　*kôshin*　royal family members, meaning lineal descendants of a monarch (*tennô*) up to and including the fourth generation, as stipulated in Clause 1 of the Laws on Inheritance and Succession (Keishiryô). However in 706 (Keiun 3, 02/16, *Shoku nihongi,* Annals of Japan, Continued), the rule was changed to include the fifth generation. Then in 798 it was changed back to the original rubric (Enryaku 17, intercalary 05/23, *Ruijû sandai kyaku,* Decrees of Three Eras, p. 509).

蔭子　*onshi*　a grace-rank-eligible individual. Sons of a fifth-ranker or a higher ranking courtier were eligible to enter the rank system at a level above the ninth-rank entry level (Laws on Promotion, Senjoryô Clause 38). And grandsons and brothers of those of the third rank or higher were also eligible for such preferential treatment.

耆　*ki*　a very elderly person of sixty-six years of age or older. Age-based

categories were important for taxation issues—as seen here, those of sixteen years of age or younger did not pay taxes (Koryô Clause 6).

癈疾・篤疾 *haishitsu tokushitsu* moderately or gravely infirm. The infirm, categorized in the codes in three levels (lesser, moderate, and grave), received tax exemptions and other protection at the moderate and grave levels. See the Koryô Clause 7.

女 *nyo* in the language of the Chinese *ritsuryô codes*, it was the general term designating unmarried females. Married women were termed 婦 *fu*. And the difference in law between the two categories was substantial. In contrast, in Japan the character 女 had two readings. The first, *onna*, referred to the general category of females in contrast with that for males 男 *otoko*. The second, *musume,* was used to refer to an unmarried female. The first of these uses had a great effect on the independent standing of women in Japanese society (Umemura Keiko 1997, p. 43). But here in Clause 5, 女 *nyo* is used in contrast to wife (*sai*妻) or concubine (*shô* 妾), who were married females.

家人・奴婢 *ke'nin nuhi* lowborn hereditary servants and bound servants in a non-official setting, in contrast to hereditary servants and bound servants that served in official settings. See the Koryô Clause 35, as well as the section on tomb guardian residence units (*ryôko* 陵戸, *Ryônoshûge* Koryô Clause 35).

Analysis

Heads of Residence Units and Heads of Households

The first section of Clause 5 of the Laws on Residence Units stipulates who should be the head of a residence unit, while the second section distinguishes taxable (*kako* 課戸) from tax-exempt residence units (*fukako* 不課戸) and enumerates which individuals have tax-exempt status.

In the first section, the gap between legal prescriptions concerning the residence unit and actual family organization in the early eighth century

is clear. While little is known about the social organization of commoners through the eighth century, it is thought that duolocal and fluid conjugal relations were common, and members of the hamlet and relatives were particularly important in terms of productive relations. The dwelling group was not yet an independent unit of production. When we see the character 家 (*ie*) in sources of that time, we understand it to mean one of three things. It was 1) a unit made up of mother, father and child, or a unit of a man and his wife. Or 2) it was a cluster of buildings including a residence and storehouses that functioned as a unit of production sometimes called a *yake* 宅. Or 3) we think of it as denoting a patrilineage through which rank and post was transmitted from a father to his son and heir. For commoners, only the first of these three existed, and only members of the nobility had the means for a household as denoted by the second and third meanings. By the later eighth and early ninth centuries, however, the top stratum of commoners was beginning to develop households that were units of production, so the first and second meanings became relevant.

So when Clause 5 of the Laws on Residence Units mandated, "In deciding the head of the residence unit (*koshu*), let the head of the household (*kachô*) serve in that capacity in every instance," we must wonder who was this household head? Clues are found in Clause 18 of the Miscellaneous Laws (Zôryô), where it states, "without the permission of the household head, younger kin shall not sell bound servants, fields, or resources of the residence and storehouses (*yake*) belonging to the household." Commentaries in the *Ryônoshûge* also indicate that this head of the household referred to in the Miscellaneous Laws was seen to have been the senior male in charge of overseeing the affairs of the household. Nevertheless, in the Laws on Residence Units the household head was understood to be "the heir" (*chakushi*). Such inconsistency in usage between chapters of the code has been a source of debate by historians for some time.

According to various relevant clauses of the Tang code, the household

head was also the residence unit head (Koryô Clause 5, *Tôrei shûi* p. 222). This indicates that the Laws on Residence Units in the Japanese code replicated that part of the Tang code. But in China, the senior male in the household headed up the patriarchal family, which system the Tang code integrated (Shiga Shûzô 1967, pp. 58–68). In Japan, on the other hand, the patriarchal family system had not yet taken form, and there was as yet no clear sense of household headship, especially among commoners (Yoshida Takashi 1983a, pp.148–51).

So the only possible explanation is that "the heir" in the commentaries referred to transmission of the post of residence unit head rather than the status of household head (Kawane Yoshiyasu 2002, pp. 207–13). In this regard there are indeed provisions concerning the heir of a rank holder in the Laws on Inheritance and Succession (Keishiryô Clause 2). And there are provisions for heirship in commoner families in the Protocols on Registers (*Sekishiki*) of 721 (Yôrô 5) that was cited in the *Koki* commentary on the Taihô code in the *Ryônoshûge* (Koryô Clause 23). Furthermore the Shimôsa Residence Unit Register from 721 and preserved in the Shôsôin treasure house at Tôdaiji contains notations that seem to indicate that an heir had assumed the role of residence unit head (*Dai Nihon komonjo* vol. 1, pp. 219–303). And according to the *Ryônoshûge* Koki commentary, when an heir was too young, "The mother shall serve as residence unit head." A citation from the later *Ryôshaku* commentary on the Yôrô code also in the *Ryônoshûge* opined that a child would not be able to bear the administrative responsibilities of a residence unit head.

While there is not a single instance in extant residence unit registers of a female residence unit head, there are two instances of a female head in the smaller *bôko* units of the Shimôsa register. Given too that there are only two cases of residence unit heads aged less than 19 years in all the extant registers, it seems likely that fraternal succession was frequent (Nambu Noboru 1992a, p. 318). And since there are other sources that show three

women serving as heads of residence units, we know that women could and did function as residence unit heads (Arai Hideki 2012, p. 226).

Finally we can also draw insights from the *Nihonryôiki* stories (*setsuwa*) compiled by the monk Kyôkai in the early ninth century. Among the provincial elites and prominent cultivators who appear therein, we find married couples in which the man had the title *iegimi* 家長 and the wife was called *ietoji* 家室—both were therefore bosses of the household. The narratives also describe couples managing their household either together or independently. Clause 5 of the Laws on Residence Units prescribes that the residence unit head should pass his post to his son or brother, but *Ryôiki* stories indicate that management of the household could be handled by either a man or a woman in the later eighth to ninth centuries.

Clauses 6 and 13

Taxation and Categories of Sex and Age

Clause 6　An individual male or female of 3 years of age or younger is a toddler (*kô*). An individual 16 years of age or younger is a child (*shô*). An individual 21 years of age or younger is an adolescent (*chû*). A man of 21 years or older is a taxpayer (*chô*). But at 60, he is an elderly man (*rôô*), and at 66, he is very elderly (*ki*). Meanwhile [a woman] without a husband [due to death or divorce] is a wife or concubine without mate (*kasaishô*).

Clause 13　When there is a desire to form a new residence unit by splitting a pre-existing unit, a new residence unit can not be formed [by a househead] who is a male not yet seventeen years of age, or by a wife or concubine without a husband. But if there are special circumstances, this law shall not apply.

Explanation of Terms

黄・小　*kô　shô*　infants and children. Such parlance was also used in the Tang codes. According to the *Ryôshaku* commentary cited in the *Ryônoshûge*, *kô* referred to the yellow tinge of infantile skin. However the term used for an infant in the Taihô code was *midori*（緑 *ryoku*）, meaning green–it is the origin of the Japanese *midoriko* found in the *Manyôshû*（#4122, Kakutani Eiko 1999, pp. 75–76）. In the early Japanese system of determining age, called *kazoetoshi*, a child was one year old at birth and then gained one year on passing each subsequent New Year's Day.

丁　*chô*　a taxpayer. A male individual from the age of 21 to 60 was termed a full taxpayer（正丁 *seichô*）and he was required to pay three kinds of tax: *chô*（tax in kind*)*, *yô*（tax in labor）, and *zôyô*（additional labor tax）.

In June 2012, at Kokubunji Matsumoto site in Fukuoka prefecture's Dazaifu city, a wooden document（*mokkan*）was found that is thought to represent corrections to a household register after the Kôin–year registration 庚寅年籍 of 690, in the reign of the monarch Jitô. Thereon the term *seichô* 政丁appears as an alternative way of writing 正丁, the full taxpayer of the codes. This earlier way of writing *seichô* probably reflected the fact that such an individual was responsible for paying full tax and labor to the monarch, which service was designated by the graph 政(Yoshimura Takehiko 1996）.

According to the Yôrô code, a male from the age of 17 to 20 was termed a "middling male"（中男 *chûnan*）; but in the Taihô code, he was called a "young taxpayer"（少丁 *shôchô*）. As such, he had to pay a quarter of the levy imposed on an adult male, but he was exempt from the *yô* tax. A male from the age of 61 to 64 was termed an elderly tax payer（老丁 *rôchô*）, and he was required to pay one–half of the taxes paid by an adult male（Laws on Taxes, Fuekiryô Clauses 4 and 14）. Meanwhile there were three types of physical disability recognized by law（Koryô Clause 7）: a light disability was called *zanshitsu* 残疾, and those with such paid one–half of the taxes paid by

an adult male taxpayer. Together with elderly males, those with a light disability were termed "lesser taxpayers" (*jichô* 次丁, Koryô Clause 8). According to an edict of 757 (Tenpyô Shôhô 9, 04/04, *Shoku nihongi*), slight changes were made to these age-based categories: a middling male was redefined as one 18 years of age or older, and an adult male taxpayer was redefined as one 22 years of age or older (Tenpyô Shôhô 9, 04/04, *Shoku nihongi*; and on *chûnan*, see Katsuura Noriko 1977).

耆　*ki*　a very elderly male who was 66 years of age or older and exempt from taxes. According to an edict of 758 (Tenpyô Hôji 2, 07/03), when age categories were again adjusted, an elderly taxpayer was redefined as one 60 years or older, while a very elderly male was redefined as one 65 years or older (*Ruijû sandai kyaku* vol. 17, p.520).

寡妻妾　*kasaishô*　a wife or concubine without a mate, that is, a woman who had lost her husband due to death or divorce. The category was included in the Taihô code, where no distinction was drawn between a wife or concubine (Koryô Clause 13). According to the early *Koki* and the later *Ryôshaku* commentaries cited in the *Ryônoshûge*, the age of a wife without mate was set at 50 or older. But according to the early ninth-century *Ryônogige* commentary, neither age nor cause affected the categorization.

口　*ku*　an individual member of a residence unit. Such members were counted *ikku*, *niku* 一口, 二口.

Analysis

Taxation and Categories of Sex and Age

Clause 6 of the Laws on Residence Units in the Yôrô code followed rubrics in the Tang code reasonably closely, but with some differences in age- and sex-based categories that affected the rules of taxation (*Tôrei shûi*, Korei Clause 8, pp. 224-25).

For example, in Tang China "a child" was 15 or younger, "the elderly"

were 60 or older, and there was no category for the very elderly. This system of age-based categories developed as a basis for taxation policies, as seen in the terminology for those from 21 to 59 years of age who were termed taxpayers (*chô* 丁). In the Chinese Jin 晋 Dynasty (265-420) system there were two categories: full taxpayers (*seichô* 正丁) and lesser taxpayers (*jichô* 次丁). Japan's codes are thought to have been influenced by these Jin categories (Yoshida Takashi, in *Ritsuryô*, Koryô Clause 6, Supplementary Notes, p. 551).

Since the purpose of Clause 6 was to articulate tax-bearing responsibility, such categories as taxpayer, elderly taxpayer, and the very elderly applied only to men, given that women did not pay taxes. That is why Clause 6 explicitly states, "A man of 21 years or older……" And yet, according to the *Ryônogige* commentary of the early ninth century, residence unit registers were also to identify women by the age-based categories of *chô*, *rô*, and *ki* (*Ryônogige*, Koryô Clause 6). Extant registers actually identify women according to these categories (ex. as *ji'nyo*, *chô'nyo*, *rô'nyo*, and *ki'nyo*). In contrast, in the Tang-era registers found at Tunhuang on the Silk Road, unmarried women who were 21 years or older were still identified as adolescent females (*chû'nyo*; Yoshida Takashi, in *Ritsuryô*, Koryô Clause 6, Supplementary Notes, p. 552). This suggests that in Japan, the labor of women was considered important, making notation of their ages necessary.

In Tang China whether a woman was married or unmarried greatly affected her social and legal status. According to Tang law, a previously married woman who had lost her husband still received a portion of officially distributed cultivating land (*handen*). Therefore her special status had to be clearly noted on the register. A married woman, on the other hand, was considered as one with her husband, so she did not receive her own portion of cultivating land. In contrast, in Japan marriage did not affect a woman's social status. Even when she was married, a woman still had status as an individual. All men and women from the age of 6 upward received their own

portion of officially distributed land (Laws on Rice Fields, Denryô Clause 3). In the reference to the wife or concubine without a mate in Clause 6, the parlance of Tang law was replicated, but it would have had no functionality in Japanese society (Umemura Keiko 1997, pp. 44–52).

In extant residence unit registers in Japan, we can see notations identifying wives and concubines, but they represented no more than a formality in preparing the register. In the eighth century there was still no social distinction between wives and concubines. Meanwhile, for a previously married woman who had lost her husband, the Taihô code used the term *kafu* 寡婦 while the Yôrô code changed the term to *kasaishô* 寡妻妾. Such a change, based only on legal prescription, is thought to have had no actual significance in Japan (Sekiguchi Hiroko 1993b, p. 210).

As for Clause 13, its purpose was to limit the formation of new residence units that lacked taxpayers, and it reflects the fact that there were differences in the age groups that were required to pay taxes in Tang China and classical Japan. For instance, in Tang China a taxpayer (丁) was 21 years of age or older, while in Japan a middling male (中男) of 17 or older paid taxes. So where the Tang code used the phrase "one who was not yet a taxpayer" (*chô ni narazu* 非成丁, *Tôrei shûi*, Korei Clause 16, pp. 235–36), Japan's Taihô code used the phrase *shôchô ni narazu* 非成少丁 to denote a child who was not yet of the age to pay taxes. And in Japan's Yôrô code, the phrase *chûnan ni narazu* 非成中男 denoted one who had not yet reached the age of a middling male and was not yet a taxpayer.

Members of the two non-tax-paying categories — one not yet a middling male or one who was a wife or concubine without a mate—were judged incapable of heading up a residence unit. Such at least was the opinion of the legal scholar who wrote the *Shu* commentary cited in the *Ryônoshûge* (Koryô Clause 13, p.273) But according to a note from the earlier Taihô code preserved in the *Koki* commentary, there could be special circumstances. Specifically, if a member of one of these two non-tax-paying

Laws on Residence Units Clause 13 Age, Sex, and Taxation

	Taxpayers who could establish a residence unit	Non-taxpayers who could not establish a residence unit
Tang China	chô 丁 taxpayer 21 years or older	chô ni narazu 非成丁 not-yet-chô 20 years or younger
Japan	seichô 正丁 full taxpayer 21 years or older & chûnan／shôchô 中男 (Yôrô code)／少丁 (Taihô code) middling male／young male 17–20 years	chûnan ni narazu 非成中男 not yet a middling male (Yôrô code) 16 years or younger ↑ shôchô ni narazu 非成少丁 not yet a young taxpayer (Taihô code) 16 years or younger
		kasaishô 寡妻妾 wife or concubine without mate (Yôrô code) ↑ kafu 寡婦 wife without mate (Taihô code)

groups could manage the residence unit, the law would not apply. From this we suspect that on occasion, a woman was seen as capable of heading up a residence unit.

Clause 14

Adding Members, Dual Registration, and Reunification of a Unit

When an individual is to be added to a residence unit, in every case first let evidence be taken from an evidence-giver to assure that the individual is not someone who has fled [an original residence unit] or someone who has been fraudulently declared deceased. Only then shall [joining a residence unit] be permitted.

In the case that an individual is registered in two residence units, then the individual should be considered a member of the one in the home province of his father. However if one of the registers in which the individual originally appears shows the individual living in the region overseen by the Dazaifu; or in Echizen, Etchû, or Echigo; or in Mutsu, Iwaki, or Iwashiro, even if it is the mother's home, then the individual should be registered at that place. And if the individual is registered in two registers in one of these provinces, then the individual shall belong to the residence unit in which he was registered first.

Although the law forbids the splitting of a residence unit, if the members of a residence unit have been displaced due to some exigency, when those members are reunited these rules shall be observed.

Explanation of Terms

保証　*hôshô*　testimony given by a guarantor（*hônin* 保人）and evidence-giver（shônin 証人）. While the former took responsibility for the veracity of testimony, the latter presented evidence. In many cases, no distinction was made（Penal Laws on Fraud and Counterfeiting, Sairitsu 詐偽律 Clause 25, 26）.[6]

元由　*motonoyoshi*　the cause or reason for something

逃亡　*tôbô*　to leave the place where one has originally been entered in a residence unit register for the purpose of escaping the paying of taxes（Penal Laws on Arrest and Flight, Homôritsu 捕亡律　Clause 12）

詐冒　*sabô*　a lie（詐 *itsuwaru*）for the purpose of escaping the payment of taxes, or the act of illegitimately claiming（冒 *okasu*）a tax exemption belonging to the sons and grandsons of grace rankers

貫　*kan*　registration in a residence unit. The term *ryôkan* 両貫, for instance, denoted registration in two different registers.

本国　*hongoku*　the province（*kuni, koku* 国）where one's original

residence unit lived and was registered, and specifically the province where one's father resided. Residence unit registers (*koseki* 戸籍) were prepared and collected within each province, and then forwarded to the government in the capital.

大宰部内　*Dazai no bunai*　the provinces under the jurisdiction of the Dazaifu, which was the Kyushu Headquarters located near contemporary Hakata. This area was relatively close to both China and the Korean peninsula and so was an important venue for foreign relations and military operations.

三越　*san'etsu*　the three provinces of Echizen, Etchû, and Echigo. These provinces along the Japan Sea coast were important for foreign relations and military operations. In Nara times they were particularly important for relations with the continental polity of Bokkai (alt. Bohai), based in presentday Manchuria.

石城, 石背　Iwaki, Iwashiro　two provinces newly formed in the fifth month of 718 (Yôrô 2), when they were split off from the large province of Mutsu. Since they were not yet provinces at the time when the original Taihô Code was promulgated in 702, they would not have been mentioned therein. The province of Mutsu was the site of military operations against the Emishi.

於法不合分折　*hô ni oite wakachihegubekarazaru*　the illegal splitting of a residence unit. For instance in the Eight Abominations (Hachigyaku) clause of the General Principles, Myôreiritsu, in the penal code (名例律6八虐条), it states that　"splitting a residence unit while grandparents and parents are still living is unfilial," and it was thus forbidden.

Analysis

Adding Members, Dual Registration, Reunification of a Residence Unit

In this clause there are three elements: 1) rules concerning the addition of an individual to a residence unit register; 2) procedures for dealing with the

case of an individual registered in two different registers; 3) reunification of a residence unit after it had split up. The second and third elements generally replicate rubrics in the Tang code (*Tôrei shûi* pp. 236–37, Korei 17), but the first was not part of Tang law and its exact meaning is unclear. The interpretation here follows commentaries in the *Ryônoshûge* and takes it as referring to the addition of an individual to an existing residence unit, rather than the creation of a new residence unit.

As for the second element, it is thought that the earlier Taihô code contained the same provisions, save for the reference to Iwaki and Iwashiro that did not exist in 702. Both the Tang and Japanese codes indicate what was to be done in the event of double registration at an original place and at a place of refuge. While both the Tang and the Japanese Yôrô codes use the term *ryôkan* for double registration, only in Japan was there the problem of an individual being listed in the residence unit registers of both his mother and father (*Ryônoshûge*).

As for the third element, reunification of a residence unit, in Tang China we can imagine situations wherein a household was dispersed during wartime. In Japan, however, it is unlikely that all the members of a residence unit left their home place together. Rather it was usually an individual that left the residence unit.

Whereas in China the residence unit was a family unit, in Japan the residence unit was not an actual family group. Individuals were registered in a residence unit register due to various sorts of relationships with the house head (Sugimoto Kazuki 2001, pp. 574–75). The ambiguity of the first element in Clause 14 is due to this difference in the nature of the *ko* and its context in Tang China and in eighth-century Japan.

In the case of an individual being registered in two different registers, we find the term *hongoku* being used only in the Japanese codes. According to the commentary in the ninth-century *Ryônogige* and in the Koki commentary of the *Ryônoshûge, hongoku* refers to the province where the

father resided. And according to the *Ryônoshûge*, the term *ryôkan* specifically meant "double registration" in the registers of the mother's and the father's residence units.

In Japan it was frequently the case that the mother and father were registered in different residence units, and the child was registered in both. For instance, according to the *Gige*, "When the mother and father are registered in different provinces, and the child is registered in both residence units, let the child belong to the register of the father's residence unit." However when the mother's residence was registered in the jurisdiction of the Kyushu Headquarters (Dazaifu) or other border area, the child was to be considered as belonging there. In actuality, when the residence unit register was compiled, the child could belong to either the mother's or the father's lineage 系, and so could be registered in either residence unit. This reflects the fact that in classical Japan the family was bilineal, visiting marriage with the husband visiting the wife's residence was widely practiced, and any sense of a family unit was weak. Membership in the residence unit was quite fluid (Yoshida Takashi 1983b, pp. 147–53).[7]

Since the father's province was to be considered the individual's residence (that is, *hongoku*), even if after a father's death a child remained with its mother, the child was to be considered a member of the father's residence unit register, according to the Ana commentary in the *Ryônoshûge*. Nonetheless the earlier Koki commentary on the Taihô code in the *Ryônoshûge* noted that it was permissible for a daughter to be registered in her mother's residence unit. This means that in the case of sons, there was a patrilineal emphasis.

From the government's perspective there was no difficulty if couples resided apart, if family members resided with the mother, or if they changed their residence (Nanbu Noboru 1992b, 426–30). In Clause 14 of the Koryô, we see the gap between actual family organization and legal prescriptions for registering individuals in a residence unit.

Clause 23
Concerning Inheritance

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 (s*enmin*) belonging to a royally recognized 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 (*shô* 妾) of a son of the deceased has no son, she should still receive the son's (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.

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

Explanation of Terms

家人・奴婢 *ke'nin, nuhi* household servants and bound servants, both of which are types of bound people (*senmin* 賤民). *Ritsuryô* law recognized two grand categories of people: freeborn persons (*ryônin* 良人) and bound persons (on which see Koryô Clauses 35, 37, 42, 43 below).

氏賤 *shisen* bound persons that belonged to a royally recognized lineage (*uji*) and who were under the management of its head (*uji no kami*). They included bound servants (*nuhi*) and household servants (*ke'nin*). There is one extant document about them: Great King Tenmu's son, Prince Takechi, inherited such persons from his mother, who came from the Munakata royally recognized lineage. And they remained with Takechi's descendents, the Takashina royally recognized lineage, for more than two hundred years, according to a directive (*kanpu*) in *Ruijû sandai kyaku* (Kanpyô 5 (893) 10/29, *Daijô kanpu*, vol. 1, pp. 8–9).

功田・功封 *kôden kôfû* merit rice fields (Denryô, Laws on Rice Fields, Clause 6) and merit benefice units (Rokuryô, Laws on Official Emoluments, Clause 13) bestowed on an official for accumulated merit. They could be transmitted to heirs, both male and female.

嫡母・継母 *chakumo keimo* the father's wives, as seen from the perspective of his heir. The *chakumo* was the heir's lawful mother. The *keimo* was the stepmother of the heir when the heir was the son of a former wife

(*Ryônoshûge* Koryô Clause 23).

嫡子・庶子 *chakushi shoshi* according to *ritsuryô* law, there were two distinctions made for which these terms were applied: 1) the sons of the wife (*chakusai*) were *chakushi* 嫡子, as distinguished from the sons of other consorts, whether wives or concubines, who were *shoshi* 庶子; and 2) the heir (*chakushi*) as distinguished from other sons (*shoshi*). The former usage is more frequent, but the second usage is the one employed in Koryô Clause 23. In Japan's classical society, the distinction between the wife and concubines as well as the role of the heir were not yet fully developed (cf. the explanatory material for Koryô Clause 6 above).

妻家所得 *saike no shotoku* resources belonging to and brought by the wife from her natal home. This clause in the Taihô code specified only bound servants (*nuhi*). And in this regard, an extant residence unit register from Chikuzen dated 702 contains a reference to bound servants belonging to the mother of a residence unit head, Hi no kimi Ite 肥君猪手 (*Dai Nihon komonjo Hennen shiryô, Shôsôin monjo*, vol. 1, pp. 102–3). Such bound servants are considered an example of possessions brought by the wife from her natal home.

姑・姉妹 *ko (oba) shimai* The former, *ko*, denotes the father's sisters, who were the heir's patriline aunts; the latter, *shimai* 姉妹, denotes the heir's sisters, who were the daughters of the deceased.

在室・出嫁 *shitsu ni araba yome ni izureba* In China, the term read in Japanese as *shitsu ni araba* denoted a daughter living in her father's household before marriage. In contrast, the Chinese terminology read in Japanese as *yome ni izureba* referred to a daughter leaving her father's household to live virilocally with her husband. On the archipelago, Japanese law makers adopted such language that fit Tang Chinese social expectations for a woman marrying out and leaving her natal home for the residence of her husband to live virilocally. But in eighth-century Japan, virilocal marriage was infrequent. Rather, wife-visiting marriage (*kayoikon*) or cases of a

husband living with his wife uxorilocally were frequent. Therefore in Japan *shitsu ni araba* was reinterpreted to mean an unmarried daughter while *yome ni izureba* meant a married daughter. Meanwhile the phrase *fuke ni arite kokorozashi wo mamoru mono* (夫家に在りて志を守る者) was interpreted to mean a widow who did not remarry.

Analysis

Concerning Inheritance

This clause articulates inheritance laws, and it is a basic source for understanding *ritsuryô* inheritance prescriptions. Its contents were influenced by the differences between Chinese and Japanese societies in terms of how resources were held as well as by kinship structures. Japanese laws on inheritance used the vocabulary of Tang Chinese law, but there were substantial changes in how drafters wrote the Japanese rules. And there were also major differences between the rules in the Taihô administrative code of 702 and those in the Yôrô code promulgated in 757. Provisions for inheritance by women constituted an area in which such differences are particularly notable.

Inheritance practices articulated in the Japanese codes were structured differently than those in the Tang code (see, for instance, *Tôrei shûi* Koryô Clause 27, pp. 245–47). The legal scholar Nakada Kaoru reconstructed relevant sections of the Tang code and Japan's Taihô code (Nakada Kaoru 1926, pp. 54–56; and the chart in *Tôrei shûi hô*, pp. 1027–29; also Narikiyo Hirokazu 2001, Part 2). Nakada noted the following differences.

In the Tang code 1) rice fields, residence, and bound persons were all included in the household property that was to be divided; 2) brothers (sons of the deceased) received equal portions; 3) sisters (daughters of the deceased) generally received nothing; 4) resources brought by the wives of

the sons of the deceased were not to be divided up by the sons in the event that they eventually formed new households; and 5) there was no provision for any voluntary bestowal by a household head, the father, while he was living.

In contrast, in the Taihô Code: 1) the residence with its storehouses and well (宅 yake) as well as hereditary household servants were treated separately from other resources, as were rice fields, perhaps because in the early eighth century such fields were not yet considered privately held goods; 2) the heir (*chakushi*) was to receive the residence and storehouses and all of the hereditary household servants, plus half of other resources, making his portion much greater than that of the other sons; 3) in general, sisters (daughters of the deceased) received nothing; 4) bound servants belonging to the wife and brought by her from her natal home were to be returned (after her death); and 5) the heir could distribute bound servants and other parts of his inheritance as he wished. The *yake* was a particularly important structure for life in classical times (Yoshida Takashi 1983a, pp. 112–14).

Then in the Yôrô Code 1) rice fields and the residence with its storehouses, bound persons, and all other resources were to be added together and then divided up, excepting bound persons belonging to a royally recognized lineage (*uji*) as well as merit fields (功田 *kôden*) and merit residence units (功封 *kôfu*) that had been bestowed on an official, which were to receive special treatment; 2) the heir was to receive two portions compared to one portion for other sons; 3) sisters (daughters of the deceased) were to receive one-half of the portion given to non-heir sons; 4) the idea of a wife's holdings returning to her natal house disappeared; and 5) bestowal of resources on someone by the deceased during his lifetime was recognized.

There were other notable differences between the Tang and Japanese codes. In the Tang code, "the wives" referred to in the section on holdings

brought from the natal home (*saike shotoku*) were the wives of the sons of the deceased. But in the Japanese codes, the referent was the wife of the deceased, the heir's father (Nakada Kaoru 1943, pp. 1351–52). And in China, since property was held by the household as a collective unit, when the household head, the father, died, the unit continued living together, using their collective resources (*kyôzai*) in which members shared equity. If the sons eventually decided to live separately, all brothers could then divide the household resources equally. The basis for such a practice was the belief that each male child equally inherited the father's personhood (*jinkaku*, Shiga Shûzô 1967, pp. 66–85). But in eighth-century Japan, the concept of a patrilineal household did not exist, and even the concept of a household with resources was weak. So while the vocabulary of the Tang code was utilized in the Japanese codes, the rules in the Japanese codes served as statutes for inheritance (*isan sôzoku no hô*) rather than as statutes for partitioning household resources when it broke up (*kasan bunkatsu no hô*). Related to these provisions too are rules in the Sôsôryô (Laws on Funerary Practices and Mourning, Clause 13) for what was to happen to the resources of a residence unit when its last member died.

There is a wealth of research and debate about differences between the Tang and Japanese codes and variations between the Taihô and Yôrô codes. For example, concerning the distinctive treatment of heirs and non-heirs in the Taihô code, there is the argument that differences reflected customary inheritance practices on the archipelago (Nakada Kaoru 1926). Another view is that they reflected incomplete understanding of Chinese inheritance practices based on the first-son-as-heir (*chakushi*) system, as well as contemporary political conditions in the early eighth century (Inoue Tatsuo 1962, Sekiguchi Hiroko 2004). Still another view is that they reflect a continuation of practices from the earlier *uji* system, including the right of women to hold, inherit, and transmit resources (Yoshie Akiko 1986). But other researchers have argued to the contrary (Morita Tei 1985, Yoshikawa

Toshiko 2006).

Whether changes made in the Yôrô code were intended to make it more like the Tang code or to integrate the customary inheritance practices of commoners is also debated. In any event, what needs careful consideration is that bound persons and rice fields were taken as a special category of collective resources, while recognition of a living father's right to bestow resources as he wished before his death seems to reflect a tendency to continue older ways despite the reception of Tang law. It is clear too that various sale and inheritance documents demonstrate that women had the right to inherit and transmit resources (Fukutô Sanae 1991, p. 192).

Clauses 24 and 25

On Marrying

Clause 24 Before taking a wife, a man shall be 15 years of age or older, and the woman shall be 13 years of age or older.

Clause 25 In marrying a woman to a man, first inform her grandparents, then her parents, then her father's brothers and sisters, then her own brothers, and then her maternal grandparents. [If she does not have such relatives], then her mother's brothers and sisters and her father's cousins should be informed. And if she does not live with her mother's brothers and sisters or with her father's cousins, or if she does not have such kin, let her make whomever she wishes the marriage contractor.

Explanation of Terms

婚嫁 *konka* *kon* 婚 denotes a man taking a wife while *ka* 嫁 denotes the woman moving to her husband's home. The term supposes Chinese-style marriage in which a woman went out from her home to live virilocally with

her husband. But in classical Japan, given the different marriage practices there, the term meant “to marry.”

嫁女　*kajo*　to arrange the marriage of a woman to a man. The Japanese reading found in legal commentaries was *onna ni otto wo awasemu* 「女にヲフトアハセム」 or *onna ni otto wo sowaseru* 「女に夫を添わせる」, which means “to pair a man with a woman,” thereby suggesting strong agency on the bride’s side. Researchers have noted that the actual form of marriage in classical Japan differed from that in China—in Japan a woman did not usually go out to live in the husband’s home. Rather wife-visiting and uxorilocal marriage relations were frequent (Sekiguchi Hiroko 2004, p. 382).

伯父・叔父・姑　*hakufu*　*shukufu*　*ko*　In classical Chinese kin terminology, *hakufu* 伯父 denoted the father’s elder brother while *shukufu* 叔父 denoted the father’s younger brother. *Ko* 姑 denoted the father’s sisters. In contrast, the mother’s brothers were called *kyû* 舅 and sisters were called *jûbo* 従母. Such completely different terms reflected the patrilineal emphasis in classical China. But classical Japanese society did not use distinct terminology for the brothers and sisters of father and mother-all were termed *oji* or *oba* (uncle, aunt), a point that caused difficulties in comprehending and applying Chinese law on the archipelago (see, for instance, the Laws on Ceremonial Protocols, Giseiryô Clause 25, concerning the five degrees of kinship).

同居共財　*dôkyo kyôzai*　the dwelling group that shares collective resources (see Koryô Clause 23 above)

婚主　*konshu*　marriage contractor, that is, the one who arranges a marriage. In Tang law, marriage was contracted not between a man and a woman but between the families of the man and woman. They agreed on a marriage contractor. But the term did not fit actual practice on the archipelago.

Analysis

On Marrying

Clause 24 of the Koryô articulated the age at which marriage could take place. Clause 25 spelled out who among the kin of a wife were involved. Various other clauses (from Clause 26 to Clause 32, see below) articulated additional conditions for marriage and divorce, while Clauses 29 and 30 articulated the fault and punishment due the marriage contractor in the case of a divorce. The Yôrô penal code is not fully extant in Japan, but we have a remnant from the Kokonritsu (Penal Laws on Residence Units and Marriage) Clause 46, which states that when a marriage that contravened the law took place, the marriage contractor would be punished (*Yakuchû Nihon ritsuryô* vol. 2, Kokonritsu Clause 46, pp. 417–20).

While Clause 24 follows the Tang code faithfully, the reconstruction of Clause 25 in the Tang code is not complete, leaving us unsure as to how it compared with Yôrô provisions (see the comparative chart in *Tôrei shûi hô*, p. 1030). While the emphasis in Tang China was on the husband's household taking in a bride, in Japan the woman's family took in a groom (Itô Sumiko 1954, pp. 4–5). Given that fact, researchers have debated whether there would have been any mention of the wife's maternal grandparents in the Tang law (Nakada Kaoru 1943, p. 1359; Takeda Sachiko 1984, pp. 37–44; Narikiyo Hirokazu 1999a, pp. 15–16). And researchers have also debated how much emphasis the Japanese law placed on the bride's relatives (Narikiyo 2001, pp. 145–57).

When we compare Tang and Japanese law, we know that 1) the Japanese drafters shortened the discussion of the marriage contractor; 2) they changed the marriage contractor into someone who should be informed about the marriage; 3) they added terminology for the wife's kin to the list; and 4) they allowed the woman herself agency in deciding who would contract the marriage. All these changes reflected major differences between

marital practices in Tang China and classical Japan.

As for the first of these, in China the households of the man and woman were to decide on a "marriage master" 主婚 (*shukon*) to contract the marriage. According to Tang law, neither the groom nor the bride could serve in that capacity. However in Japan the decision to marry was made by the man and woman, who were to ask for the permission of the woman's parents. (*Ryônoshûge, p. 300*). Here at the end of Clause 25 we see a reference to the marriage contractor, but the role is attenuated compared to its importance in Tang law (Nakada Kaoru, 1943, p. 1359). In Japan the parents were to be consulted, but their agency was not primary as it was in Tang China.

As for the second change, it reflected a real difference from Tang marital practice, a fact that is confirmed by the extant fragment from the Kokon ritsu. The contrast can be seen in a commentary cited in the *Ryônoshûge* that notes, "First, inform the grandparents and parents." The commentary's interpretation—"inform them [grandparents and parents] and receive their permission" (告知し承諾を得る)— is very different from the wording of the Tang code, according to which grandparents and parents were the primary agents in arranging the marriage.

As for the third change, a broader group of members of the wife-to-be's kin group was added to the list of those to be notified and consulted. In a society where marital relations often played out at the bride's home, the wife's relatives were deeply affected.

As for the fourth change, we see therein recognition of the bride's own wishes and agency. Confirming that interpretation, the Shaku commentary on Clause 25 in the *Ryônoshûge* states: "Should someone speak to her about marriage, then she should inform her grandparents and parents" (*Ryônoshûge*, p. 300). Based on the extant evidence, this seems close to actual practice at the time (Takamure Itsue 1966, p. 267). Indeed there are good examples of such behavior in both the *Nihon shoki* and in *Nihon ryôiki*

stories (Kobayashi Shigefumi 1994, p. 136).

Clauses 26 and 27

Cancelling a Marriage, Divorce, and Illicit Sexual Relations

Clause 26　If, after arrangements are made, the marriage does not take place within three months, or if a man flees and does not return within one month, or if he sails to a foreign place and does not return within one year, or if he commits a crime serious enough to merit a punishment of more than one year of forced labor, then if the woman's household seeks to nullify the marital arrangements, it shall be permitted. And, after the marriage has taken place, if the husband leaves for a foreign place and does not return (if there is a child, within five years; if there is no child, within three years), or if he flees and does not return (if there is a child, within three years; if there is no child, within two years), then the woman shall be permitted to remarry.

Clause 27　If a man and woman engage in an illicit sexual relationship and then marry, even if their crime is forgiven [in an amnesty], they must divorce.

Explanation of Terms

逃亡　*tôbô*　to leave the place where one is registered for the express reason of escaping the required poll taxes (*fueki*). The law differentiated one who left to escape taxes from a migrant (*furô* 浮浪) who fled for other reasons.

没落外蕃　*geban ni motsuraku*　to leave for and remain in a foreign place. The concept of *geban* (which might be translated as "the marches" or "border lands") reflected the Middle Kingdom sense of Chinese civilization, which was appropriated by Japanese code writers as well. From the perspective of

eighth-century Japanese, such foreign marches included Silla (Shiragi) and Pohai (Bokkai). And according to the Ana commentary in the *Ryônoshûge* (p. 302), another such place was the land of the Emishi.

徒罪以上　*zuzai ijô*　any crime deserving of the serious punishments of a period of forced labor, exile, or death. Japanese penal law listed five types of punishments: beating with a branch, beating with a cane, forced labor, exile, and death (*Ritsuryô*, Myôreiritsu Clauses 2, 3, p.15). So according to Clause 26, if the husband-to-be was convicted of a crime deserving any of the highest three levels of punishment, the woman's household could ask that the marriage arrangements be nullified.

姦（姦）　*kan*　illicit sexual relations; any incidence of sexual relations outside of a properly arranged marriage as defined by law.

Analysis

Cancelling a Marriage, Divorce, and Illicit Sexual Relations

Clause 26 defined legal conditions for nullifying marital arrangements before the marriage took place and by request of the woman's family. Clause 27 mandated divorce in the case of a couple that had had sexual relations outside of marriage and then married. The latter followed Tang law almost verbatim. We do not, however, have the Tang model for Clause 26(cf. chart, *Tôrei shûi hô*, p. 1031.)

In classical China a proper marriage was conducted in two stages: first, the marriage contract was made (see Koryô 25), and then the woman was welcomed into the husband's home. In Japan the codes articulated this same process. As for nullifying the arrangements, if the household of the husband-to-be returned the goods received from the household of the wife-to-be, the arrangements could be nullified (*Yakuchû Nihon ritsuryô* vol. 2, Tô Kokonritsu 26, pp. 389-92). And should any of the seven complaints listed in Clause 28 be applicable to his wife, a husband could divorce her.

From the wife's side, the only conditions under which she could request nullification of the marriage arrangements or gain a divorce were those noted in Clause 26. It is clear then that the conditions for men and women in marriage were quite unequal.

But how did all of this actually work in Japan? To begin, it is not certain that the marriage contract actually existed. According to the Koki commentary on Koryô Clause 26 of the Taihô Code in the *Ryônoshûge*, if without reason the man did not visit his wife for three months after a marriage, such behavior was grounds for divorce (*Ryônoshûge* p. 302). In the minds of legal experts of the time, the beginning of a marriage was nothing other than the man's initial visit to the wife. And as for divorce, the commentary in the ninth-century *Ryônogige* says, "When the husband and wife live in the same administrative township (*gô*) but do not meet each other, then the marriage is nullified." So the continuation of marriage visits indicated that the marriage continued, but the cessation of such visits meant divorce (Sekiguchi Hiroko 1993c, p. 383; Yoshida Takashi 1983b, pp. 138-39). The administrative unit called a township 里 (*sato, ri*) was made up of 50 residence units, and it was, per the *Ryônogige*, the locality from which marital partners might be chosen and across which the man might commute to visit his wife uxorilocally. And according to the Japanese codes, registers for all the residence units in a township were to comprise a single volume (*kan* 巻). So it would have been easy to comprehend the movement of persons between residence units in a township. Meanwhile, in Section 24 of the *Ise monogatari* (Tales of Ise), we hear of a woman taking a new husband after the three-year absence of her mate, so the three-year period seems to have been an actual standard (Kurihara Hiromu 1999, p. 57).

Differences in the meaning and significance of *kan* 姦 & 奸, denoting illicit sex, were great between Tang China and Japan. In China, all sex outside of a properly arranged marriage was considered illicit by law and punishable, and the Japanese penal code replicated that principle. For

instance, the Zôritsu (Miscellaneous Penal Laws Clause 22) states that such illicit sexual relations were punishable by one year of forced labor (*Yakuchû Nihon ritsuryô* vol. 3, p. 748). Thus any sexual relations outside of a marriage arranged by a marriage contractor as mandated by Koryô 25 were illicit. Even if their crime were forgiven, as in a general amnesty, Clause 27 demanded that the partners divorce.

But there was a problem with applying such law in Japan. On the archipelago a marriage usually began with voluntary sexual relations between a man and a woman. And that was a practice that, according to Clause 27, would have been labeled illicit. We have to suspect, therefore, that Clause 27 had little applicability. Indeed the lack of any commentary on it in the *Ryônoshûge* suggests that fact. A single exception was that, according to Koryô Clause 43 (see below), relations between a master and a bound person (*senmin*) were considered illicit. In other instances it seems that the concept of illicit sexual relations was not yet well developed (Sekiguchi Hiroko 1993a, pp. 204–6; Koryô Clause 43).

Clause 28

Seven Reasons for Divorce by the Husband

There are seven reasons for divorcing one's wife (*shichishutsu*). The first is, the wife has not produced a child. The second is promiscuity. The third is, lack of obedience to the husband's father and mother. The fourth is talkativeness. The fifth is a tendency to steal. The sixth is jealousy. And the seventh is serious illness. In every case the husband should attest the situation in writing and have his relatives sign it. If he or his relatives are illiterate, let them sign with their fingers.

However there are three situations that render a divorce impossible (*sanfukyo* 三不去). The first is that the wife has helped with the mourning of her father-in-law or mother-in-law. The second is that her husband went

from poor to rich during their marriage. And the third is that the wife has no home to which she can return. Nevertheless in the case of irreparable disharmony between husband and wife, promiscuity, or serious illness, this law [on impermissible divorce] shall not apply.

Explanation of Terms

棄妻 *kisai* the divorce of a wife by her husband, which required notification of the husband's close relatives and the marriage contractor as well as the return of any gifts brought by the bride (Koryô Clauses 29, 30).

無子 *mushi* barrenness, although early experts in Japan were divided in their interpretations as to whether this meant the lack of a son or the lack of any child (*Ryônoshûge*, p. 304). According to the extant fragment of the Kokon ritsu, if the wife was 50 and had had no children by that time, she was considered barren and could be divorced (*Yakuchû Nihon ritsuryô* vol. 2, p. 409).

舅姑 *kyûko* the parents of the husband (here the term had a different meaning from that in Koryô 25 above, where it denoted the mother's brothers and father's sisters).

手書 *tefumi* a document declaring a divorce, which was to be written by the husband. In Japan, according to the Koki commentary in the *Ryônoshûge* (p. 306), it was to be sent to the head of the township (里長 *richô*). But there are no extant examples of such a document.

画指 *kakushi* a means of signing a document without writing, by making a print of a finger. There are extant examples among documents excavated in China at Tunhuang along the Silk Road, as well as documents extant in Japan from Nara through Kamakura times (cf. the entry for *kakushi* in the *Kokushi daijiten* vol. 3, p. 184, for illustrations).

義絶 *gizetsu* a condition representing an irreparable break between husband and wife, and a reason for legally mandated divorce. According to

Koryô 31, if one of a married pair wounded or killed a parent or a close relative of the partner, or if a close relative of one partner killed a close relative of the other, then even should the crime be forgiven in a general amnesty (大赦 *taisha*), a divorce was required.

Analysis

Seven Reasons for Divorce by the Husband

There were three types of divorce recognized by Tang family law: 1) that initiated due to the common will of both families; 2) that initiated by the husband; and 3) that which took place because the law mandated it.

Since the first type was to take place because of the shared desire of both households, it did not involve the state or its laws (*Yakuchû Nihon ritsuryô* vol. 2: Kokonritsu Clause 41, p. 410). The second type is that discussed here. The extant remnant from the Kokonritsu Clause 40 lists punishments for breaking this law. And a third type of divorce took place because the law mandated it, according to the protocols of Koryô Clause 31, such as in the case of an illicit sexual relationship outside of a legal marriage (*kan* 姦) as defined in Koryô Clause 27 (see above).

The laws concerning divorce in Japan, despite some differences in how a declaration of divorce should be signed, were almost identical with those of Tang law (see the comparative chart in *Tôrei shûi hô*, p. 1032). But since in practice divorce in Japan was left up to the partners themselves, there are many questions as to how the law was actually applied on the archipelago. We can only say that application was quite different than in Tang China (Narikiyo Hirokazu 2001, pp. 164–73). It is thought, however, that the idea of divorce by the man's initiative was already developing in Nara times, following Tang influence (Kurihara Hiroshi 1999, pp. 59–62). In this regard, according to the Koki commentary on the Taihô Code from the beginning of the eighth century, there were six rather than seven reasons for a man to

seek a divorce (*Ryônoshûge*, Koryô Clause 28, p. 304). A seventh reason, the wife's serious illness, was added to the Yôrô code compiled in the Yoro era (717–24).

In his poems in the eighth-century *Manyôshû* (Anthology of Ten Thousand Leaves) that censured the flightiness of a subordinate, the aristocrat and poet Ôtomo no Yakamochi (718?–85) cites the seven reasons for divorce and the three reasons why a divorce was impermissable, as well as the prohibition against taking multiples wives (*Manyôshû* #4105–4110). This demonstrates that Nara officials took a keen interest in Chinese rules concerning marriage. Nonetheless Yakamochi made little distinction between his subordinate's marriage to a woman back in the capital and the latter's relationship with an entertainer in the province where Yakamochi was governor. Yakamochi considered both relationships to be marriages (*kekkon*), but he referred to the wife in the capital as "the former wife." This reveals the fluid sense that people at the time had of marriage and divorce, and how there was a clear gap between legal prescriptions and actual practice (Sekiguchi Hiroko 1993c, p. 382).

Eight extant declarations of divorce (*hôsaisho* 放妻書) have been found among the documents discovered at Tunhuang along the Silk Road in China, together with two drafts (*shitagaki*). Notably therein the seven reasons for divorce were not stipulated, nor were the actual reasons for divorce clarified. In some cases the declaration included the wish that the wife should be able to remarry, indicating an agreement between the two households on the divorce. Chinese-style *ritsuryô* law discriminated against women in the area of divorce, but in actual practice the two families and local elders often negotiated the best end to difficult situations. Researchers have also pointed out that women were reasonably influential in Tunhuang society (Umemura Keiko 2007, pp. 14–30).

It is not clear what documents had to be produced at the time of a divorce in classical Japan. It was only in Edo times, by which time classical

Chinese ethics had penetrated commoner society, when a husband would draw up a declaration of divorce and pass it to his wife. The idea that only a husband could divorce his wife was an element of shogunal law in Edo times. And in such cases, just as at Tunhuang much earlier, the declaration of divorce did not clarify reasons for the divorce. But it served as a means of guaranteeing the wife's freedom to remarry if she wished (Takagi Tadashi 1987).

Clauses 35, 37, 42, 43
Status Groups and Marriage Regulations

Clause 35 As for those in the five categories [of bound persons, *senmin*]—those in tomb guardian residence units (*ryôko*), residence units of official servants (*kanko*), hereditary servants (*ke'nin*), official bound servants (*kannuhi*), and non-official bound servants (*shinuhi*)—let each marry another from the same category.

Clause 37 If a freeborn person (*ryônin*) or hereditary servant is tricked into a condition of bound status by marriage to a bound servant, and should children be born of that union, if later there is a complaint and the plaintiff is returned to his or her original status, then his or her children shall have the parent's original status.

Clause 42 When a person from a residence unit of official servants or tomb guardians, or a hereditary servant, or a bound servant whether official or non-official, marries a freeborn person and gives birth to a child, if he or she did not know they were marrying a person of different status, let the child be of freeborn status, and let the couple divorce. But when a bound person escapes and gives birth to a child, then whether one partner knows the status of the other or not, the child shall be considered of bound status.

Clause 43　If a hereditary servant or male bound servant lies with a woman who is his master, or with a relative of his master within five degrees, the government will confiscate any child born of the union [and make that child a bound person, as a member of a residence unit of official servants or as an official bound servant].

Explanation of Terms

陵戸・官戸・家人・公私奴婢　*ryôko, kanko, ke'nin, kushi nuhi*　Five categories of bound persons (*senmin*). Tomb guardian residence units (*ryôko*) guarded the tombs of monarchs and queen-consorts. They seem not to have been mentioned in the Taihô code, since they do not appear in the Koki commentary on Koryô Clause 35 (*Ryônoshûge*). Nor do they appear in the texts of wooden tablets (*mokkan*) found at the Heijô palace that date from the early eighth century and that show writing practice containing Clause 35 and Clause 38 of the Koryô (*Mokkan kenkyû* 10, 1988, p. 90). Meanwhile others of bound status included those in residence units of official servants known as *kanko*, official bound servants that belonged to the court (*kunuhi*), hereditary household servants (*ke'nin*), and non-official bound servants (*shinuhi*). Members of the residence units of official servants together with hereditary household servants comprised an upper stratum of those of bound status, and they could form families. Hereditary household servants passed on their status from generation to generation, were not bought and sold, and their inappropriate use by the owner was prohibited by Koryô Clause 40. Also, according to commentaries on the same clause, one in three members of their families was to be exempt from service, in order to devote himself or herself to the family's livelihood (*Ryônoshûge*). Researchers suspect, however, that these categories of official servants and hereditary household servants were mainly prescriptive—their actual historicity is doubted. Bound

servants are also thought to have formed families, and to have been passed down by the owner from generation to generation (Yoshida Akira 1963, pp. 30–33).

当色 *tôshiki* "appropriate to the category" —the character 色 denotes a category, as in 五色賤 (*goshiki no sen*), the five categories of bound persons. According to the letter of the law, each bound person was to marry a person from his or her own category. But whether there could be a marriage between a bound person belonging to the government and one belonging to a private master was debated by classical specialists (Koryô Clause 35, *Ryônoshûge*, pp. 333–34).

良人 *ryônin* a freeborn person, in contrast with a bound person (*senmin*). The two categories, 良 and 賤, were the prime status categories of the *ritsuryô* codes. Freeborn persons included officials (*kanjin*) and non-officials (*shomin*). But notably, the heavenly sovereign (*tennô*) transcended the two categories.

主 *nushi* master of a bound servant *(nuhi)*. According to the Tang code, bound servants were part of the collective resources of the household, so any freeborn household member was the master of such bound servants. The Japanese codes also reflected such thinking. However as seen in Koryô 39 in the Yôrô code, drafters discarded the Tang provisions enabling a house head (*kachô*) to free bound servants or hereditary household servants. And in the extant residence unit registers, bound servants were considered possessions of individuals, whether they belonged to the residence unit head or, in one instance, to the mother of a residence unit head who possessed 13 bound servants (see *Dai Nihon komonjo Hennen shiryô* vol. 1, p. 64). There are many known cases wherein women belonging to the rural elite (*gôzoku*) owned such bound servants.

五等以上親 *gotô ijô no shin* literally, "relatives of the five degrees," the extensive kin and affinal grouping defined by the administrative code Laws on Propriety (Giseiryô Clause 25).

没官 *mokkan* confiscation of property by the authorities. Here the term refers to the power of authorities to make freeborn persons, non-official bound servants, and hereditary servants into official servants or official bound servants.

Analysis

Status Groups and Marriage Provisions

These four clauses prohibited marriage between persons of different status categories while also prescribing the disposition of children born of such unions.[8]

Compared with the situation in China, the vague differentiation between freeborn (*ryô*) and bound (*sen*) status in classical Japan is striking, as is the weak differentiation between marital relations (*kon*) and illicit sexual relations (*kan*). We know from the Laws on Residence Units (*Koryô Clause 23*) and the Laws on Arrest and Flight (*Homôryô Clauses 4 and 14*) that hereditary household servants and bound servants were considered property in the Japanese codes. But unlike in China, in Japan the members of official residence units (*kanko*) and official bound servants (*kunuhi*) were given equal amounts of officially distributed fields called *kubunden*. Specifically these hereditary servants and bound servants were to receive 1/3 of the two *tan* of fields distributed to freeborn males. That means that while they had meager livelihoods, they nonetheless had means of self-support (Enomoto Jun'ichi 2003, p. 7). We also know that bound servants had families, lived in hamlets, and carried on productive lives much as did hereditary household servants. For example, official bound servants (*kunuhi*) named in a document dated 750 lived in a hamlet and were members of productive operations there (*Dai Nihon komonjo Hennen shiryô* vol. 3, p. 359; Ishigami Eiichi 1971, pp. 11-21). And rather than being subject to sale and purchase, bound servants in Japan were generally considered the hereditary possessions of wealthy

rural elites (*gôzoku*). They suffered only mild social deprecation (Yoshie Akiko 1986, pp. 109–11).

A rule concerning the treatment of children from "mixed marriages"—marriage between those of different social categories—was first promulgated in the eighth lunar month of 645 (Taika 1), according to the official court history *Nihon shoki (*Chronicle of Japan*)*. Historians call this rule, "The Law on Relations between Men and Women" (*Danjo no hô*).[9] It provided that the child of a freeborn couple went with the father; the child of a freeborn man and a bound servant woman went with the mother; the child of a freeborn woman and a male bound servant was to stay with the father; and the child of two bound servants from different families would stay with the mother. Here can be seen differentiation in the treatment of freeborn persons and bound servants, but there are no details concerning treatment of those of bound status. The rule was simply that the child of a freeborn couple went with the father—that child received his status and family name, which is an early official expression of patrilineality (Narikiyo Hirokazu 1999b, p. 258). But the child of a mixed marriage, one born of a freeborn father and a mother of bound status, went with the mother. And the child of two bound parents was to stay with the mother. Considering that husband and wife frequently lived separately in those times, it is likely that children were sometimes raised with the mother and took her family name. Notably too, the Law on Relations between Men and Women is itself evidence that marriages between freeborn and bound persons were taking place.

In Tang China, conjugal relations between bound persons were not viewed as marriage (*kon*).[10] But in the Japanese codes there is no provision like that in the Tang code (Zôrei Clause 15) that allowed for pairing of official bound servants (*kanko*, *kunuhi*) by authorities. Such would not have suited social practice on the archipelago, and it was left out of the Japanese code. Moreover in Japan's Koryô Clause 35, conjugal relations between bound servant partners was termed "marriage," while according to Koryô Clause 42,

relations between a freeborn and bound partner were termed those between a husband and wife. This indicates the vagueness of the status differentiation between freeborn and bound persons on the archipelago at the time (Enomoto Jun'ichi 2002, pp. 130–32). And as we have already seen, according to Chinese law, only marriages carried out according to the proper process were valid. All others were considered illicit. But in Japan, marital relations began with the intent of and actual relations between the man and woman, which is why even those of bound status could marry (Sekiguchi Hiroko 1993a, pp.205–06).

To conclude, according to *ritsuryô* principles, the child of a marriage between freeborn and bound partners would become a bound person. Nonetheless this principle is contradicted by Clause 42, which states that if a freeborn partner were unaware of a difference in status, any child born of the union would be considered freeborn. On the other hand, according to Clause 43, should a female master or master's kinswoman have illicit relations with a male of bound status, the child would be confiscated by the authorities to be made into an official servant, whether as the member of an residence unit of official servants or as an official slave. Notably, commentaries in the *Ryônoshûge* differentiated voluntary and involuntary relations, and in the latter case, any child produced was to be freeborn, as was any child born of illicit relations—voluntary or otherwise—between two parties unaware of a difference in social status.

All of the above points to the fact that in classical Japan the actual gap in status between the freeborn and those of bound status was vague, and that the social bias suffered by bound persons was slight. Even those of the highest status were not forbidden from marrying those of bound status. And since, according to Clause 5 of the Laws on Residence Units, bound persons were exempt from taxation, such marriages served to free progeny from taxation. On the other hand, when the progeny of mixed marriages became freeborn, the government benefitted: as freeborn subjects, they became

taxable. That was undoubtedly why a law of 782 (Enryaku 8, 05/18) in *Ruijû sandai kyaku* (vol. 17, p. 522) states that in a mixed marriage between freeborn and bound partners, the child was to be considered freeborn. So did the prohibition against mixed marriages lose its meaning. By the tenth century the bound status categories of the eighth-century codes had generally been forgotten.

Notes

1 In English, see the introduction in D. Ko et al. 1999 for a short overview of the development of *ritsuryô* law and thought in China, esp. pp. 4–18. Also important are Carl Steenstrup 1991, J. Piggott 1997, and C. Holcombe 1998.

2 See two recent essay collections edited by Ôtsu Tôru for discussions of the resulting research: Ôtsu 2008 and Ôtsu 2011.

3 A very few partial translations exist at present: Joan Piggott has translated the Laws on Monks and Nuns (Sôniryô) in an appendix of her doctoral dissertation, "Tôdaiji and the Nara Imperium" (Stanford University, 1986); Karl Friday has worked on the Gunbôryô (manuscript), and Joan Piggott has worked on the Jingiryô (manuscript). Part of the Kushikiryô was translated in 2005, during a Kambun Workshop sponsored by the Project for Premodern Japan Studies at the University of Southern California. It can be consulted on the Kambun Workshop website, http: //dornsife. usc. edu/ppjs/. In addition the USC Project for Premodern Japan Studies will soon announce its new webpage devoted to English interpretations of the *ritsuryô*-we plan to gather annotated translations so that readers can get a better sense of these laws and the current state of research on them.

4 On the Tensei code see Ôtsu 2011, 279–98. An extraordinary find in 2012 near the Dazaifu (Kyushu Headquarters) near Hakata in Kyushu of a wooden document from the late seventh century and containing elements of a residence

unit register (*koseki*) has provided new insights into the process of how these registers might have been compiled. See *Nishi Nihon Shinbun* (morning) June 13, 2012; and Mainichi Shinbun (morning) June 13, 2012.

5 For additional research concerning the order of the various clauses in this chapter, see Kikuchi Hideo 1973 and Ômachi Ken 1986.

6 Translations for penal law chapters are those in Wallace Johnson 1979–97.

7 In English, see Sekiguchi Hiroko 2003 and Yoshie Akiko 2005.

8 Punishments for partners in such unions were included in the penal code (in the Kokonritsu chapter), although relevant sections of the Japanese *ritsu* are not extant. But we have the almost fully extant Tang provisions in the *Tôritsu sogi*. For a printed edition of the latter see Ritsuryô kenkyûkai 1978–99, vols. 2–3. And in the same series, see volumes 5 through 8 for a Japanese transcription (*kundoku*) and explanation. Compiled in Tang times as a thirty-volume compendium of penal law from the late seventh and early eighth centuries, the *Tôritsu sogi* is considered an important source for the Tang as well as the Japanese Taihô and Yôrô penal codes, although less than half is extant today. For the Kokonritsu chapter, see vol. 6, pp. 203–312.

9 In English, see W.G. Aston, 1972, Book 2, p. 202.

10 In reconstructing the Tang code, Niida Noboru used *kon* 婚, or "marriage," in his description of such relations when he reconstructed the Korei Clause 39 (*Tôrei shûi*, p. 258). But that mistake was subsequently corrected in *Tôrei shûi ho* (p. 545). Indeed, that the Tang code did not consider such pairings to be marriages has now been confirmed by the newly discovered Tensei administrative code of 1029, during the Northern Sung Dynasty, which makes it clear that such pairings were considered nothing more than the result of arrangements (*haigu*) by either the government or the master. See Enomoto Jun'ichi 2002, pp. 127–28. On the Tensei code, see Ôtsu Tôru 2011, Hattori Kazutaka 2012, and the English essays in *Acta Asiatica* 99 (2010).

Appendix

Chapters of the Yôrô Administrative Code

官位令	Kan'iryô	Laws on Posts and Ranks	19 clauses
職員令	Shikiinryô	Laws on Appointments to Offices and Posts	80 clauses
後宮職員令	Kôkyûshikiinryô	Laws on Appointments in the Back Palace	18 clauses
東宮職員令	Togûshikiinryô	Laws on Appointments in the Household of the Crown Prince	11 clauses
家令職員令	Keryôshikiinryô	Laws on Appointments in Royal and Noble Households	8 clauses
神祇令	Jingiryô	Laws on Propitiation of the Deities of Heaven and Earth	20 clauses
僧尼令	Sôniryô	Laws on Oversight of Buddhist Monks and Nuns	27 clauses
戸令	Koryô	Laws on Residence Units	45 clauses
田令	Denryô	Laws on Rice Fields	37 clauses
賦役令	Fuekiryô	Laws on Taxes	39 clauses
学令	Gakuryô	Laws on Official Scholarship and the Royal University	22 clauses
選叙令	Senjoryô	Laws on Promotion	38 clauses
継嗣令	Keishiryô	Laws on Inheritance and Succession	4 clauses
考課令	Kôkaryô	Laws on the Evaluation of Officials	75 clauses
禄令	Rokuryô	Laws on Official Emoluments	15 clauses
宮衛令	Kueryô	Laws on Gatekeeping in the Residential Palace	28 clauses

軍防令	Gunbôryô	Laws on Defense	76 clauses
儀制令	Giseiryô	Laws on Ceremonial Protocols	26 clauses
衣服令	Ifukuryô	Laws on Dress	14 clauses
営繕令	Eizenryô	Laws on Construction and Repairs	17 clauses
公式令	Kushikiryô	Laws on Official Documentation	89 clauses
倉庫令	Sôkoryô	Laws on Official Storehouses	16 clauses
厩牧令	Kumokuryô	Laws on Official Stables and Pastures	28 clauses
医疾令	Ishitsuryô	Laws on Medical Practices	26 clauses
仮寧令	Kenyôryô	Laws on Officials' Holidays and Leaves	13 clauses
喪葬令	Sôsôryô	Laws on Funerary Practices and Mourning	17 clauses
関市令	Genshiryô	Laws on Barriers, Markets, and Trade	20 clauses
捕亡令	Homôryô	Laws on Arrest and Flight	15 clauses
獄令	Gokuryô	Laws on Judging Crimes, Imprisonment, and Pardons	63 clauses
雑令	Zôryô	Laws on Miscellaneous Matters	41 clauses

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