

On the Early Japanese Law and Society : As compared with the Early Irish Law and Society

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On the Early Japanese Law and Society : As compared with the Early Irish Law and Society

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この報告原稿は、ダブリン高等研究所(Dublin Institute of Advanced Studies)のケルティック研究部門(Celtic Studies)における口頭発表のため用意したものである。1999年11月7日から筆者は文部省派遣短期在外研究員として、同部門のFergus Kelly 所長に受け入れて頂き、短期間ながら(2000年1月25日までの予定)古代アイルランドの法制と社会について勉強している。当初 Kelly 所長より、同部門主催で年一回開かれる年次大会が今年は11月19日と20日の両日開かれるので、その場で報告してみないかと懇懇されたが、本格的な研究報告は筆者の現時点の能力では無理であるし、また質疑応答に対応できる英語の会話能力も備わっていないので、もっと小規模の私的な会合で報告させて頂くことになった。ただ現在のところその会合はまだもたれていないし、日程等も定まっていない。あるいは場合によっては、開かれない可能性もあるのではないかと推測している。いずれにしても大変複雑な、しかも未だ報告もされていない原稿を掲載させて頂くということで、まことに恐縮至極ではあるが、及川先生の御退官に際して是が非でもなにがしかの一文を寄せたいという筆者の意向を汲んで、どうか諸賢のご寛容をお願いしたい。

筆者は渡愛に先立ち、一ヶ月余ロンドンにて過ごしたが、この報告原稿は、ロンドン大学の歴史研究所(Institute of Historical Research)に通って、アイルランド関係の文献を調査するかたわら書き上げたものである。極めて短期間に、しかも手許に関係文献が備わっていない環境で書き上げたものなので、思わぬ間違いをおかしていることもあるかもしれない。また、何分に

も本来の専門領域が日本法制史という、日常的に英語を使用する研究分野ではないせいもあって、英語表現の稚拙さや誤りも多々あるのではないかと思う。イギリス滞在中に、ケンブリッジ大学の国際法研究センター（Lauterpacht Research Center for International Law）に文部省派遣長期在外研究員として留学している同僚の五十嵐正博教授から多数の訂正箇所を指摘して頂いたし、またアイルランドに来てからは、ホームステイ先を斡旋して頂いたダブリン英語学校（Dublin School of English）の教師である Sean Golden 氏にも添削して頂いた。しかし、内容は勿論、英語表現に関わる問題についても、最終的な責任が筆者にあることはあらためていうまでもない。両氏のご教示の後に、さらに書き足したり書き直した箇所もあるので、そのような部分にいくつか表現上の誤りがあるのではないかと危惧している。

（12月10日ダブリンにて）

It is my great pleasure to have an opportunity to make a short presentation before you. I come from Japan, far East Asia. I teach Japanese legal history at the Faculty of Law in Kanazawa University. The area of my research is mainly in the early Japanese law and society, from the 7th century to the 12th century. And I am also interested in the early law and society of various countries. Moreover, I am interested in how state and law have come into existence. Why are they necessary? In the future, I just imagine if such society could be realized, a society without state and law. Although, I think, to pursue such a society is a perpetual subject for mankind, to answer these question, it is necessary to refer to the enormous bulk of studies, especially on early Greece, Rome, Egypt, Mesopotamia, India, China, and so on. As it is impossible for an individual effort to do it, I would like to stop talking about this subject, only saying that the last month I was overwhelmed by the splendid collections of the British Mu-

seum. I visited there almost every day, during my stay in London.

My another interests are related to the theme about the transition from the ancient society to the medieval society. They say that in Japanese history, there existed the feudal society, having similar characters of the medieval society in Western Europe. Since Japan was modernized about one hundred and thirty years ago, the Japanese scholars used to consider the Japanese historical development compared with Western Europe. For instance, it is the famous legal historian in Japan, Kaoru NAKATA, who compared the 'Syōen', which is the land-tenure system of the medieval Japan, with the manor of Western Europe. However the objects of their considerations were mainly the institutions of Germany, France, and England.

Several years ago, I read a book, titled 'Early History of Institutions', written by Henry Maine, famous in Japan as an author of the book of 'Ancient Law'. He was also a Governor-General of India. By reading this book, I realized the existence of abundant documents about the early Irish law and society, which is not almost known in Japan. So I decided to learn the Brehon Laws, as well as Japanese legal history. But I do not have the knowledge of the Irish language at all, of course neither old Irish nor Latin. A few years ago, I purchased the great work, 'Corpus Iuris Hibernici', from research funds, but I could only display them on my bookshelf. I have read only a few works of literature. In Japan, it is difficult even to read the book, 'Ancient Laws of Ireland'. I copied it partially at the Hitotsubashi University in Tokyo, and recently gained two volumes. It was very expensive. In such circumstances, the precious work 'A Guide to Early Irish Law', written by Director Fergus Kelly, who kindly accepted me, was very useful and profitable for me. I would like to express my sin-

cere appreciation to him. Anyway as my talk of today is based on restricted learning, I would appreciate if you could point out and correct my errors.

Now, let me talk about the main subject. Recently in Japan, there exists a trend looking at the similarity between Ireland and Japan, especially in the music culture and the mythology. A certain number of people are interested in the traditional Irish culture. I understand that the period from the 7th or 8th century to the 11th or 12th century was the transitional time in both countries. Today, I will talk about the peculiar similarity about the law and society in those days between our two countries. I would like to focus on four points.

But before this, I would like to point out two rather fundamental differences which are probably part of our common knowledge. Firstly, while the early Japanese law was basically imported from China, the early Irish law was unique in origin and in content. In early Japan, the scholars and the officials were sent to China to learn about the Chinese culture, including legal culture, and then returned home. From the second half of the 7th to the first half of the 8th century, they played a leading role in compiling the code of law about three or four times. The code of law compiled the last time, that is '*Yōrō Ritsu-Ryō*', is now handed down to us. However it remains not as the shape of the code itself, but as the law-texts which were compiled by the lawyers, who supplemented them with glossaries and commentaries afterwards. It consists of two parts, that is, '*Ritsu*' as the penal code and '*Ryō*' as the administrative code. While '*Ritsu*' has partially remained, '*Ryō*' has almost completely remained. '*Ryō*' is extremely valuable because in China '*Ryō*' has been lost.

Certainly, we had our own legal relations and thoughts indigenous to

ancient Japan. But they did not fundamentally become the statute laws (except a famous law, Constitution of 17 articles, which is the edict of the Prince '*Shōtoku-Taishi*'). And we are able to know their contents slightly through a few descriptions in the historical literature.

On the other hand, as far as I understand, the early Irish Law is very different from the Japanese one. We can find it in prose, verse, gloss and commentary, in which legal relations and usage of ancient celtic society reflect. Ancient Chinese law in the East, on the one hand, and ancient Roman law in the West, on the other hand, vastly influenced the countries around them. While the early Japanese law was influenced by Chinese law despite their political situations with China, It seems to me that the early Irish law was not influenced by Roman law(Though I have to refer to the important work lately written by W.N.Osborough '*Studies in Irish Legal History*', I do not understand its content precisely). Perhaps, the difference might be derived from historical and geographical circumstances. Anyway while the former is a statute law, the latter is from the customs of the native people, I think. This is a crucial difference.

The next difference, which is more familiar to us, relates to the social conditions. That is, the early Japanese society is based on agriculture, especially the cultivation of rice in the paddy(I'm sorry to use this word),and the early Irish society is principally based on animal farming. Sometimes this difference is mentioned about Asia and Europe. It may be too exaggerated, too simplified, and too much of a generalization. But as far as Japan and Ireland are concerned, the contrast among them would be recognized for considerably long term(though it may be said to be the same among various countries),and its difference is very clear at least in early society. In early Japan, one of the most important taxes is that of rice.

And in the case that one buys or sells valuable goods, for example land, he pays or receives the rice as the substitute of the money (Coins were already made, but were not commonly used). On the other hand, in early Ireland, the honour-price, which measures the rank and position of persons in the society, is expressed by the quantity of cows. In the former case the product of the agriculture, and in the latter case the object of animal farming plays a very important role.

Thus early Japan and Ireland are very different from each other. Let me talk about the structure of State a little bit more. In early Japan, the central government controlled almost the whole country except for parts of the north and south. And as far as its appearance is concerned, the character of government is considered as despotic, centralizing to the Emperor. This may be different from early Ireland, though the character of chieftain of early Ireland varied with the times. But I do not refer to this topic, because the theories are divided among the historical scholars of Japan. Anyway there are many differences between the two countries, nevertheless I would like to find the similarity. Today, I would like to generally speak on four points.

Firstly, I will consider the form of the law-texts. As mentioned above, the early Japanese law and the early Irish law were very different as regards their origins and contents. But the form of documents remaining as the law-texts is very similar. Of course, Chinese letter or alphabet, vertical writing or laterally writing, and the materials used in writing etc, we find many differences. But essentially as the works of the lawyers, I would like to recognize the common elements. In Japan, there remain mainly two types of the early law-texts. The one is called '*Ryo-no-Gige*', which means the glossary about '*Ryō*'. Its glossary is officially acknowledged by

the State. It was compiled at the beginning of the 9th century. We have clear evidence, which describes the detail of the compilation. Another is said to be compiled around the end of the 9th century, but the date of compilation and the name of compiler are unclear. It is called '*Ryō-no-Shūge*', which means the collection of the commentaries about '*Ryō*'. The reason why they were compiled, is mainly to avoid the confusion of the interpretations about the '*Ritsu-Ryō*' code. There were disagreements as to the interpretation of many articles among the lawyers in the second half of the 8th century. Then the official interpretation of the provisions of '*Ryō*' was made by '*Ryō-no-Gige*'. On the other hand, '*Ryō-no-Shūge*' was privately compiled. It collected almost all commentaries, even those which were not officially adopted. It had also an educational purpose. Several families of early Japanese lawyers succeeded the post of Doctor in '*Ritsu-Ryō*', and took over the interpretations through several generations. But they had nothing to do with the religion at all. They were mere officials who were engaged in administrative services. This is a fact that no one can deny, and is quite different from early Irish lawyers. Anyway such interpretations made by them were collected in '*Ryō-no-Shūge*'. However, it is not translated in Present-day Japanese, because it is difficult to read, particularly with citations which are hard to distinguish. In such a case where there are many citations, it is hard to recognize which is the interpretation of one lawyer, and from where or to where, the citation continues.

We have many manuscripts about these two law-texts. They are slightly different, and are written in different ages. The oldest manuscript is estimated to date from the 11th or 12th century. But only a portion is left. Now please look at a paper written in Japanese in front of you(See the end).This is one of the old manuscripts of '*Ryō-no-Shūge*'. The large let-

ters in one line writes the original articles. These are not capital letters, because the Chinese language does not have two types of letters, but have only one type. Though not seen in this paper, there are slightly small letters in one line, too. They are the original notes that also existed from the time the code was compiled. The sentence following the part noted A, is official gloss. In *'Ryô-no-Gige'*, only this part is described besides the original texts and notes. The sentence following the part noted B, consists of various private commentaries. Though only one commentary is seen in this paper, usually several commentaries continue thereon. Part A and B are written in two lines by the smaller letters more than original notes, following the original text or between them. Part C, which is the citation from Chinese literatures, was added marginally by someone after this manuscript had been written. Thus, the several glossaries and commentaries are contained in one manuscript. Presumably there would have existed the manuscripts which described the commentary of each lawyer. But such manuscripts didn't survive at all.

So far, I have talked about the Japanese law-texts and manuscripts in detail. They have some similar elements with the Irish ones as regards their form. It is interesting to note that we can find out there were four stages. Firstly the original text is cited in one line. The original text consists of two parts, that is, on the one hand, the original article and the original note in Japan, on the other hand, the verse and the poem in Ireland. And then, primary gloss or official gloss follows which is more important than other commentaries. Thirdly various commentaries follow which are expressed in two lines, and in the smaller letters. Lastly there is the marginal note which is added afterwards. In this way, I find out the multiplied stratum of the glosses and commentaries in early law texts of

our two countries.

Moreover I would like to talk about the similarity of method on the glosses and commentaries. Professor Liam Breatnach describes four kinds of the glosses and commentaries in his paper. That is, (1) clarification of the plain sense of the original text, (2) citation of parallel passage from other text, (3) treatment of a statement in the original text in a far more detailed way, (4) etymological glosses. When I read this sentence, I thought they are the same as the commentaries of '*Ryô-no-Shûge*'. It is likely that the cases of (2) and (3) are mixed and hardly distinguished from each other in '*Ryô-no-Shûge*'. But fundamentally I recognize the four kinds of glosses and commentaries in early Japanese law-texts.

Secondly, I will consider the land-tenure system. Though I know there are some noticeable differences to be perfectly honest, I dare to exaggerate the similarity here. In early Japan, the land is divided in four categories as a whole. That is,

- (1) The land which is distributed to all people above six years old according to the distinction of sex and social rank. Woman gets a thirds less than man. And lower people, for example, slave gets two thirds less than farmer, noble and so on. But such rules are not necessarily enforced, and in reality, the land is distributed to the chief of the house or family group. Distribution of land is carried out every six years simultaneously all over the country by the central government. Once distributed, the person can utilize the land for their whole life, but cannot sell it. It is possible to lend it only during one year. And it principally consists of the paddy fields. It seems to be likely that originally this land is distributed to the people by the kin or the tribe. In my mind, it is roughly to be compared to Kin-land in early Irish society.

- (2) The land which produces foods in the Palace of the Emperor, and the land which is distributed to the officials and the nobles. Very fertile paddy fields are managed to produce the rice for the Emperor and his kin. And various spots are set up to supply foods for banquet in the Palace. Then the paddy fields are distributed to the nobles and the officials according to their position and rank. In principle the nobles become the high-ranking officials of central government or the local officials. It is estimated generally that the land thus distributed approximately amounts to 1.5 percent of paddy fields all over the Japan in those days. Very roughly speaking, this type of land is compared to Royal-Land in Early Irish Society.
- (3) The land which is allowed to be cleared and cultivated for the temples, the shrines, the nobles, and the farmers. Especially a large area was given to the temples. In those days, the temples were special organs that prayed for the safety of the State. And cleared land, which is privately cultivated, is free for sale, rent, mortgage and so on. The temples received a lot of land from the nobles and the farmers. The reason why they offered their land to the temples is an economical one, because the land in the possession of the temples is easily exempted from taxation. I think, this land can roughly be compared to the Church-Land in early Irish society.
- (4) The land other than the arable land, including not only mountain and bush, but also river and marsh. Any individuals, any groups and any organizations are prohibited to monopolize this land. It is open to everybody. The article of '*Ritsu-Ryō*' code prescribes this land as "to be utilized publicly and privately in common". But from about the 9th century, the powerful nobles and temples gradually monopolized the land

temporarily at first, and in due course they occupied it exclusively in cooperation with the provincial officials. I think, this land can also roughly be compared to the Common-land in early Irish society.

I depicted the land tenure-system in the early Japanese society, basically according to the classification of professor Kelly in his latest work, 'Early Irish Farming'. I may have cut the legs a little to be suitable for my bed. But It would be due to the existence of more or less similarity in the land-tenure system of both countries that I was capable of doing it.

Thirdly, I will consider the loan-system. In early Japan, there exists the loan-system, called '*Suiko*'. The objects of '*Suiko*' are various. But the rice is the most popular and important. '*Suiko*' entails high interest. The article of '*Ritsu-Ryō*' code prescribes that the interest of '*Suiko*' must not exceed one eighths of the capital every 60 days and the interest must not exceed the capital after 480 days. According to the difference of the creditor and the resource, there are two types of '*Suiko*'. One is called public '*Suiko*' which relates to the officials and the national treasury. The other is called private '*Suiko*' which relates to the temples, the nobles, the wealthy farmers, and their resources. Probably '*Suiko*' originates from the necessity to help each other. But in early Japanese society, it is deprived of this function. Public '*Suiko*' is almost like tax. And after the 9th century, private '*Suiko*' was linked with public '*Suiko*'. Especially the wealthy farmers were entrusted with the management of public '*Suiko*'. Through it, they gained the submission of many other farmers, and soon they became lords. We call this type of lords as '*Zaichi-Ryōshu*', that is, lords on the spot, differentiating the traditional lords, the nobles and the temples. They played a leading role on the transition into the medieval period. Afterwards they became '*Samurai*' or warriors. And the groups of warriors

organized a new government in the East of Japan against the old government in Kyôto.

Thus '*Suiko*' played a very important role from the early society toward the medieval society in Japan. Similarly in the early Irish society, the cattle-loan, according to the name given by Mrs. Nerys Patterson in her work 'Cattle Lords & Clansmen', mediate between the lord and the client. In the free client and in the base client too, the clientship starts from the advance of fief for the client by the lord. The objects of fief are various, but stock is the most important. In return, the free client is obliged to express his homage and do labor-service besides payment of rent. And the base client also owes his lord various services and rent. He is entirely under submission to his lord through receiving the cattle equivalent to his honour-price besides fief.

Of course, '*Suiko*' and cattle-loan is more or less different system, and we can easily notice the difference between them. But in my opinion, as regards function, it is worth while to compare them because the relation between the lord and the client is formed through the most important goods and chattels, not the land, in their society.

Lastly, I will consider the problem about the marriage and family. A chapter of '*Koryô*' in '*Ritsu-Ryô*' code prescribes the various matters of the family at length. But we regard it as different from the family in reality. It prescribes the ideal of the family according to Chinese provisions. So I will not talk about its content, but let me present one article. It is called the article of '*Shichishutsu*', that means the seven removals. It lists the causes, which entitle the man to divorce his wife freely. It coincides with the seven grounds of divorce in a gloss of Irish law-text. Of course the content is different from each other. The provision of '*Ritsu-Ryô*' code

is severe for a woman. It prescribes the seven situations of a wife, that is, being childless, sexual matters, being unkind to husbands' parents, being gossipy, willing to steal, being jealous, unfortunately being ill.

Now we can recognize the marriage and family in reality from two kinds of documents. One is the family registers in the 8th century. They are preserved as they are in 'Shōsōin', which was established in the 8th century, and is a National Treasure. Here are revealed two types of family, that is 'Gōko' and 'Bōko'. The former is a large family which sometimes includes over one hundred people, and the latter is an ordinary family which generally includes several people. But from a half century ago, the controversy has arisen as to the relation between them, and which reflects the reality. Today, we regard 'Gōko', that is, a large family as somewhat artificial. But it is very difficult for us to make it clear thoroughly. Of course there existed the kin in early Japan. We cannot understand precisely the relation of the family in the register and the kin in the other documents. It would be the same as the relation of *fine* and *cenel* in early Irish society.

The other is the diary of the nobles and the religious scripts. They appear mainly after the 10th century. Mrs. Itsue TAKAMURE, (She is a non academic researcher) collected and investigated many cases. As a result, she insisted that in early Japan the husband visited his wives' house or he stayed in his wives' house under the consent of her parents. And she insisted on the maternal lineage. But her theory is not accepted to all scholars. Some scholar maintains that the husband accepted his wife into his house, and another scholar maintains that there were two ways. Anyway I think it cannot be denied that there was the marriage based on the female house in early Japan. In this way, I am very interested in the fact that

there was a “union of a man visiting” among the various forms of marriage, and the maternal kin had very important significance in early Ireland. I would like to research such a subject during my stay.

Today I have talked here about some similarities between early Japan and Ireland. Of course neither any contact nor connection between our two countries were there at that time. Nevertheless, we can find out some similarities between us as I have mentioned. Therefore I cannot but think that mankind establishes the similar institutions under the similar stage of development in spite of their different surroundings.

JAPANESE WORDS

Kaoru NAKATA	中田 薫
Syôen	莊 園
Yôrô Ritsu-Ryô	養老律令
Ritsu	律
Ryô	令
Syôtoku-Taishi	聖德太子
Ryô-no-Gige	令 義 解
Ryô-no-Shûge	令 集 解
Suiko	出 舉
Zaichi-Ryôshu	在地領主
Koryô	戶 令
Shichishutsu	七 出
Shôsôin	正 倉 院
Gôko	鄉 戶
Bôko	房 戶
Itue TAKAMURE	高群逸枝

Ryô-no-Shûge

Name of Article Name of Chapter

Article Number of Volume

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全澤文庫

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