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Introduction to Japanese Law

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This course follows the Prof. Abe's course of the same title and tries to approach the Japanese legal system from a slightly different perspective. Emphasis will be on general subjects such as historical developments, constitutional schemes, judiciary and legal professions, dispute resolution, etc. rather than on specific topics of practical interest, which are to be dealt with in other courses. The instructor was born in 1934. His long personal experiences will be infused in the course hopefully to make the course historically interesting.

A. Historical and Comparative Basis of Japanese Law

It is important to understand the present Japanese law from a historical perspective. Japan experienced a radical legal reform at least twice in its modern history, firstly during Meiji period starting in 1868 under an influence of the European Civil Law and secondly after the defeat in the Pacific War under an influence of the American Common Law. The third wave of reform has visited Japan in the first decade of this century as the justice system reforms dealt with in C below.

(1) Tokugawa Law (1603-1868)

1. JOHN H. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS (1936), VII Japanese Legal System (III) Third Period, pp. 479-525

2. DAN F. HENDERSON, CONCILIATION AND JAPANESE LAW – TOKUGAWA AND MODERN Vol. I (1966) pp. 157-169

(2) Meiji Westernizaion

3. Yoshiyuki NODA, Introduction to Japanese Law (1976, Translation by Anthony Angelo from French) Chapter III, Reception of Western Law pp. 41-62

4. Constitution of the Empire of Japan of 1889 (known as Meiji Constitution) (same as ABE MATERIAL)

(3) Post 1945 Reforms

5. Constitution of Japan of 1946 (known as Post-War Constitution) (same as ABE MATERIAL)

B. Nature of Japanese Law

Is the Japanese law fundamentally different from the Western counterpart? This is a question constantly asked by the students of Japanese law in and outside of Japan. Here is one of the answers.

6. J. C. SMITH, *Ajase and Oedipus: Idea of the Self in Japan and Western Legal Consciousness*, 20 U.B.C. L. REV. 341-377 (1986)

C. Courts and Judges

Japanese courts and judges share common features with European Civil Law countries. But there are some Common Law elements as well. In this area, a significant reform has taken place as a result of the Justice System Reform movement driven by the Prime Minister Koizumi from 2001.

7. Yasuhei TANIGUCHI, *Post-War Court System as an Instrument for Social Changes*, in GEORGE DEVOS ED., INSTITUTIONS FOR CHANGE IN JAPANESE SOCIETY (1984) pp. 20-40

8. Setsuo Miyazawa, Successes, Failures and Remaining Issues of the Justice System Reform in Japan: An Introduction to the Symposium Issue, 36 Hastings Int'l & Comp. L. Rev. 313 (2013)

D. Legal Education and Professional Training

The post-War system of university legal education, National Legal Examination and professional training at National Legal Training and Research Institute has undergone a fundamental reform with the creation of "Law Schools".

9. Daniel H. Foote, The Trials and Tribulations of Japan's Legal Education Reforms, 36 Hastings Int'l & Comp. L. Rev. 369 (2013)

10. No material

E. Lawyers, Quasi-Lawyers and Foreign Lawyers

Practicing legal profession in Japan faces a challenge. Demand for a radical increase in number, deregulation, foreign lawyers, etc. are some of the issues.

11. Excerpt from Japan Business Law Guide: Introduction to Japanese Law by Veronica Taylor with Kyoko ishida (2007), pp. 47-60 [7-230 – 7-920]

12 Yasuhei Taniguchi, The Changing Image of Japanese Practicing Lawyers (Bengoshi): Reflections and a Personal Memoir, in Harry N. Scheiber & Laurent Mayali eds., Emerging Concepts of Rights in Japanese Law 223 (2007)

13. Bruce E. Aronson, The Brave New World of Lawyers in Japan Revisited: Proceedings of a Panel Discussion on the Japanese Legal Profession after the 2008 Financial Crisis and the 2011 Tohoku Earthquake, 21 Pac. Rim L. & Pol'y J. 255 (2012)

F. Dispute Resolution

This is a favorite subject in the study of Japanese law because law is but the ultimate means of dispute resolution. Kawashima's article is a classic in this field to be cited first when writing about Japanese law in English.

14. Takeyoshi KAWASHIMA, *Dispute Resolution in Contemporary Japan*, in ARTHUR VON MEHREN, ED., LAW IN JAPAN pp. 39-72 (1963) ABE MATERIAL

15. Tom Ginsburg & Glenn Hoetker, The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation, 35 J. Legal Studies 33 (2006).

15bis Yasuhei Taniguchi,The Development of an Adversary System in Japanese Civil Procedure, in Daniel H. Foote ed., Law in Japan: A Turning Point, p. 80 (2007)

16. Aya Yamada, ADR in Japan: Does the New Law Liberalize ADR from

Historical Shackles or Legalize It? 2 Contemp. Asia Arb. J. 1 (2009)

G. Constitutional Review and Constitutional Issues

Constitutional review system created by the post-War Constitution has enabled the Supreme Court to create a significant body of constitutional case law.

17. David S. Law, Why has Judicial Review Failed in Japan, 88 Wash. U. L. Rev. 1425 (2011)

H. Criminal Process

Criminal process is traditionally characterized by an extremely high rate of conviction and a low rate of incarceration. The whole system is now under fire when "the safe street of Japan" is becoming a myth and the new assessor (*saiban'in*) system has been introduced..

18. Hiroshi Fukurai, A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice system Reform Council Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation, 36 Hastings Int'l & Comp. L. Rev. 517 (2013)

I. Administration and Business

Relationship between the government and business circle has been changing since the collapse of bubble economy.

19. Tom Ginsburg & Glenn Hoetker, The Effects of Liberalization on Litigation: Notes toward a Theory in the Context of Japan, 8 Wash. U. global Stud. L. Rev. 303-315 (2009)

J. Family Law and Women's Rights

Family law underwent a radical change after the War but the society could change only slowly. Now that the process of adaptation is completed, new issues face the family law. Slow development of women's right in workplace under the Equal Employment Opportunity Act is analyzed by Prof. Ishida, a female law professor.

20. Yasuhei Taniguchi in collaboration with Akiko Taniguchi, Succession Law and Inheritance Disputes in Japanese Family Court Conciliation, in Harry N. Scheiber & Laurent Mayali eds., Japanese Family Law in Comparative Perspective 119 (2009)

21. Kyoko Ishida, Promotion of Workplace Gender Equality and the Impact of Free Market Principles in Japan, Potter & Gibb, eds., Gender Equality and Trade Regimes: Coordinating Compliance (2012, The North-South Institute, University of BC, Canada)

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John Henry Wigmore, A Panorama of the World's Legal Systems (Washington Law Book Company, 1928; 1936 ed.

VII Japanese Legal System

(III) Third Period

7. The first great figure in the third period is that of the victorious Regent, Tokugawa Iyeyasu, in the early 1600's.[1] Under the Tokugawa dynasty of the Regency (A. D. 1603-1868), the nation reached a permanent state of political equilibrium, economic prosperity and social quiet,—comparable to that of France under Louis XIV. Feudal tenures continued, and the military class dominated. But the central federalized government of Tokugawa held unquestioned sway. It now proceeded to close the Japanese islands against all foreign intercourse and the fear of foreign invasion, and provided within its own extensive domains a model of administration for the fiefs of the greater semi-independent barons. The nation henceforth, for nearly three centuries, enjoyed a complete peace, internal and external, unparalleled in any European country.

During that period literature and commerce flourished, and prosperity prevailed. The activities of commerce [480] developed all the expedients and principles of European commercial life. Bills of exchange and banks, the clearing house and the produce-exchange, the promissory note and the check, the insurance-policy and the bill of lading, the chain-store and the trade-guild,—all these features of advanced commercial life are seen reflected in the legal records. Even the clearing-house check, and "future"

sales on the rice-exchange, are found. How many of the germs of these devices had been originally imported from China, cannot be told. But at any rate the technique of commerce had developed far beyond that of Athens, the most advanced commercial state of ancient times, and at least on a par with that of the then contemporary Europe.

8. Naturally, the native legal talent for law and order now also found its opportunity for development. This took place under the control and guidance of the Regent's Supreme Council. Iyeyasu obliged the great barons to spend a part of each year under his sight in Yedo, his new capital (now Tokyo); and their castle-like mansions and parked estates were a notable feature of that city.[11] And though the great barons, when at home in their own provinces, were allowed to retain local jurisdiction in legal matters (for they had their own courts, like the English courts baron), yet they were virtually under central control. The Tokugawa Supreme Court at Yedo was [481] given a federal original jurisdiction, for suits between parties from different provinces; a certain confirmatory jurisdiction was reserved for death sentences imposed on a vassal in the baron's court for political offences;[11] the barons' judges, on cases within their own provinces, often consulted the Tokugawa Court with a view to uniformity of law; and "in all matters" (says an edict of A. D. 1635) "the example set by the laws of Yedo is to be followed in all the provinces".

Under this regime, a copious stream of legislation and decision, during three centuries of a legal-minded dynasty, now built up the nation's legal system. Three or four outstanding features may be noticed.

9. In general, the laws and decisions were not publicly promulgated; they were circulated in manuscript for the use of officials only. "Not to be seen by any but the officials concerned", is the rubric at the end of the Code of A. D. 1790. This was perhaps on the Confucian principle that the responsibility of doing justice rests on the ruler, not on the people. "The way to govern the country is to secure the proper men; if there be capable men in office, the country is sure to flourish; if there be not capable men in office, it will go to ruin"; such is the literal quotation from Confucius that forms the closing article of the feudal Code of A. D. 1615. Another saying of Confucius was often repeated by the Tokugawa rulers: "Let the people abide by the law, but not be instructed in it". The ideal in the framing of a law was to guide the dull magistrate by its provisions, and to permit the wise magistrate to supplement it with his wisdom. And so the written laws were commands addressed to the officials, and not addressed to the people; therefore not needing to be generally circulated.

But the administration of justice was in the hands of a professional class, and to this class the laws were fully made known. There was a large staff of clerks and assistants for the Supreme Court at Yedo, and also for every one of the local magistrates in the counties, who virtually formed a special trained class with permanent tenure and a system of promotions. They were required to be skilled in the keeping of accounts, to have a general knowledge of civil and criminal law, and to be familiar not only with the customs of their own county but with those

of adjacent regions. There were numerous books of instruction for these magistrates—some printed, some copied by hand. They went under various names. "Code of Practice" (Koji-sosho-tori-sabaki-sho) is the name borne by a manuscript code dated A. D. 1791—the well-worn 'vade mecum' of some local judge." And there has survived doubtless many a "Manual for Trials" (Kohan-go-tei-sho) in the record-chests of the old county-families."

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There were no professional advocates or jurisconsults (as in Greece or among the Mohammedans). Each party was supposed in theory to conduct his own case. To obtain payment of a claim on behalf of another, taking a fee, was unlawful. Nevertheless, many made a practice of thus acting for others, on the pretext of relationship with the party or of his illness and inability to attend; much money was made by such attorneys; but the fee was clandestine.

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The trial method was identical with the one already developed in China and in continental Europe,—the inquisitorial method, which gives all responsibility to the trial magistrate. Japan was a country of law and order, for its criminal justice was stern and highly organized." The ideal judge of Oriental romance, endowed with piercing penetration into the hearts of litigants and a sturdy sense of equal justice, was a prominent figure, not only in the government, but also in the popular imagination. Oka Tadasuke, Baron Echizen, in the early 1700's comes down to posterity with a fame like Solomon's; there still circulates among the humbler classes of Tokyo

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next is [488]

a popular book containing the sensational stories of his wonderful insight and shrewd justice." One of the anecdotes handed down about him is almost the exact duplicate of Solomon's judgment between the two women who claimed the same child:

[*A Judgment of Oka Tadasuke.*] "About a century and a half ago, a woman who was acting as a servant in the house of a certain Baron had a little girl born to her. Finding it difficult to attend to the child properly while in service, she put it out to nurse in a neighboring village, and paid a fixed sum per month for its maintenance.

"When the child reached the age of ten, the mother, having finished the term of her service, left the Baron's mansion. Being now her own mistress, and naturally wishing to have the child with her, she informed the woman who had it that she wanted the child. But the woman was reluctant to part with her. The child was very intelligent, and the foster-mother thought that she might get some money by hiring her out. So she refused to give her up to the mother. This of course led to a quarrel. The disputants went to law about it; and the case came up before Oka Tadasuke, then Magistrate of Yedo.

"The woman to whom the child had been intrusted asserted that it was her own offspring, and that the other woman was a pretender. Oka saw that the dispute was a difficult one to decide by ordinary methods. So he commanded the women to place the child between them, one to take hold of its right hand and the other of its left, and each to pull with all her might. 'The one who is victorious,' said the Magistrate, 'shall be declared the true mother.' The real mother did not relish this mode of settling the dispute; and though she did as she was bidden and took hold of [458] the child's hand, she did what she could to prevent the child from being hurt, and slackened her hold as soon as the foster-mother began to pull, thus giving her an easy victory. 'There!' said the foster-mother, 'the child, you see, is mine.'

"But Oka interposed: 'You are a deceiver. The real mother, I perceive, is the one who relaxed her grasp on the child, fearing to hurt her. But you thought only of winning in the struggle, and cared nothing for the feelings of the child. You are not the true

mother;' and he ordered her to be bound. She immediately confessed her attempt to deceive, and begged for pardon. And the people who looked on said, 'The judgment is indeed founded on a knowledge of human nature.'"

Though the governmental codes were compiled in the form of instructions to officials, it must not be supposed that the laws were secret in any sense. The ordinary trial courts were open to the public. New or standard penal laws were posted on public placards at the cross-roads. The laws of land tenure and family succession were founded on notorious custom. And each village had its own written code of rules for local affairs;[11] this was read aloud by the district magistrate on the first day of each year, and then signed by every householder. It corresponded somewhat to the "keuren" of the Netherlands and the "handfest" and "weistum" of Germany at an earlier period.

10. Another fundamental feature of the system was the principle of conciliation,—the principle so prominent in Chinese justice (*ante*, Chap. IV), and here again (if not a general Oriental trait) a result of the Confucian philosophy imported a thousand years before.

The principle of conciliation resulted thus: Every town and village was divided into "kumi", or companies of five neighbors, the members of which (somewhat as in the Saxon frankpledge or frithborg), were mutually responsible for each other's conduct. In case of a disagreement between members of a company, the five heads of families met and endeavored to settle the matter. All minor difficulties were usually ended in this way. A time was appointed for the meeting; food and wine were set out; and there was moderate eating and drinking, just as

at a dinner-party. This, they thought, tended to promote good feeling and to make a settlement easier; for everybody knows, they said, that a friendly spirit is more likely to exist under such circumstances. Even family difficulties were sometimes settled in this way. Thus, if a man abused his wife, she might fly to one of the neighbors for protection, and, when the husband came to demand her, the heads of families in the company would meet and consult over the case. If a settlement failed, or a man repeated his offence frequently, he might be complained of to the next in authority, the chief of companies; or else the neighbors might take matters in their own hands and break off intercourse with him, refusing to recognize him socially; this usually brought him to terms. An appeal to the higher authorities was, as a rule, the practice in the larger towns and cities only, where the family unity was somewhat weakened, and not in the villages, where there was a great dislike to seeking outside coercion, and where few private disagreements went beyond the family or company. A case which could not be settled in this way was regarded as a disreputable one, or as indicating that the person seeking the courts wished to get some advantage by tricks. In arranging for a marriage partner for son or daughter, such families as were in the habit of using this means of redress were studiously avoided. It was a well-known fact that in those districts where the people were fond of resorting to the courts they were generally poor in consequence. If even the company-chief could not settle the matter, it was laid before the higher village officers, the elder and the headman. In fact, the chief village officers might almost be said to

form a board of arbitration for the settlement of disputes; for in deciding the case, the headman received the suggestions of the other officers. It was discreditable for a headman not to be able to adjust a case satisfactorily, and he made all possible efforts to do so. In specially difficult matters he might ask the assistance of a neighboring
[492] headman. If the headman was unable to settle a case, it was laid before the local magistrate, who, however, almost invariably first sent it back, with the injunction to settle it by arbitration, putting it this time in the hands of some neighboring headman, preferably one of high reputation for probity and capacity.

When a case finally came before the magistrate for decision, it passed from the region of arbitration, and became a law-suit. From the magistrate it might pass to the higher courts at Yedo. But even when the case finally came to the magistrate's court, it was not always treated in the strictly legalistic style familiar to us; the spirit of Japanese justice dictated a broader consideration of the relations of the parties. What the judge aimed at was general equity in each case. There was, of course, an important foundation of customary law and of statutes from which all parties thought as little of departing as we do from the Constitution; but these rules were applied to individual cases with an elasticity depending upon the circumstances.

A few selections of actual cases will give a better idea of this conciliatory justice than any number of generalizations. The following documents are from public records, not quite a century old, belonging to a village some eighty miles from Tokyo, lent from the family-chest of an old
[493] deputy-magistrate.[8] The first document explains itself:

[*A Conciliation Case.*] "Bond offered to Haikichi and Tsubei. My son Sutegoro, on the occasion of a festival at the Zoko temple on the 28th of last month, wounded you and your son Tsubei in a quarrel. We are distressed at hearing that you are to take the matter into court, for my son's punishment would doubtless be severe. We asked Wahei, representative of the farmers of this village, and Tomoyemon, of Hatta village, to mediate and to ask your pardon. We are grateful to you for having extended it, and now promise not to suffer the said son Sutegoro to live in this village hereafter. He has already fled the village, dreading the consequences of his conduct; but if he ever is found again within the village, he shall be treated according to your pleasure: we shall offer no objection to whatever you may do. We offer this document of apology, sealed by the chief of the company and by the mediator.

"Tempo, 11th yr., 8th mo., 3d day [1841].
Farmer Yobei, the parent.
Farmer Sujibei, his relative.
Farmer Isobei, Chief of company.
Wahei, Mediator.
Tomoyemon, Mediator, Chief Farmer."

The next tale is a longer one; for this case went as far as the magistrate:

[*Another Conciliation Case.*] "*Petition* to Shinomoto Hikojiro, Magistrate of Koma County. The undersigned respectfully represents as follows:—

"Uhei, farmer of this village, has laid the following matter before us. A certain Cho, the daughter of Jirozayemon, farmer in Kiwara village, was a farm-servant in the family of Asayemon, a fellow-villager, during the past year. On the 2d of this month this woman Cho, accompanied by her father, by Yazayemon, farmer of that village, and by Tomoyemon, farmer of this village, came to my house, and made the claim that my son Umakichi should marry

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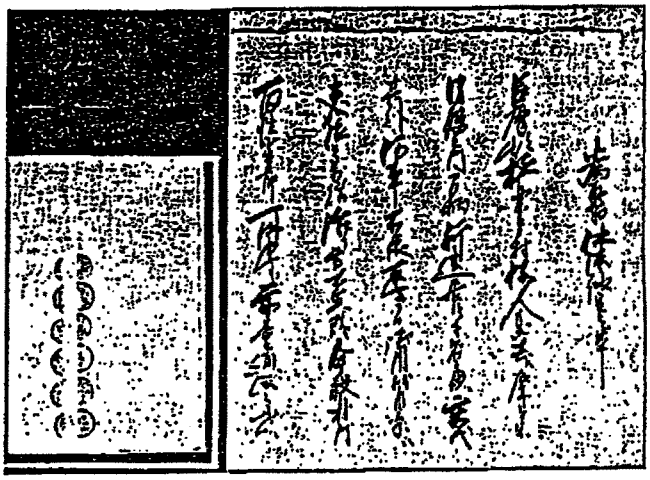
her, inasmuch as their previous relations had made it honorable for him to do so. I asked my son if her assertions were true, but he denied it. I told them of my son's denial, and requested these persons to leave the house immediately. But they did not do so; and in my opinion their object was merely to extort money from me by false assertions. On the 4th of this month these persons came again, and threatened me with violence if I did not yield to their demands; but the neighbors intervened, and persuaded them to depart. On the 5th they came again. This time I went with the woman Cho to an inner room, and questioned her sharply, and was convinced that the demand was a trumped-up one. We are watching Cho day and night with four men; for, being a woman, she is more likely to trick us. But all this is very annoying, and I am obliged to beg you to summon these persons and order them to desist. My perturbation of mind incapacitates me from performing my duties as a farmer. I therefore make this respectful request. If you grant it, I shall be forever grateful.

"Tempo, 10th yr., 2d mo. [1840].
Farmer Uhei, Complainant.
Warrantor, Asayemon, Headman of Village.
Countersigned, Ichikawa, Deputy-magistrate of County."

"*Petition for Dismissing a Case.* In the matter of Cho, already reported, we beg to file the following petition for dismissing the case:—

"Cho, daughter of Jirozayemon, farmer of Kiwara village, asserted certain illicit relations with Umakichi, the son of Uhei, in this village; and a demand was made upon Uhei, who reported the matter to your office, and you began to investigate the case. But the affair turns out not to be an important one, and the whole matter has arisen from some foolish statements made by the woman Cho. She has returned to her home, and all the parties are now satisfied with the result. This settlement has been brought about through your influence, and we are very grateful. We beg therefore that you



VIII. 19—PARTIES' SETTLEMENT-RECORD, A. D. 1779

The seals at the left show a mode of authenticating similar to the English indenture. The counterparts of the instrument are placed edge to edge, folded, and half the seal-mark remains on each

province and under the same jurisdiction, alleging that Kurohira Village was located at Ontake Mountain, that its inhabitants had since time immemorial been accustomed to make a good subsistence from the woodbote and other profits à prendre on the mountain-side; that nevertheless the right of taking wood for buckets and for goldsmith charcoal, included in the aforesaid profits, which Kurohira Village was entitled to take for its own use, was seized by inhabitants of Ontake Village, who prevented passage by the road known as Takashiba Road; and that, since a judgment formerly given on this dispute in the Shotoku period [A. D. 1711-1716] Kurohira Village was greatly suffering for lack of the means of livelihood, and now asked for restoration of its rights under the former custom.

will shut your eyes to the case, and not give it any further consideration.

"Tempo, 10th yr., 2d mo, [1840].
Ichikawa, Deputy-magistrate.
Farmer Uhei, Complainant.
Headman Asayemon, Warrantor.
Farmer Jirozayemon, Defendant.
Farmer Hichibei, his relative.
Farmer Masabei, his company-chief.
Headman Shirozayemon, Warrantor."

"*Approved:* Shinomoto Hikojiro, Magistrate of Koma County."

When the controversy was pushed beyond the stage of conciliation and reached the Supreme Court at Yedo, still the principle of conciliation left its marks: for the judicial record was usually completed by the filing of an instrument drafted in the name of the parties, reciting the issues, the facts found, and the terms of the decision, and signed by all the parties in token of their assent to the settlement.[1] The following record, marking the last stage of a long-drawn-out litigation over a rural right of easements and profits, illustrates this method:[2]

[*Record of a Case Appealed.*] "*Lawsuit of Kurohira Village, Kai Province, vs. Ontake Village, same province, over Profits à Prendre.* Anyei, 8th year, 10th month, 21st day [1779].

"Yamamura, Baron Shinano [Exchequer Judge], sitting Judge.

"Kurohira Village in Koma County, Kai Province, under the jurisdiction of Local Magistrate Kubo Heizaburo, brought an action before the said magistrate against Ontake Village, same county and

"This suit was disposed of by Heizaburo under the usual procedure and referred by him to the Supreme Court together with the documents and his report. By the Supreme Court a summons was then caused to be served upon both parties and the case was examined anew. It was found difficult to give a correct decision on the matter without a view of the land in question. For this purpose, Nakai Seidayu, another local magistrate, was sent to the said land, and he made an inspection thereof. Upon the report of Nakai Seidayu stating the result of such view and survey, a hearing was again had. Now, by instruction of Baron Matsudaira of Ukio [chief judge] the judgment is given as follows:

"In the judgment given on this dispute in the Shotoku period, it is stated that 'branches and leaves, materials for handles of hoes and for clubs, ferns and mushrooms, may be taken by Kurohira Village on the mountains and the forest appertaining thereto, according to former custom'. But this passage by no means includes a prohibition to take the materials for handles of buckets, and for manufacture of goldsmith-charcoal. Thus it is clear that the judgment referred to does not prohibit profits à prendre of these two sorts. Ontake Village is therefore not to interfere with the taking of such profits by Kurohira Village. But the Takashiba Road is the road by which all carriage of profits à prendre is expressly forbidden by the former judgment just referred to. So that no inhabitants of Kurohira Village are to pass along that road bearing any profits à prendre in future. They are to reach their village by the main road, which is accessible from the Main Temple Gate and leads to Kofu. In all respects the former judgment above referred to shall be observed forever. In testimony of obedience to this judgment by both parties, a certificate will be forwarded to this court.

"This judgment will be notified in writing to Ishii Saichiro, clerk of the magistrate Kubo Heizaburo. This case was referred

here by Kubo Heizaburo through the Exchequer Magistrate; there is therefore no declaration on file in this court.

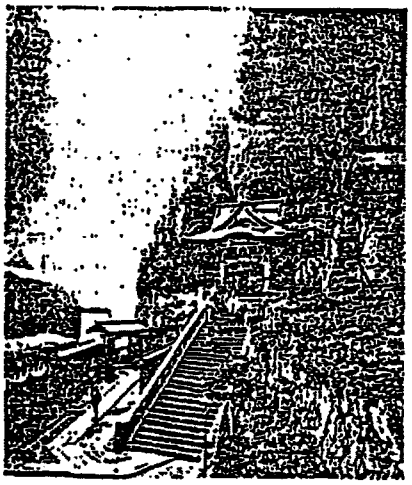
"Attest:

Kamiya Ruhachiro, clerk of the Court".

"Certificate to the Honorable Supreme Court:

"1. Our suit came to this honorable court; but owing to the location of the land in question, it could not, without further inquiry, give a correct decision, and Magistrate Nakai Seidayu was sent to the land, and the land was actually surveyed by him. Upon his return of the results of that survey, a new hearing was had.

"2. Kurohira Village as complainant alleged that since many years ago Kurohira Village had been in possession of the eight sections of land on Ontake Mountain and that certain other hillsides had belonged to it,[39] when they were under the jurisdiction of Matsudaira, Baron Kai; moreover, a hot spring commonly called Tonohira Spring had been in its possession; thus there had been many profits à prendre, such as timber for planks and for charcoal and mushrooms, the use of the hot springs, and the clearing of ground for cultivation. Every year, a quantity of mushrooms and a



VIII. 20—Haruna Mountain and Temple
This is a region similar to the one concerned in the lawsuit,—temple lands in a mountain region

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tax amounting to 3 Kwar and 500 mon in Yeiraku coinage had been presented and paid in to the then holder of the fief. All the said profits were used to be carried away along the Takashiba Road to Kofu, through the Ontake Temple lane, and sold in the market thereof. In the course of the period Hoyei [A. D. 1704-1710] a dispute took place between Kurohira Village and Ontake Village which was finally adjudged by the honorable Supreme Court, a copy of which was indorsed on the back of the map of the land in question. Later on, in the course of the period Shotoku [A. D. 1711-1716] another suit was brought before the same court with respect to the profits à prendre of the same land, in which judgment was given by the court and again indorsed on the back of a new map of the same land. On that occasion, the map containing the terms of the first judgment given in the period Hoyei, and the old registry of land ownership, was surrendered to the honorable Supreme Court, and the lands of the Ontake Mountain and hot spring above referred to, and other mountain lands individually owned by the farmers, were declared to be temple property. Thus, the old communal rights of Kurohira Village, as well as certain individual titles of its farmers, were lost at one stroke, and the whole community of Kurohira was extremely distressed, so that it was thereafter compelled to seek the profits à prendre of the above description on the land above referred to, for urgent need of want of the means of subsistence, although it did not knowingly act contrary to the judgment given in the period Shōtoku. It was truly forced by its extreme necessities to cut down trees, break off branches, and even scrape together leaves, to make the handles of hoes, mallets, etc. All these articles were carried along the Takashiba Road to Kofu, where they were sold to the public. Pursuant to this custom, a group of men of Kurohira Village were passing along the Takashiba Road with the wood for bucket-handles and charcoal, in October, 4th year of Anyei [A. D. 1775] when the watchman of Ontake Village intercepted their passage and seized all their loads, to their great distress. Often before this, the people of Ontake Village had robbed

the men of Kurohira Village of the fruits of their labors; the foregoing was only one instance. Since the judgment in the period Shotoku, Kurohira Village has become gradually poorer and more distressed. On the other hand, the people of Ontake Village continue to open new sections for cultivation on the land in question, and they cut down standing trees at their pleasure.

"The plaintiff village further alleged that it was unaware of any ground for Ontake Village's conduct, which appeared to be inconsistent with the law. The plaintiff was in the habit of presenting mushrooms and paying a tax to the owner of the fief in conformity with former custom. Moreover, it prayed the honorable Supreme Court to recognize its rights in the section bounded by the Iwana river on the South, the Muroka meadow and the peak of Hiraiwa on the North, Ara river on the East, and the two peaks of the Ko mountain and of Hishi mountain on the West. The hot spring would thus, it was believed, fall within its territory. Further, as to the profits à prendre, the plaintiff asserted that it was entitled to carry its loads along the Takashiba Road without any obstruction by the people of Ontake Village.

"3. On the part of the defendant village, it was alleged that the judgment of the period Shotoku expressly forbade the villagers of the plaintiff Kurohira to take the aforesaid profits, or pass along the Takashiba Road therewith or to occupy the said sections, and that, therefore, the defendant village had posted watchmen there to watch for travellers. In October, 4th year of Anyei [1775] some men of Kurohira Village came along the Takashiba Road with loads of wood, and the watchman thereupon seized and took from them the wood, within the limits of their right. Defendant, Ontake Village, possesses a tract of land, granted by the government, yielding 240 bushels of rice; the product of which is allotted to the temple staff for the public expenses of Ontake Village. The section of land between the Main Temple Gate and the Upper Temple is temple-land, by the judgment of the period Shotoku, whose terms are in-

dorsed on the back of the map. Defendant, Ontake Village, has been duly observing the terms of the judgment. Plaintiff, Kurohira Village, owns one piece of farm-land, 26 bushels yield, located within the limits of the Ontake Mountains. But, in strict point of law, it has no title to any of the forest land therein. It did have, by virtue of the former judgment, the right to enter and take the branches and leaves of trees (as materials for hoes and clubs) and ferns and mushrooms, to be found in the forest lands, and it did so take them. Such forest profits are sufficient for its requirements. Nevertheless, it frequently attempted to exceed these rights contrary to the terms of the former judgment, and proceeded also to take articles not expressly permitted by the former judgment to be taken, and passed with them along the Takashiba Road, along which it was unlawful for Kurohira Village to pass. Thus, in spite of its lack of grounds, Kurohira Village unjustly claims that its people are entitled to use that road.

"As to the plaintiff's further charge that Ontake Village has unlawfully and surreptitiously cleared certain land for cultivation and cut down standing trees, the defendant Ontake denies any unlawful conduct on its part. What happened was merely that, at the repair of the temple, some standing trees were cut down, to be used only for that purpose, and after request made to the Temple Commissioner for instructions. In no respect has the defendant acted unlawfully.

"4. The claims of neither party in this suit are fully sustained by the honorable Supreme Court. We have now been given the following judgment: 'In the judgment given on this dispute in the Shotoku period, it is stated that "branches and leaves, materials for handles of hoes and for clubs, ferns and mushrooms, may be taken by Kurohira Village on the mountains and the forest appertaining thereto, according to former custom". But this passage by no means includes a prohibition to take the materials for handles of buckets, and for manufacture of goldsmith-charcoal. Thus it is

clear that the judgment referred to does not prohibit profits à prendre of these two sorts. Ontake Village is therefore not to interfere with the taking of such profits by Kurohira Village. But the Takashiba Road is the road by which all carriage of profits à prendre is expressly forbidden by the former judgment just referred to. So that no inhabitants of Kurohira Village are to pass along the road bearing profits à prendre in future. They are to reach their village by the main road, which is accessible from the Main Temple Gate and leads to Kofu. In all respects the former judgment above referred to shall be observed forever.'

"We respectfully acknowledge these honorable orders. In case of our disobedience, we shall be liable to any punishment. In witness of our obedience, we have the honor to file this certificate with the honorable court.

"21st day, 10th month, 8th year of Anyei [1779]

"Plaintiff: Under the jurisdiction of the Local Magistrate Kubo Heizaburo, Kama County, Kai Province;

[Signed] Kurohira Village, by Tozayemon, headman, general representative,
Rihei, company-chief, general representative,
Taroyemon, Agent of the farmers.

Under the jurisdiction of the same office, same county, same province;

"Defendant:

[Signed] Ontake Village
Naito Iki, Chief Elder and Temple Custodian and general representative,
Kubodera Iyo, general representative."

11. The foregoing two features of Japanese justice were attributable to the borrowed Chinese philosophy of

life. But a third feature was indigenous, and has its nearest analogy in English legal history. From the 1600's onward, the highly organized judiciary system began to develop by judicial precedent a body of native law and practice, which can only be compared with the English independent development after the 1400's. It is by reason of this achievement of the Tokugawa dynasty that the Japanese legal system is entitled to be regarded as an independent one. A national law has been developed through precedents by a few other peoples also,—by the Hebrews, the Romans, and the Mohammedans; but in those three systems this was done by unofficial jurists, while in the English and the Japanese systems it was done by the official judges themselves.

For understanding the purport of two or three illustrations, the judiciary organization must be briefly sketched. The Regency domain (i. e. apart from the few large self-governing baronies) was divided into three jurisdictions,—metropolitan, rural, and ecclesiastical. To the Metropolitan Judge were brought all suits in which the plaintiff was a townsman; to the Exchequer Judge all suits in which the plaintiff was a countryman; and to the Temple Judge, all suits by a resident of the ecclesiastical lands. These three judges, sitting in banc, formed the Supreme Court. But the judges were not always the

same persons; because each of these posts was dual, held by two officials, each one of whom in alternate months sat in the Supreme Court (six days in a month.) At other times he officiated in his own jurisdiction. But even here he was more or less an appellate judge, because many or most cases had already been heard by a lower magistrate in each of these jurisdictions; so that there were two possible stages of revision. Original jurisdiction was taken by the Supreme Court in one class of cases only, viz., in suits between parties from different jurisdictions. Otherwise its jurisdiction was appellate only. But an appeal in the strict sense was allowable only on the ground of a denial of justice in the court below—an extreme and rare issue. Instead, however, the revisory function was supplied by frequent voluntary references of cases by the individual member-judges on doubtful points or on subjects calling for a uniform practice.

Such, in rough outline, was the judiciary scheme by which the law was now professionally developed under the Tokugawa dynasty.

The rules of procedure were thoroughly worked out, as befitted an elaborate judiciary system. The following set of rules for the use of maps and plans in land-title disputes will serve to illustrate; it is taken from the Code of A. D. 1742:

[*Rules of Procedure for Using Maps.*] "Upon the adjudication of boundary disputes the plans prepared by the courts of the boundaries of provinces and of counties shall be certified by the seal of the Council of State and those of the three Judges.

"Other plans embodying the judgment of a court shall be endorsed and certified by the joint seals of all three Judges . . . . . .

"In land disputes, the plans of both parties shall be produced; and whether it be the boundaries of a province that are in controversy or merely the boundary of a county, these shall be compared with the government map of the province; and if it be found that in the main there is no discrepancy between them, it shall not be necessary to send a surveyor before delivering judgment. As a rule surveys are not to be too freely ordered, but only in very complicated cases.

"In cases which cannot be decided without the holding of a survey, if the dispute has reference to the boundary of a province or of a county, the government inspectors and the magistrate shall be sent to make the survey. If the dispute relate merely to the boundaries of villages, the magistrate alone is to be sent. And even in disputes as to county boundaries, when the case is free from complications judgment may be given after a survey held by the local magistrate.

"In disputes about rice fields and dry fields and hills and forests and other private rights, when the maps and documents produced by the parties are not sufficiently clear to allow of a decision being given without a rectification of the boundaries, it shall not be necessary to report the case to the Supreme Court for trial, but a subordinate magistrate of the neighborhood is to be sent to carry out a rectification of the boundary."

Formal appeals were comparatively rare. But when the individual member-judge, acting in his own juris-

diction, was in doubt, he prepared a full statement of the case (much after the manner of an equity judge's findings), and submitted it to the Full Chamber for decision. The following commercial case, readily paralleled in our modern civic life, and raising an interesting question of partnership law, shows the technique of this method of decision:

[*Record of a Decision on a Partnership Claim.*]

"An Action by Kinsuke, of Susaki Village, Musashi province, against Toshichi and another, of Ofune-kuramaye ward, Fukagawa District, Yedo, before Baron Sado.
Dated Kokwa, V (Ape), 2, 4 [March 8, 1848].

"1. *Consultation* by Kusumi, Baron Sado, Exchequer Judge.
Kinsuke, dependent in the household of Sobei, elder of Susaki village, Katsushika county, Bushu province, in the magistracy of Saito Kabei . . . . *Plaintiff.*
Toshichi, renter of the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa District, [Yedo] . . . *Defendant.*
Summoned for examination [as witness], Mosuke, renter of the shop of the five-men company, in Shimo ward, Reiganjima, [Yedo].

"The above action was brought before me, a summons issued for the 7th day, and trial had. The plaintiff Kinsuke had formerly lived in Tokoyama-dōbō ward, [in Yedo], dealing in sandals. The defendant Toshichi was some years ago in the employment of Heibei, Kinsuke's adoptive father. That Kinsuke had lent certain sums to Toshichi was clear; but the case could not be determined without examining the above Mosuke, renter of the shop of the five-men company, of Shimo ward, Reiganjima, [Yedo], and he was summoned and examined.

"The plaintiff Kinsuke pleaded as follows:—

"The alleged loan to Toshichi was made under the following circumstances. Toshichi, in the last Dragon year [1844] joined in the contract, long held by Mosuke, for the cleaning of the canal passing under Kyo Bridge, and undertook half of the length to be cleaned, agreeing to contribute to the expense, the total amount of which was to be about 3,237 'ryo'. But, his available money not being enough, he informed Kinsuke and requested him to make a loan, showing the indenture executed between himself and Mosuke, and agreeing that payment of principal and interest should be made from the Government-money received from time to time in payment during the progress of the cleaning. The plaintiff then from time to time, beginning with the 12th month of that year, lent various sums to the defendant, sometimes taking an instrument of loan, sometimes getting the defendant's seal in an account-book. But as the undertaking went on, the expense increased beyond the estimates, and the work began to go more slowly; and finally Mosuke, who had other undertakings of the sort on his hand and was pressed for money, proposed to the plaintiff and the defendant to take up jointly with him the cleaning-contract for the above place, just as the work stood. The plaintiff was informed of this proposal by the defendant, and agreed to it, the arrangement being that those sums which had been lent up to that time to the defendant should, with their interest, be left as they were; and any moneys which might be received [from the Government] for the undertaking should be divided among them without caring for settlement of the loan-account. In the 10th month of the next Serpent year [1845] a new indenture to this effect was made out by all parties, and Toshichi and Kinsuke entered upon the work. Kinsuke might have taken an active part with the others in watching the work, employing laborers, paying wages, etc.; but as the business was unfamiliar to him, he left all to the others. The cleaning went on; but after a time some spots were found where the difficulty of the work un-

expectedly increased the expense, so that the original estimate of cost was exceeded; and at last the plaintiff and the defendant were obliged to withdraw from the undertaking, and Mosuke proceeded alone with the remainder and ultimately finished it.

"The total amount of the advances made [by Kinsuke] in this undertaking was 1,920 'ryo' 1 'bu' odd, and of this sum 945 'ryo' had been paid, leaving a balance due of 975 'ryo' odd. Toshichi, indeed, had also made some contributions [to the expenses of the joint undertaking before Kinsuke entered], but these were small. It would be unreasonable, were the plaintiff alone to be the sufferer. Toshichi had invariably evaded with profuse apologies his requests for payment, declaring that he was quite willing to pay, but could not until the accounts had been settled with Mosuke; and yet he continually delayed the settlement of that account. The plaintiff himself had borrowed from different quarters the amounts advanced [to Toshichi], and being without excuse for his own creditors, had been obliged to sell even his house and furniture, and had become a dependent in the household of Sobei, a relative, of Susaki village, Musashi, where he now is. The plaintiff therefore demands a detailed account of the payment of all sums due.

"The defendant Toshichi pleaded as follows:—

"He had formerly been employed by Heibei, the adoptive father of Kinsuke. In the preceding Dog year [1838] he had left this position, and had entered the sandal business for himself, hiring the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa. Meanwhile Mosuke, renter of the shop of the five-men company in Shimo ward, Reiganjima, had taken a contract for the cleaning of the canal flowing under Kyo Bridge; but the area to be cleaned was larger than he was able to undertake alone, and in the last Dragon year [1844] he had asked Toshichi to become his partner and undertake half the length to be cleaned. The cost of the whole undertaking was to be 3,237 'ryo' odd. An indenture was drawn up between them, agreeing that whenever the Government-instalments should

be paid, they should be divided between them. Toshichi thereupon advanced 250 'ryo' odd for the work, and then, not having the money himself, he applied to Kinsuke to furnish further capital. The loans began in the 12th month of the same year, sometimes an instrument of debt being given, sometimes the seal being affixed in an account-book. The agreement was that payment should be made, principal and interest, at each time that a Government-instalment was received. The work of cleaning was begun in the 1st month of the ensuing Serpent year [1845], but it progressed slowly, though several advances of money were made. At this juncture Mosuke, who had taken other contracts of the sort and was pressed for money, proposed that the defendant and Kinsuke should take the remainder of the Government-money, 782 'ryo', pay 50 'ryo' due for hire of mud-scows, and take up jointly with him the cleaning-contract for the place already undertaken by Toshichi, just as the work stood. Toshichi informed Kinsuke of the proposal, and, a favorable reply being made, Mosuke gave notice to the authorities and obtained their sanction. The sums already borrowed by Toshichi, with the interest, were to be left as they were, the agreement being that whatever money might be obtained from the undertaking should be divided among the plaintiff, the defendant, and Mosuke. The former having thus become the partners of Mosuke, a new indenture was made out on the 20th of the same month, and the work was entered upon by them.

[Rubric.] "The above instrument was ordered to be produced, and read as follows:

'Indenture.

'Whereas the cleaning of the canal under Kyō Bridge has been undertaken by you, and one of us then agreed to undertake the cleaning of one-half the length, advancing his own share of the expense, and since the work has been begun and during its progress the Government-money has not been sufficient and large amounts of money have been spent; now

therefore it is agreed between all parties that we shall receive the remainder of the Government-money, 782 'ryo', pay 50 'ryo' due for the hire of mud-scows, and undertake the cleaning of the portion now remaining, and carry it on until completed and officially inspected; that we shall pay the wages of the bargemen, the expense of official inspectors' sheds and laborers' sheds, fees of superintendents, laborers' wages, etc., and shall make every effort to guard against delay; that we shall have no responsibility in regard to the two special places [left to your charge]; that on request we shall deliver to you your share of any extra payments [of the Government-money] which we may obtain for specially difficult portions; and that you shall leave the pumps, scaffolding, and other apparatus just as they now are, the same to be restored to you on completion of the work. Acting under the agreement thus privately made between us, we shall complete the cleaning not later than the last day of the ensuing 11th month, putting on a sufficient number of men and boats; and if this proves impossible we shall endeavor to cause as little inconvenience as may be. In testimony of this we hereby exchange instruments of the above effect.

'Kokwa, II [Serpent], 10, 20 [Nov. 19, 1845].

Toshichi, renter of the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa.

Kinsuke, land-renter of Jutaro, in Tokoyama-dobo ward.
To Mosuke, Esq.'

"The above instrument being drawn up, the plaintiff and the defendant became the partners of Mosuke. But in a short time difficult portions were found in the area to be cleaned, and the cost increased largely, until the amounts paid in by Kinsuke by the 11th month of that year amounted to 1,920 'ryo', 1 'bu'; for the slowness of the work made it difficult to estimate the total cost of any portion

beforehand. Moreover, as the time for completion named in the contract had now expired, the two [Kinsuke and Toshichi] were obliged to give up the undertaking, the remainder of the work being undertaken and ultimately completed by Mosuke. Of the above 1,920 'ryo', 1 'bu', 945 'ryo' in all has since been paid at various times to Kinsuke, and the amount left unpaid is 975 'ryo', 1 'bu'. The above facts are admitted. But [there are reasons why the payment of this remainder should not be enforced]. Now that the plaintiff and defendant, after entering into the above contract and making out a new instrument in which they appeared as partners [of Mosuke] (who appears to have taken advantage of their inexperience in such matters and knowingly included the most difficult places in the portion assigned to them), have given up the undertaking on account of their miscalculation of the expense, it is difficult to see why Kinsuke should make the claim that he does. Of course the defendant occupies the position of a former servant of Kinsuke, and does not wish to appear guilty of a breach of the duty of devotion arising from that relation; but as his account with Mosuke is still unsettled, it is impossible for him yet to settle the claim of the plaintiff.

"Mosuke's statements were as follows: . . . [here his testimony is fully analyzed by the judge.]

"[Findings]: Such were the statements of the parties, [and the court has reached the following conclusions]: It is clear that the plaintiff had lent various sums to Toshichi, taking sometimes an instrument of loan, sometimes the defendant's seal in an account-book. But when the new instrument was drawn up, by which both parties became the partners of Mosuke, and [it was stipulated that] these advances should be left as they were, and that any money which might be received by them from the government for the undertaking should be divided among them on its completion, without caring for any settlement in regard to the above advances, this claim for the advances became merely a partner's contribution sub-

ject to the risk of profit and loss, and was no longer to be regarded as a debt due from one to the other.

"The parties declare that they have no fault to find with the proceedings as related above.

"Trial was held as above related. The parties disagree as to the validity of the claim, but it seems to me that the matter is one of profit and loss, and that the judgment should be that no order of payment should be made. I therefore consult you on the subject.

"Year of the Ape, 2nd month."

"2. *Judgment by the Full Chamber.*

"Kokwa, V (Ape), 2, 4 [March 8, 1848].

Before the Baron Sado, Exchequer Judge.

"An action having been brought by Kinsuke, of Musashi province, Katsushika county, Susaki village, in the district of Magistrate Saito Kabei, for arrears of a money loan of 975 'ryo', 1 'bu' odd, alleged to be due from Toshichi, renter of the shop of Kinjiro, of Fukagawa, Ofune-kuramaye ward, [the defendant, was summoned by a 7-day indorsement and trial was had. The judgment is that no further trial shall be had. It is plain that the plaintiff lent the above sum to the defendant, partly on instruments of loan, partly in the shape of book-debts. But when the new instrument was drawn up and the partnership was formed with Mosuke, renter of the five-men-company's shop in Reiganjima, Shimo ward, for the cleaning of the canal, the loan was left as it was, the parties agreeing that whatever moneys might be received for the cleaning upon its completion shouldbe divided among them, and that no further account should be taken of the loan in question, the advances thus becoming a partnership risk of profit and loss. The parties should be directed to hand up an instrument (of submission).

"Note, that as the case was brought up by the Exchequer Judge, there is no complaint on file."

The development of an independent system by case-law is amply revealed in the records of these two hundred and fifty years of Tokugawa precedents. Throughout that period of records, there is found not a single citation of a Chinese or any other foreign law-book, but only of Japanese laws and precedents,—a feature not true of any European people (except the Keltic) since Roman times. The underlying political philosophy was in origin Chinese; but the Tokugawa technique was Japanese. The system was self-developed.

In the following two typical cases, one judge consults another about a pending case; is answered by an opinion citing precedents, drawing a distinction and reserving the distinguished case for future decision; and then, a few months later, the distinguished case comes up on the calendar and the Full Chamber decides it,—all in the best traditional spirit of English case-law[k]. It will be noted that the search for precedents ranged back nearly a century:

[*Supreme Court Opinions on the Survival of a Money-Claim.*]

"Payment by a Debtor who has suffered Local Exile.

"Dated Bunsei, X, 11, 2 and 18 [December 19, 1826, and January 4, 1828].

"1. *Consultation by Sakakibara, Metropolitan Judge of Yedo.*

"Ought not the successor, if any, of a person who has suffered local exile, to undertake the debts of his predecessor; provided no

forfeiture of cultivated and residence land and of other property was made?"

"2. *Answer by Ishikawa, Exchequer Judge.*

"We acknowledge the receipt of your inquiry. We understand you to refer to the case where the defendant suffers local banishment, and we searched for precedents on that point, but found none. We discovered, however, a case where this court was asked, in Gembun, IV, 10 [November, 1739], whether a claim for money lent by one who was afterward sentenced to local exile was subject to extinguishment, in which a negative answer was given, although the contrary rule would apply if a confiscation of patrimony had accompanied the sentence, for this would include the money loan. A sentence of local exile has nothing to do with wife or son, so that the wife or the son may take the cultivated and residence land and other property, or, if there be none, the exile may be given the proceeds of a sale of the property. Now, as even the claim of an exiled creditor is not extinguished, much less should the liability of such a debtor. In the latter case, the name of the debtor's successor, if any, should be substituted by the court in the order for payment; and even if there is no successor, the court should revise the instrument (if confiscation has not occurred), as soon as the debtor has fixed his residence, and deliver it to him, ordering payment without fail. But in Kwansei, VI [1794], the defendant in a suit pending before your predecessor, Ikeda, Baron Chikugo, absconded, and the Full Chamber decided (there being no precedent in which the wife or son had under those circumstances been ordered to be substituted in the order for payment) that in the future in such cases no substitution should be ordered, but the order for payment should be annulled. According to this it would seem proper in the present case to annul the order for payment. Yet if such a rule be established, it would not be just, in our opinion. In ordinary actions on money loans, we have customarily allowed the plaintiff to name the successor as defendant, where [the debtor has died and] a successor is in

existence; and so in case of a pending action, when the absconder's successor is determined, it is but just to have his name substituted, and deliver it to him and order payment.

"If you agree with these views, we trust that you will lay the matter before the Full Chamber, so that our practice for the future may be determined.

"11th month"

"3. *Letter from Ishikawa to Sakakibara.*

Bunsei, XI, 1, 28 [March 13, 1828].

"You consulted us in the 11th month of last year as to the case of a debtor who has suffered local exile. We answered that we hoped to see a rule fixed for the future, not for that case only, but also for that of a debtor absconding pending action brought, and requested you to lay the matter before the Full Chamber, if agreeable. We shall be glad to hear your views on this subject, and beg to ask your advice."

"4. *Answer by Sakakibara.*

Bunsei, XI, 2.

"I consulted you, as you say, in regard to local exiles' debts, and your answer suggested that payment should be ordered, which in fact accorded with my own view, and I made order accordingly. You also noted the case of a debtor absconding pending an action before my predecessor, Ikeda, Lord of Chikugo, in which the Full Chamber decided not to order a substitution of wife or son, which seemed to require me in this case to annul the order of payment; and suggested that such a general rule would be productive of injustice, and that where a successor has been determined, we should order him to pay; and proposed a reference to the Full Chamber. But what I consulted you about was not the case of a debtor absconding pending action brought, but a first-seal case [that is, a case where the defendant is out of the jurisdiction of the Lower Court (in this

case by banishment), and the case must be sent to the Full Chamber for trial]; and we were both agreed, as to this case, that payment should be ordered, and I did so order. So that as to this point no reference to the Chamber seems to be required. As to the other case you spoke of, I am myself not yet decided, and I think it more suitable to consult the Full Chamber when the occasion calls for it."

This particular question, here left undecided, came up a few months thereafter; as the next precedent shows:

[*Supreme Court Opinion on a Successor's Liability.*]

"Dated Bunsei, XI, 4, 2 [May 15, 1828].

"1. *Inquiry by Saga, Baron Bugo, and Ishikawa, Imperial Steward, Exchequer Judges.*

"In cases where the defendant in an action for money lent or unpaid purchase-money has absconded, we have hitherto thought that we should not entertain the complaint, where the creditor sues the successor, because the whereabouts of the debtor may eventually be discovered and he may then be sued. This practice of refusing in such cases originated perhaps in the idea that, even though a so-called successor exists, either there has been no determination that he has in fact become the successor, or else, as sometimes happens, his house is extinct and one of his relatives assumes his estate. Moreover, the disappearance has taken place because of the debtor's adverse circumstances; so it seems doubtful whether a suit against the successor, supposing there were one, would be of any avail. In those cases where a debtor has died [pending suit], and his widow has succeeded him, we have been accustomed to order the suit to be reinstituted against her, describing her in the complaint as 'Haru, widow of Taro,' and alleging that a sum of money lent to the husband in his lifetime is due and unpaid. We have also made some investigations as to proceedings in similar actions against villagers.

In the last year of the Hare [1819], when Ishikawa, Imperial Steward, and Toyama, Palace Warden, were Lawsuit Judges in the Exchequer Department, there were a number of actions on money loans in which the creditor, because the debtor had died or was otherwise unavailable and had left no estate, was suing the surety. It was thought by the court that the clause of the instrument 'If the principal shall be in arrears, etc.,' signified only the case where the principal, in his lifetime, utterly fails to pay the debt; so that where the principal had merely absconded, and no successor exists, the creditor should wait until the whereabouts of the debtor was discovered [and then sue him]; and that therefore suits against the surety should thenceforth be entertained, the principal having absconded, only when the clause read 'If payment by the principal is in any way hindered, payment shall be made by the surety,' and not otherwise, even where the principal had died. The matter was referred to the Full Chamber, and they came to the following conclusion: 'Generally, when a debt is secured by the addition of a surety's name, the purpose of having a surety is that he shall attend to the debt if payment is not made; so that the addition of a surety is to no purpose if the court declines to order payment merely because there is no clause expressing the undertaking of the surety. The obligation of a surety, of course, lasts only during his lifetime [and does not descend to his successor], while that of a principal debtor who dies or absconds survives against his son, grandson, etc., if there be any patrimony inherited. But when a debtor leaves no such successor, the court should order payment by the surety, if, after examining the circumstances under which he became surety, it considers that he ought to be regarded as liable,—and this in spite of the absence of any clause expressly undertaking liability. In answer to the argument that we ought not to hold him liable without such a clause, it may be said that, if we should refuse [creditors would be loath to lend], the money circulation would diminish, and undesirable results would follow. It appears better to order payment by the surety without distinguishing between the clauses "If

the prificipal shall be in arrears, etc.," and "If the principal's payment is in any way hindered."'

"Such was the decision of the Full Chamber. In the present case, too, we think that it would be unjust if the creditor could not sue the successor, even though the debtor's non-payment is owing merely to his having absconded. However, if on this principle we decided that a relative who assumes charge of the estate and acts on behalf of the debtor in his business or in his cultivation is liable for all the debts of the fugitive as 'undertaker of the estate', then nobody would ever be found to perform such offices, and the result would be many waste estates. In such a case, therefore, the rule should be as hitherto, that the mere undertaker is not to be charged with debts. But henceforth, when a suit is brought by the creditor against the son or other alleged successor to the estate of the fugitive, the plaintiff should consult with the officers of the defendant's village, and obtain from them a certificate of identity of the defendant, bearing the names and seals of the village officers and certifying that the defendant has succeeded to the estate of the fugitive; and if the plaintiff can show such a document, he may go on with his suit.

"We think that the rule should be thus, and [we have the less hesitation in coming to this conclusion because] there can be no objection, since the order of the last year of the Horse [1822] respecting money loans, unpaid purchase-money, etc., on the part of village officers, to forwarding the necessary certificate of identity.

"We therefore make the above proposal. 4th month.

2. *Decision of the Supreme Court Full Chamber.*

"Decided in accordance with the proposal, Bunsei, XI, 4, 2, [May 15, 1828]."

The Tokugawa legal system, thus developed by native genius, might in the local course of events have produced

more distinctive fruits of independence. But at this juncture international history diverted its destiny.

(IV) Fourth Period

12. In 1853 the long international seclusion of Japan was broken. Commodore Perry came with his American fleet, and demanded rights of trading. Other nations followed. In these treaties the Japanese gladly conceded to the foreign nations the power and duty of extra-territoriality, i. e. jurisdiction over the foreign nationals, as the price for refusing general rights of settlement throughout the land. Meanwhile the powerful semi-independent barons seized the opportunity to rebel, denouncing the Regency for its subservience to the foreign nations. By the revolution of 1868, the political government shifted back, after seven centuries, from the Regency to the Emperor.

Japan now realized that the time had come for it to absorb all the science and arts of the Occident, from which it had been secluding itself. To this task the nation's talent devoted itself for the next thirty years.

This task accomplished, the national pride now became restive under the concession of extra-territoriality. In demonstration of its right to resume complete sovereignty over national justice, the Government undertook to re-

make the form of its law on Occidental models. In 1889 came the written constitution; Count Ito,[11] its inspirer and draftsman, ranks as Japan's greatest statesman of the last generation. The most able younger minds were sent abroad to master the Occidental systems of government and law. During the 1880's and 1890's, in Tokyo, thousands of aspirants in Tokyo schools studied the laws of France, Germany, and Anglo-America,—at first under imported law teachers, afterwards under the returned Japanese jurists bearing Occidental degrees.[12] Meanwhile, five new codes were prepared,—first drafted by jurists imported from France and Germany: then re-cast, in contents better adapted to Japanese institutions, by the new generation of Japanese jurists trained in the Occidental laws. These went into force in the last decade of the century. In the next decade, foreign extra-territoriality was relinquished.

VIII. 22—Count Ito Hirobumi
Framer of the Imperial Constitution of 1889

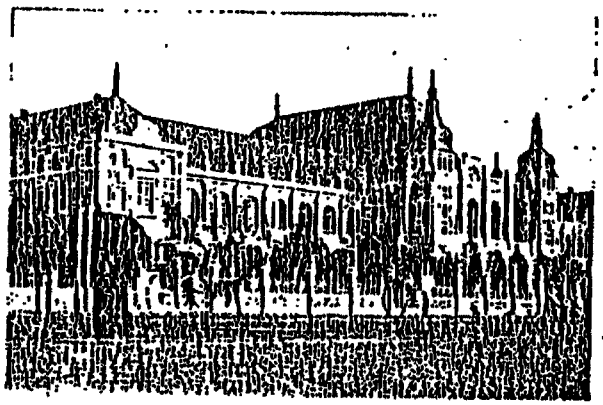
Tomii Masaakira
Dean of the Law Department
Imperial University

Hatoyama Kazuo
President of the Semmon
Law School

Kikuchi Takko
President of the Law Institute

Kaneko Kentaro
President of the Japan Law School

VIII. 23—Modern Law Professors



VIII. 24—Modern Supreme Court Building

From what has been sketched of the Tokugawa institutions of the third period, it is easy to see that the task, in these new codes, was not to create a legal system, but to revise an existing one. But the officials of the old Regency had politically disappeared; and there existed no body of professional juristic literature available for educating the new generation and for supplying the technical legal phraseology. Moreover, foreign expectations had to be satisfied. Hence, in framing the new codes, resort was had to the compact scientific materials of the Romanesque system from the continent of Europe.

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The law was re-stated on the classification of the Romanesque law; the new legal language being constructed from the Chinese etymology; for Chinese literature had been to Japan what Latin had been to Germanic Europe.

The Supreme Court," for example, was now called "Tai-shin-in", Supreme Judicial Office, instead of "Hyo-jo-sho", or Chamber of Decisions; and the Code of Civil Procedure was termed "Minji Soshoho Seikai", instead of "Kori-sosho-tori-sabaki-sho". Criminal trials were conducted in court-rooms furnished on the Occidental model; and the bailiffs and police, though gentry ("samurai") by descent, everyone of them, now wore Occidental uniforms." The external modes of the West have been adapted by the native spirit of Japan to form a new composite whole.

VIII. 25—Modern Criminal Court-Room

This reorganization of the ancient native institutions to suit the times, welding together

West and East, signified hardly a new legal system, but the re-making of an old one, by a process with which Northern Europe was already long familiar, when Roman law was welded with Germanic law (*post*, Chap. XV). Japan was the first Oriental country to undertake it voluntarily. But it is this same process that is being repeated, in a later generation, in Siam, in China, in Turkey, in Persia; and in those also it has come as a 'quid pro quo' for the relinquishment of extra-territoriality and as a symbol of external assimilation between Orient and Occident.

To future historians must be left the analysis of the future result. The old Japanese artists, in their masterly woodcuts, were fond of depicting the celebrated mountain Fuji, one of the nation's (and the world's) scenic gems. The art of the modern photographer, too, may present it to us in another guise. The impressions are different. But the mountain is the same."

VIII. 26—Fuji Mountain

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Dan Fenno HENDERSON,

Conciliation and Japanese Law
-Tokugawa and Modern -, Vol. I

(University of Washington Press &
University of Tokyo Press, ca. 1966)

SUIT INNS

Throughout the proceeding in Nuinosuke's case we have made passing comments on the role of the innkeeper in the conduct of litigation in the Edo courts, and perhaps now with the case as background, we should consider more fully what the innkeeper's position and function really were. For he was indeed the only person connected with Edo litigation who might be regarded as a predecessor of the modern Japanese lawyer.[101] The inns at Edo and Osaka differed considerably in origin and functions, and we will confine ourselves to the Edo inns.

Initially the innkeepers situated in the vicinity of the Edo courts developed their legal expertise from the fact that they were regarded by the Shogunate as the houseowner for the itinerant litigants whom they might be housing, and in that status the innkeeper was required to sign documents and appear at the commissions with his tenant. Having observed the role of Chūbē's houseowner in the foregoing proceeding, we can appreciate that an innkeeper who catered to litigants and who was treated as their houseowner would go to court often and become quite knowledgeable in the procedures and practices at the courts.

It is next important to note that this quite ordinary Tokugawa status of houseowner, implying certain authority over any litigant tenant who might be lodging at the inn, grew into a specialized vocational status recognized by the Shogunate at least after the Temmei period (1781–88). Eventually the innkeepers of Edo organized into three guilds comprised collectively of about two hundred member inns located in Bakurō-chō and Kodemma-chō. Also apparently some from the Eighty-Two-Inn Group were scattered about what is now the Marunouchi district. They were granted a monopoly franchise for all of the suit inn business, and it seems that their inns catered rather exclusively to litigants at least from the Genroku period (1688–1704) until they were dissolved at the time of

[101] Besides the materials in Nakada Kaoru, "Tokugawa jidai no minji saiban jitsuroku," 3 *Hōseishi ronshū* 753–904 (1943), this account of the Edo inns is based on Takigawa, *Kujiyado no kenkyū* (1959); and Hiramatsu Yoshirō's review thereof in 12 *Hōseishi kenkyū* 242–43 (1961). Compare Okudaira Masahiro 奥平昌洪 *Nihon bengoshishi* 日本辯護士史 (History of the Japanese lawyers) (1914) and the following works which seem to be based on Okudaira: Ōsaka bengoshikai (ed.), *Ōsaka bengoshi shikō* 大阪辯護士史稿 (Draft history of the Osaka lawyers) (1937); Tōkyō bengoshikai (ed.) *Bengoshishi* 辯護士史 (History of lawyers) (1939); Nihon bengoshi rengōkai (ed.), *Nihon bengoshi enkakushi* 日本辯護士沿革史 (History of the development of the Japanese lawyers) (1959).

the Tempō reform (1842). Thereafter the individual inns operated separately and apparently catered to regular travelers as well as litigants.

In exchange for its monopoly protection granted by the Shogunate from roughly 1781 to 1842, the Edo inns performed the following four services for the Shogunate: (1) they delivered the summons issued by the courts; (2) they were responsible for the custody of persons Entrusted to the Inns *(yado azuke)* by the court; (3) they were required to supply food to persons entrusted to them; (4) they had the duty of providing fire protection to the various court buildings. The services the innkeeper supplied to his tenant-client were many and varied, and a review of them indicates that the innkeeper was a busy man. Apparently, however, the inn's legal services were concerned almost exclusively with civil litigation, and the tenant-clients were usually rural litigants. We can suppose that Edo townsmen and other urban litigants relied heavily on their town officials and the expert underlings in the town office to handle their litigation, since these officers were required to accompany the litigant to court anyway, as we saw in Chūbē's case. In Osaka the inns were apparently sometimes consulted even by litigants not lodging in the inn, but we have found no evidence to date that such a practice had developed in Edo.

A rather concrete idea of the nature and extent of the innkeeper's legal services can be obtained by surveying Buzaemon's activities on behalf of Nuinosuke. Buzaemon or Kōsuke, his assistant, personally drafted all of the legal documents in the course of the litigation—including petitions, receipts, notices, reports of failure of conciliation, and the final conciliation agreement—as well as all corrections required by the court. All of these documents were handwritten in brush in several copies, and sometimes this drafting was done under considerable pressure at the commission. The actual documents show a certain skill in anticipating and avoiding legal problems (e.g., the receipt of the summon). The innkeeper instructed Nuinosuke on the procedures that had to be followed to file a suit, get the endorsement, and serve the summon. He also led the tenant by the hand to the various offices and then accompanied him personally to the numerous hearings. Just to get the endorsement of each of the eight commissions in the rice case took two full days of trudging through the busy streets of Edo afoot. It took six days of scurrying about to get the approval of Nuinosuke's daimyō. For these reasons it has been aptly suggested that the innkeepers really ate with their feet.

At the hearings, the innkeeper went into court with Nuinosuke and sat on the gravel just back of him, where he could carefully watch the course of testimony and request a continuance if his client got himself into difficulty. Likewise, the innkeeper participated in the negotiation of twelve continuances and numerous conciliation sessions and did the paper work

involved, including five notices of failure of negotiations. In addition, Buzaemon was indeed an innkeeper and in that capacity during the course of the proceedings he furnished Nuinosuke with his room and meals, which were the chief source of income for the suit inns, although it can be surmised that they also received a success fee and clerical fee besides. The Edo inns were rather plain compared with those in Osaka, which also carried on a profitable business as fiscal agents for farmers. These farmers brought in their rice to be sold by the inn, which paid the farmer's tax for him to the lord in cash. The daily rate of an Edo inn was said to have been 240 *mon*, which was roughly equivalent to the rate of a low-class inn catering to the general public (not a suit inn) in Osaka of the same period.

One final point needs to be emphasized. Including both his legal and hostelry services, the innkeeper was an important part of the workings of civil justice in Edo, and it can be fairly concluded that without his services, the complexities of jurisdiction, procedure, and documentation in the Edo courts would have effectively barred the assertion of many claims, otherwise valuable under Shogunate law. In evaluating these officially authorized innkeepers and their role in the judicial process, it is important to distinguish them from the unauthorized Suit Solicitors *(kujishi)*, who were prohibited to operate and who conducted a marginal practice with frequent cases of bribery and swindling.[102] Indeed, confusion of the suit inn and the suit solicitor has tended to obscure the fact that the authorized suit inns, even if they had not acquired the attributes of modern professional ethics and sense of mission, were nevertheless hard working, skilled, and resourceful legal experts, whose services were quite necessary to the Edo courts and litigants, especially rural petitioners. Indeed, the Shogunate seems to have ordinarily referred to the inns as "Edo yado" in its regulation, thus avoiding adverse inferences associated with the "kujishi," which had been banned from the Genroku period (1688–1704) onward. The Tokugawa public, however, used the term *kujiyado* and modern Japanese historians have failed to distinguish between them and *kujishi*, and therefore they have tended to overlook this legitimate element of the modern lawyer's forebears in Japan.

CONCLUSIONS

In conclusion, several features of the Tokugawa civil trials deserve to be re-emphasized. Dispute-settlement powers were decentralized in the family, village, or fief. Such decentralization meant that, for litigants, the first hearing before the official or lord in charge of the territory was usually the last hearing; what "appeals" there were existed largely for officials.

[102] Takigawa, *Kujiyado no kenkyū* 8–10 (1959).

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Noda, Introduction to Japanese Law (1976),
Chapter III Reception of Western Law (part), pp. 41

CHAPTER III

RECEPTION OF WESTERN LAW

THE PROCESS OF RECEPTION

In 1853 Commodore Matthew Calbraith Perry of the United States Navy arrived in Japan to present to the Tokugawa government a letter from President Fillmore to the Japanese emperor, asking Japan to open its doors freely to foreigners once more. Perry was escorted by four warships. Though the tone of the letter was courteous, it left no doubt of the real intention of the United States, and the Bakufu was thrown into great confusion. Already a small number of Japanese had seen the reopening of Japan to the outside world as a necessity and had launched an impassioned campaign to propagate their ideas at the risk of losing their lives.[1]

The Bakufu finally took account of the fact that it was no longer possible to maintain its policy of *sakoku* and decided to reestablish relations with foreign countries. In 1858, the fifth year of the era of Ansei, Japan concluded commercial treaties with the United States, England, France, Russia, and the Netherlands, but in its ignorance of international law it accepted unfavorable conditions. These treaties, concluded as they were on the basis of an inequality of bargaining power, could not but hurt the pride of the Japanese people, and the Meiji government which succeeded the Bakufu was obliged to try to do away with them.

The Bakufu had, even before the arrival of Perry, begun to become unsettled, and the change it then made in its policy was decisive for its fall. In the end, after violent political and military campaigns between the partisans of the imperial court, who sought to strike down the Bakufu by means of the imperial authority,

[1] E.g., Yoshida Shoin.

and those who sustained the Bakufu, the imperialists won. They were a group made up mostly of *bushi* of the lower class of the four great *han* of the southwest: Satsuma, Choshu, Tosa, and Hizen. In 1867 the last shogun handed back his political powers to the emperor, and the system of military government that had lasted for seven hundred years came to an end. A new page in Japanese history began with the era of Meiji.

This revolution is called Meiji Ishin, and *ishin* means literally "here are new things."[1] From the beginning the new government had to grapple with a critical problem—what could be done to maintain the independence of the state against the imperialistic forces of the West? Were there other ways besides adopting capitalism? No better means could be found for preserving its independence, so the new government set to modernizing the social and political organization of the country on the principles of modern capitalism. This of course called for a restructuring of the legal system, but the reform of the law was an urgent necessity anyway, as the Meiji government wanted to obtain the revision of the treaties of Ansei and the other parties to the treaties demanded the modernization of the Japanese legal system as a condition precedent to that revision. The Japanese government did not have time to allow the law to be created spontaneously in response to the needs arising from the gradual transformation of the social structure to a capitalist society. The pressure was to concentrate on providing a new legal system whatever the social state of Japan might be.

The best way to obtain this result as quickly as possible was of course to follow the example of the advanced capitalist countries, which at that time were France and England. Japan chose the legislation of France as its guide because the Common Law

[1] It is a matter of dispute whether this historical event can be called a revolution. It all depends on the definition of revolution. According to the *Vocabulaire juridique* of Henri Capitant a revolution is "a popular movement of reasonable size which aims at overthrowing the rulers of a state by force and changing the organization of that state without observing the legal requirements previously laid down." The Japanese political reform had all the elements required by this definition with the exception of "popular movement." Since the Meiji Ishin brought about a change of the subjects of political power only within the same privileged class, it could not be qualified as a revolution. It is perhaps better to speak of restoration rather than revolution, though this movement, which was not in itself a popular one, did constitute an anticipation of the will of the people.

system appeared too complicated, whereas France had the five Napoleonic codes. Moreover the French codes had already been the inspiration for many countries that were modernizing their societies. From 1869 the Japanese government showed a great interest in the translation of the French codes. One of the members of the first imperial government, Soejima Taneomi, in that very year ordered Mitsukuri Rinsho, an intellectual with a good knowledge of French, to translate the Penal Code. Mitsukuri finished a section of his translation before the end of the year and the minister of justice, Eto Shimpei, who read the translation, was greatly impressed. So impressed in fact that he rather hastily conceived the idea of also having the French Civil Code translated and applied as Japanese law, and he thereupon ordered Mitsukuri to translate the Civil Code and all the other Napoleonic codes as quickly as possible. When he gave the order to Mitsukuri, Eto is reported to have said: "Translate those codes as quickly as you can and don't worry too much about any errors you may make." Mitsukuri worked diligently and accomplished his task in less than five years.

At the end of the period the Bakufu realized the necessity of having information on things foreign and created an institute for the study and teaching of European culture (*yogaku*). The main topic for study in this institute was European languages; among them Dutch was originally considered the most important because the Netherlands was the only European country which had permission to trade with Japan through the period of the *sakoku* policy. Mitsukuri had begun by studying Dutch. He learned quickly and was soon an assistant teacher at the institute. It did not take him very long to see how important French was, and he busied himself with learning it too. He had no particular knowledge of law, but all the learned men of the *yogaku* were encyclopaedists, and were regarded as omniscient. With this background Mitsukuri undertook the task of translating the French codes. It is easy to imagine the difficulties that he must have encountered in completing his task—he did not have the use of a good French-Japanese dictionary or the assistance or advice of any French lawyer. It is therefore surprising to know that the greater part of the current Japanese legal terminology

was invented, or at least suggested, by him. Even the two basic words "right" (*kenri*) and "obligation" (*gimu*) are attributed to Mitsukuri.[3] He was like an architect who had to begin by making his own bricks. One result is that his translations are highly defective to the eyes of modern jurists, though they were of invaluable assistance to the legal men of the time. As a judge of the Japanese Supreme Court said much later, "these translated codes were like a light shining suddenly through the dark night," and the judges of the time found in them the only legal bases on which they could properly base their decisions.[4] Although none of the translated codes was applied in Japan as Eto had wished, these translations were the first step to the reception of Western law. Eto gave up the idea of applying the civil code in a translated form, but he did not give up the idea of having a Japanese civil code as soon as possible. He immediately undertook to draw up a Japanese civil code and set up a committee for the purpose, with himself as president, and proceeded with zeal on a draft based on the French Civil Code.

[3] A biography of Mitsukuri gives us some idea of his extraordinary efforts: "At the time of his translation legal science was still in its formative stages and Rinsho had no knowledge of it anyway. He had no commentary, no dictionary, and no lawyer with whom to consult. He had great difficulty in understanding difficult passages in the French texts, and as he found many ideas in them which did not exist in the traditional Japanese conception of law, he was greatly embarrassed by the lack of words with which to translate the French. He sought advice from Sinological experts, but they were unable to advise him on adequate terms. He therefore had to invent the terminology himself, but his words were not readily accepted because they were not Japanese. Words such as *kenri* and *gimu* were borrowed from Chinese words which he found in the Chinese translation of an English text of International Law! Almost all the other legal terms, such as *dosan* (moveables), *fudosan* (immoveables), *sosai* (compensation), and *mishitajoken* (condition subsequent), were invented by Rinsho after much difficult research." Fumihiko Otsuki, *Mitsukuri Rinsho Kun den* [Biography of Mitsukuri Rinsho] (Tokyo: Maruzen, 1907), pp. 88–100 passim.

[4] Although it cannot be conclusively proved that the judicial decisions of the first years of the Meiji era were based on the Japanese translations of the French codes, there is good reason to presume that this was the case. The following expressions are found in the reasoning of numerous decisions: "It is obvious according to the general principles of law . . ."; "According to the nature of things . . ."; "For the reason that . . ."; "Equity requires that . . ." There is little doubt that the judges of the time in fact relied on the rules applicable in the French codes under the guise of general principles. Boissonade said: "The civil law judges of Japan, deprived of the sources of their ancient law, are most of the time unable to rely on fixed and certain customs, and are obliged to resolve their difficulties according to the principles of natural law which they find formulated in foreign codes which form a sort of common law of the West." Gustave Boissonade, *Projet de code civil de l'Empire du Japon* (Tokyo, 1882–1889), Vol. I, p. XXIV.

After the dramatic death of Eto in 1874 by capital punishment for a political crime, the drafting work was continued under the direction of the new minister of justice, Oki Takato. In 1878 a draft civil code in three books and 1,820 articles was completed, but it was not adopted because of its too faithful imitation of the French code.

The need to modernize the law was not limited to the field of civil law, but it was in the drafting work related to the civil code that the difficulties inherent in Europeanization of the law were most felt by the draftsmen. The government therefore decided to call in French jurists to help. In 1872 Georges Bousquet, advocate at the Paris Court of Appeal, came to Japan as legal adviser to the imperial government. He stayed four years and spent his time principally in educating Japanese lawyers at a special school of French law which was established on his advice in the Ministry of Justice.[5] In 1873 Gustave Boissonade, professor at the Faculty of Law in Paris, was invited by the Japanese government to take on the task of improving the legal system,[6] and he stayed in Japan for twenty years at the wish of the Japanese. He performed a great service, not only for the law and in the education of lawyers, but also in the political field.

Boissonade began his legislative work by drafting a penal code and a criminal procedure code. He finished both in 1877 in their French form, and they were then translated into Japanese for discussion and modification by the legislature.[7] The codes were adopted and promulgated in 1880 and came into force in 1882. They were the first modern codes to be applied in Japan. Until

[5] The Japanese translation of the course that he gave at this school of law is still extant. Bousquet participated in the drafting work for the civil code project and also suggested a section of the project which he drafted himself. After his return to France, he published a very interesting in-depth study on Japan, (*Le Japon de nos jours*, 2 vols.), which is essential reading for all those who are interested in Japanese history of the period.

[6] Concerning Boissonade, see Yosiyuki Noda, "Gustave Boissonade, comparatiste ignoré," published in *Problèmes contemporains de droit comparé*, ed. Naoʃiro Sugiyama, a collection of comparative law studies commemorating the tenth anniversary of the foundation of the Japanese Institute of Comparative Law (1962), Vol. II, p. 235f.

[7] The legislature was not as yet the Imperial Diet. The most important legislative organ before the creation of the Diet was the *Genrin* (Senate). Legislative bills were in principle discussed by this body, but the government could promulgate law without prior discussion in the *Genrin*..

then the Meiji government had formulated some rules relating to crimes, but it had publicized them only in the Chinese manner as directives to public officials.[8] The Japanese people as a whole had no knowledge of the principle of legality in crime and punishment until the codes drawn up by Boissonade were promulgated. The penal code remained in force until 1908, and the criminal procedure code until 1890.

In 1879 Boissonade proceeded with the task of drafting a civil code. He took charge of drafting the bill only insofar as it related to property law. Family and succession law were to be left to Japanese draftsmen because these subjects were closely related to the traditional mores of the country, though the influence of Boissonade was very great on those parts of the draft also. Boissonade based his draft on the French Civil Code, but he used comparative methods in its elaboration. He worked tirelessly, studying the case law and theory of French civil law, trying as far as possible to harmonize it with legislative, judicial, and doctrinal developments in other countries. Of his method of work, Boissonade said: "Doubtless what Japan adopts should not be French law purely and simply. I want your government to adopt our laws only to the extent that they have been proved good by the experience of three-quarters of a century. I will use every effort to incorporate in the draft the improvements that time has shown necessary and particularly those improvements that other Western jurisdictions have adopted in their wisdom and justified by their experience."[9] Thus inspired, he drew up the text and a commentary[10] on the draft civil code in French. "The drafting of the civil code was finished in April, 1889. It has thus taken us ten years although we had the temerity to

[8] More precisely, the government promulgated three penal codes between 1868 and 1873. The first code was officially known as the Provisional Criminal Code. The last two were applied concurrently until the promulgation of the Criminal Code of Boissonade. The third code amended and complemented the second without abrogating it. The influence of the French code, though slight, can already be seen in the third code. Though the last two codes were published by the government, the preamble to them declared: "All public officers are commanded to observe the rules of this code."

[9] Gustave Boissonade, "Ecole de droit de Jedo," *Revue de Législation* (1874), p. 511.

[10] The text and commentary have come down to us in Boissonade's monumental work, "*Projet de code civil de l'Empire du Japon*, 5 vols.

believe that five years would be sufficient."[11] The draft was translated into Japanese as it was drawn up. Then the translated portions were discussed and modified by the legislature.[12]

In 1889 part of the draft drawn up by Boissonade was adopted. It contained the book on "Property," the greater part of the book on "Methods of Acquiring Property," the book on "Securities Guaranteeing Obligations," and the book on "Modes of Proof." In 1891 the other part, that was entrusted to the Japanese draftsmen, was completed. It included a book on "Persons" and a part of the book on "Methods of Acquiring Property" dealing with "Succession." Together the two parts formed a single code which was promulgated in 1891, to come into force on 1 January, 1894. The code was not just a copy of the French code but followed a plan very similar to that of the Napoleonic Code, even though it was composed of five books instead of three. Unfortunately it did not come into force as envisaged. From 1889 there were indications of a movement hostile to the future application of the code. Lawyers divided into two camps and a violent debate, which has been compared with that which arose in Germany between Savigny and Thibaut concerning the need there for a code, arose between the partisans of the immediate enforcement of the code and those who favored a postponement. Articles, monographs, and manifestoes were published and distributed for and against the Boissonade code. Postponement was demanded because the Boissonade code did not sufficiently take account of the traditional customs and morality of the Japanese people. One of the most conservative of the jurists, Hozumi Yatsuka, professor of constitutional law at the Imperial University in Tokyo, went so far as to state that once the civil code came into force, loyalty to the emperor and filial piety would be at an end. The reasoning of the partisans of postponement was ill-founded, because the part of the code strictly relating to moral traditions had been drawn up by Japanese and took account of those traditions. Furthermore, it had been modified to a great extent by the committee and by the senate in order to adapt it even more to Japanese

[11] Ibid., Vol. I, p. VIII.

[12] The drafts were first discussed by the civil code drafting committee, then by the *Genrōin*, and finally were debated in the Privy Council.

tradition.[13] The political situation, however, favored the adversaries of the Boissonade code, and in 1892 the Imperial Diet, which had begun to function as a legislative body in 1890, voted for the postponement of the civil code.

This failure of the Boissonade code is usually explained as the result of opposition between the school of French law and the school of English law.[14] Outwardly this would appear to be so, but there is possibly a more important reason, a political rather than a legal one.[15] The postponement of the code was only a manifestation of the general decline in influence of French culture.

The 1868 Restoration was brought about by *bushi* of the lower class. They had occupied a lowly place in the feudal hierarchy, though they had nevertheless belonged to the privileged class. Their ideology had never been bourgeois, but they wanted a capitalist society. For this reason the government born

[13] For example, the first draft provided that a minor, man or woman, could not marry without the consent of the parents, but the Senate changed this provision to provide that every man and woman of no matter what age had to obtain the consent of parents to marry. The new civil code of 1898, which purported to be in conformity with the wishes of the partisans of postponement, demanded parental consent only for a man under 30 and a woman under 25. Boissonade himself said: "He [the French lawyer with responsibility for drawing up the draft of the civil code, i.e., Boissonade] submitted his work [text and commentary], bit by bit to the Japanese committee. The latter, having had it translated by those members who knew French and French law, sought to reconcile the new law with the old and often sought amendments for this reason, or else they made the changes themselves when the author was unable to accept them. This is to say that in spite of his reluctance, plurality of heirs was abandoned in favor of the maintenance of rights of seniority of the kind known under the former regime, with an absolute character as regards both moveable and immoveable goods and a generality of persons, such as had never existed in any European country." Boissonade, "Les anciennes coutumes du Japon et le nouveau code civil, à l'occasion d'une double publication de M. John Henry Wigmore," *Revue française du Japon* (1894), p. 12.

[14] English law was taught along with French law from the beginning of the Meiji era. The center of instruction was the Law Faculty of Tokyo University for English law, and the school of French law in the Ministry of Justice for French law. Besides these two schools there were several others which specialized either in French law or in English law. The students of the two different systems naturally formed groups of differing legal outlooks.

[15] It is worth recalling what P. Koschaker said: "Foreign law is not received because it is considered the best. What makes a legal system suitable for reception is rather a question of force [*eine Machtfrage*]. Reception relates on the intellectual and cultural plane, at least, to the extent to which the law benefits from a position of strength: Whether this strength still exists at the time in question, or whether there is a vivid recollection of it and the civilization it represents at the time in question, is an important political question." *Europa und das römische Recht* (München: Verlag C.H. Beck, 1947), p. 138.

of the Restoration, which was made up largely of these *bushi* of the lower rank, did not want the development of a bourgeois society. Instead they favored the formation of an absolutist state, but at the beginning the government was extremely weak. This government had succeeded somehow or other in bringing the *han* under the imperial power, but it was by no means certain that it could take strength from this situation in the immediate future. It was therefore obliged to seek the voluntary collaboration of the former *han* until it had consolidated its position. It was forced to appear democratic and even appeared to respect public opinion and to encourage discussions in public. One of the five articles of the imperial declaration promulgated at the beginning of 1868 says: "It is desirable to convoke public gatherings as often as possible for the purpose of discussing all important problems." And in the same year it proclaimed the fundamental principles of government in which the principle of the separation of powers was announced. In this milieu liberal ideas from the West quickly spread among the Japanese. In the first years of the Meiji era the works of Mill, Bentham, Montesquieu, de Tocqueville, and even Rousseau, to mention only the leading names, were well known.[16] People even discussed French and English philosophy.[17] Consequently it was quite natural that the legal ideas of France and England should also be received and that French law along with English law should have exercised a considerable influence on Japanese law.[18]

Inspired by liberal ideas, a political movement called the *Jiyu Minken Undo* (the liberal movement for human rights) started about 1880. It was supported by a large part of the populace, and it succeeded in getting the government to agree to the creation

[16] From 1871 to 1877 translations of Mill's essay, *On Liberty*, *Representative Government*, *Political Economy*, and *Utilitarianism* appeared; in 1873, *Theory of Legislation* by Bentham was translated into Japanese; a complete translation of *L'esprit des lois* was made in 1875; Rousseau was well known by the partisans of the *Jiyu Minken*, and his *Social Contract* had been translated into Japanese by 1882.

[17] "... the first two decades of the Emperor Meiji's reign saw a Japan to all appearances intoxicated with the strong wine of Western thought, techniques, and customs." Richard Storry, *A History of Modern Japan* (Penguin, 1960), p. 107.

[18] Numerous French legal texts were translated in the first years of the Meiji era. From 1870 to 1889 there appeared translations of the works of Laferrière, Demolombe, Bathie, Accolas, Faustin-Hélie, Mourlon, Ortolan, Bélime, Boistel, and Baudry-Lacantinerie among others.

of a national assembly. The movement was liberal in appearance only, for most of its supporters were discontented former *bushi* who had been excluded from political power. The government took steps against the movement both by oppressing it and by corrupting its leaders. The oppression was extremely violent and the leaders were easily corrupted, so the liberal camp did not last long.

Also about this time the government was beginning to feel strong enough to show its hand. Even in 1881, when it had submitted to the pressure of the liberal movement, it had secretly decided to draw up a constitution following the Prussian model to prepare for the opening of the national assembly which had been promised to the liberals. According to its idea the new constitution was to be granted by the emperor to his subjects, and for this reason the absolutist character of the Prussian Empire was more attractive to the Japanese statesmen than was the French Republic.

From 1881 on the absolutist character of government policy became more accentuated, and this political tendency was reflected at the legal level too. The decline in the influence of French law was only one of its aspects. Another aspect was the increasingly important role that German law was playing in the Japanese legal world.[19] Seen in this context the failure of the Boissonade code becomes more comprehensible, and it is significant that the year in which the first attack was made against the code was also the year of the promulgation of the absolutist constitution.

In 1893 a council for codification studies was set up, and within the framework of this council a law-drafting commission was appointed for the civil code. It consisted of three persons, Hozumi Nobushige, Tomi Masaakira, and Ume Kenkiro, all of whom were professors in the Faculty of Law at the Imperial University of Tokyo. Tomi and Ume had done their legal studies in the Law Faculty of Lyons and both had obtained their doctorates in law there. The commission was formally charged with the revision of the Boissonade code, but basically its job was to draw up a new code. The three commissioners proceeded to their work by dividing the labor. All the topics of the code were

[19] It is no accident that the translation of German works began about 1888.

shared among them, each choosing those topics in which he believed himself most knowledgeable.

Many foreign systems were consulted in this work, but particular reference was made to the two drafts of the B.G.B. (the German Civil Code). The commission had decided to give up the scheme of the French Civil Code and substitute it with that of the B.G.B. The code was divided into five books. The first three, the general part, the book on real rights and the book on obligations, were completed in 1895, and voted by the Diet and promulgated in 1896. The other two books, on family law and succession, were then drawn up with great prudence because the draftsmen had to avoid being in a position where they would be subject to criticism for not having taken proper account of traditional morality. The last two books were finished in 1898 and approved by the Diet, and the complete new Civil Code came into force on 16 July 1898.

How much did the new code differ from the Boissonade code? Those who had favored postponement of the Boissonade code wanted to believe that it differed substantially, and looking at form alone it could indeed be thought to be entirely different, for the method followed in its construction was German; but when the content is considered the story is different. The three draftsmen adopted many of the solutions given in the drafts of the German Civil Code, but they also retained many of the provisions drafted by Boissonade. What is more they sometimes accepted solutions other than those found in either the German or Boissonade codes. The new code was therefore somewhat eclectic. Articles 415–422, relating to damages for the non-performance of obligations, may be taken by way of example. Of these eight articles six were drafted on the basis of the articles of the code drafted by Boissonade supplemented by a study of the solutions provided in other European codes, such as the German, Swiss, Austrian, and Dutch. Sometimes the draftsmen of the new code were more faithful to the Code Napoleon than Boissonade himself. Article 420, relating to penal clauses, does not allow the court to increase or diminish the sum agreed upon between the parties. This is what the French Civil Code provides in article 1,152. Yet, in his code, Boissonade had admitted the possibility

of the sum being reduced. This example in itself is insufficient to give a total view of the new Civil Code, but it does serve to show that it was not a faithful imitation of the B.G.B.

The tendencies of the three draftsmen were as follows: Hozumi, *primus inter pares*, had been educated in English law but had also studied at the University of Berlin.[39] Ume and Tomi had been trained in French law. Tomi, who had not studied in Germany, thought that the German Civil Code was better than the French. Ume represented the French law school in Japan, although he too had studied in Berlin; he had been the most ardent of those supporting the immediate implementation of the Boissonade code. At the French Civil Code centenary celebrations in 1904 at the Faculty of Law at the Imperial University of Tokyo, Ume, who was presiding, stressed the influence of French law on the new Japanese Civil Code:

> Professor Boissonade, who was invited to come to Japan, finished his drafts of the Penal Code and Criminal Procedure Code first. Then he began drawing up a civil code. This code was completed and promulgated in 1890. It was in form a little different from the French Civil Code but its content was based entirely on the French Civil Code, with account having been taken of the modifications made to it by legal theory and case law. This code never came into force. The code that replaces it and that resembles the German Civil Code in form has often wrongly been believed to follow exclusively the pattern of the German code. In truth, however, it does not. The new code is based on the French code and other codes of French origin at least as much as it is on the German code.

The legislator devoted his main efforts to the drafting of the Civil Code, but other laws were produced too.

The drafting of the Commercial Code was carried out along with that of the Civil Code. The person in charge was a German jurist, H. Roesler. He began his work in 1881 with a study of the commercial laws of all civilized countries. Although he was

[39] He was therefore familiar with German law. Hozumi was very interested in legal philosophy, and his legal ideas took an evolutionist tendency under Spencer's influence. His thinking on the civil code can be found in his English work: *Lectures on the New Japanese Civil Code as Materials for the Study of Comparative Jurisprudence*, 2nd ed., (Tokyo: Maruzen, 1912).

German his draft is based principally on the French Commercial Code. Roesler ended his work in 1884. His draft was discussed in the legislative commission created under the minister of justice in 1887, and in 1890 the Commercial Code was promulgated to come into force from 1 January, 1891. However, apart from the articles on companies and bankruptcy, for which there was a great economic need, its coming into force was postponed just as was that of the Civil Code. In 1893, in the interim period, a commission to revise the Commercial Code was appointed to the council for codification studies. This body drew up a new draft in two and a half years. The Diet voted the new Commercial Code in 1899 and it came into force on 16 June of the same year. This new code followed the German system with the subject matter allocated as follows: Book I, General Part; Book II, Commercial Companies; Book III, Commercial Acts; Book IV, Bills of Exchange; and Book V, Maritime Commerce. Book IV was abrogated in 1933 and replaced by two special laws relating to bills of exchange and cheques, which were necessitated by the accession of Japan to the Geneva Conventions on those topics; Books I and II were entirely redrafted in 1938.

In the field of judicial organization and civil procedure the influence of French law was at first very great. From the early Meiji era, Eto Shimpei was much concerned with the improvement of the judicial system and followed the French model, though in his time the separation of powers had not been implemented because the Ministry of Justice was also the Supreme Court. In 1875 a Supreme Court of an autonomous nature, called the *Daishinin* (court of superior hearings), was constituted, and beneath it were structured inferior tribunals of various types. The special school of French law created in the Ministry of Justice in 1872 was training judges; English law was being taught in the Tokyo University Law Faculty; and the special school of French law where Bousquet and Boissonade taught was annexed as a French law section to the Faculty of Law of Tokyo University in 1885. In the first years of the Meiji era a very large number of the judges were trained according to French law, and prior to the coming into force of the Japanese codes the judges decided most cases according to French or English law.

In 1904 sixteen of the twenty-nine judges of the Supreme Court were law graduates who had specialized in French law. After the promulgation of the Constitution, however, the influence of German law gradually extended to the field of judicial organization.

In 1887 the government entrusted Otto Rudolph, a German jurist, with the task of drawing up the law on the organization of the courts. Rudolph drafted a bill on the model of the German law of 1877 but he also collaborated with other foreign jurists, notably Roesler, Albert Mosse, also Germans, Boissonade, and Kirkwood, an Englishman. The bill was discussed by a commission, became law in 1890, and governed the judicial and court system until the radical reform of the judicial organization after World War II. The statute was called the Law on Court Organization, but it also dealt with the ministère public.

The evolution of the law of civil procedure was almost the same as that on judicial organization. At the beginning of the Meiji era many civil procedure laws were established on the French model,[21] but it is very doubtful whether the judicial officers of the time completely understood them. A Ministry of Justice memorandum addressed to judges in 1872 places on record that "Since the judicial service aims at protecting the rights of the people . . . , judges must handle litigants with care. However, it is said that there are some judges who confuse civil and criminal cases and submit civil litigants to birching or whipping. This is absurd, and judges are required henceforth to avoid any repetition of this sort of thing." It should also be pointed out that at this time conciliation in the manner of the preceding era was greatly encouraged, with the result that the judges had the conciliation of litigants as their main task. There was no desire to give a definitive solution to cases according to the law.[22]

The modernization of the legal system demanded the perfect-

[21] In the law of 17 July, 1873, relating to civil procedural forms, many provisions are reminiscent of those in the French code. For instance, a plaintiff had to go to a scrivener to have procedural documents drawn up. The function of this scrivener was incompatible with that of the *daigenin* (barrister), and the office was therefore perhaps created on the model of that of the *avoué*. Moreover, the number of words which may appear on each line of a page of a deed drawn up by the scrivener is laid down in the law. No such tradition had previously existed in Japan, so once again the limitation seems to have been imported from France.

[22] This is still a very strong tendency today.

ing of procedural law as well. So, in 1884 a German jurist, Techow, was asked to draw up a draft civil procedure code based on the German law of 1877. This Code of Civil Procedure was promulgated in 1890 and came into force the following year.[23] In contrast to the Civil Code, which is an eclectic work combining the French and German principles, the Code of Civil Procedure follows the German system almost exactly. There was a failure, however, to harmonize it with the Civil Code, so that in many cases there is a significant gap between the solution given in each.[24]

At the time when the movement of *Jiyu Minken* was flourishing, a great desire for a constitution was expressed among the Japanese. Numerous private projects for a constitution with varying political standpoints were published, and the greater number of the draftsmen saw that the constitution should be, if not an agreement emanating from the social will of the people, at least an agreement between the emperor and the people, and that a constituent assembly was required for this purpose. The government had other ideas; it had no intention of taking the wishes of the nation into account. After the repression of the liberal movement it secretly began the drafting of a constitution of its own. In 1882 Ito Hirobumi, one of the highest officials in the imperial government, left for Europe to study European constitutions. He concentrated his studies on constitutions of the German type and was strongly influenced by German constitutionalists such as Gneist and Stein. Ito returned to Japan in 1883, and the drafting of the constitution probably started in 1886. Three high officials faithful to Ito were chosen as his assistants, and one of them, Inoue Kowashi, was given prime responsibility for the drafting of the text. He worked with the assistance of advice from the two Germans, Roesler and Mosse, who were both known to be great admirers of the Prussian Constitution of 1850. It is natural, therefore, that the draft drawn up by Inoue bears the visible

[23] Since the date for coming into force of the Civil Code was 1898, the procedural rules were applied earlier than those of substance!

[24] For instance, the equivalent of the French *contrainte* is employed in differing senses in the two codes: article 414, paragraph 2, of the Civil Code uses it to mean *contrainte directe*, while article 734 of the Civil Procedure Code uses it in the sense of *contrainte indirecte*.

imprint of the Prussian Constitution. In 1888 the draft was completed and submitted to a specially set up private council for consideration. Ito thought that the draft of the constitution should be discussed not in any constituent assembly representing the nation but before a body composed of the great men of the state.[25] On 11 February, 1889 (legend has it that the emperor Jimmu ascended the throne on 11 February), the Constitution was solemnly granted by the emperor to his subjects. On that day the emperor informed his ancestors of the Constitution, and deigned to issue an imperial rescript in imposing style to impress upon his subjects the grandeur of the constitutional empire. He said in the rescript that he proclaimed this great charter as an intangible and everlasting gift to all his present and future subjects.

The Constitution was a work of compromise between the idea of divine law and constitutionalism, but the powers of the emperor were nevertheless undeniably great under it. Article 4 provided that the emperor was the head of the state and that he combined in his person all the governmental powers. The Imperial Diet was only an organ for collaboration with the emperor. The laws were made with its consent (article 37), but the legislative power was exercised by the emperor (article 5). The powers of the Diet were extremely limited. For example, the government could bring back the budget of the preceding year if the new year's budget was not voted on in the required time (article 71). This measure in itself considerably weakened the power of the Diet to control the government. What is more a very extensive controlling power was reserved to the emperor. He could promulgate several types of regulatory measures, such as urgent measures and independent measures (articles 8 and 9), without the intervention of the Diet. Urgent measures were issued during the period when the Diet was not sitting and could be abrogated if disapproved of by the Diet. Independent measures were those that sought to maintain public security or to increase national well-being. Neither could derogate from statutes, but they nevertheless limited the legislative power of the

[25] This privy council, which was never a constitutional organ, continued to play an important role in the absolutist government even after the promulgation of the Constitution.

Diet. Another point to note is the independence of the military. It was not the Constitution itself which formally provided for this, but under the constitutional regime the former practices continued. It consisted in placing the military power beyond the control of the civil ministers and in permitting the army and navy chiefs to deal directly with the emperor. This absurd custom favored military despotism and finally led Japan to catastrophe.

In spite of its absolutist character, the 1889 Constitution did permit the democratization of government, and a democratic political tendency did develop during this period of evolution of constitutional life in Japan. After World War I a liberal democratic movement grew in all sectors of national life. In the field of legal theory this tendency was represented by Minobe Tatsukichi, professor of constitutional law at the Faculty of Law of the Imperial University of Tokyo, and Yoshino Sakuzo, professor of political science of the same faculty. Unfortunately the democrats were forced to retract under the pressures of the military. In sum, what was assured by the Constitution was, as Professor Oka, one of the most eminent historians of Japanese politics, points out, only apparent constitutionalism.

In the field of administrative law the evolution was very complicated. In the first years of the Meiji era the political and administrative organization was modified frequently. Initially the *ritsu-ryo* system was reinstated, but slowly the influences of French and English law were felt in this field too. In 1871 the *han* regime was suppressed and the country was divided into *ken* (prefectures). The reform reverted to an old model, but even at this time some European influence could be traced in the law. About 1885 the central and local administration was perfected along Prussian lines. In 1885 the cabinet (*naikaku*) system of government was established, and in 1888 a law on *communes* and in 1890 a law on *departements* was promulgated. The operation of the Japanese administration before World War I was characterized by its bureaucratic, centralized, and police-state tendencies.

Japan made great efforts to modernize its legal system on the model of the advanced countries, and it is not an exaggeration to say that the modernization can be analyzed as a Europeanization or Westernization of Japan. It has been shown that the basic

structure of the Japanese legal system was formed mainly by German and French law, but, as has also been shown, the rules of these Western laws were not always properly understood by the Japanese draftsmen. In one piece of legislation rules borrowed from both French and German law could be found. The draftsmen were short of time and often combined rules superficially without harmonizing them at a conceptual level. The reception was not a direct one. It was the result of a complex process of referring from one body of law to the other.

REAL SIGNIFICANCE OF THE RECEPTION

Although Japan succeeded in faithfully and skillfully imitating the French and German legal systems, its own culture could not help but give an original character to the system that was received. The rapid Europeanization was limited to the field of state law, which dealt with only a very small section of Japanese society. Further, it must not be forgotten that the modernized law was put into operation by men whose outlook was determined by a peculiar set of geographical and historical factors. As Koschaker said, "No legislator could avoid leaving some area for the application of indigenous law, and even if he envisaged an en bloc reception it is doubtful that he could even then completely exclude indigenous law. For though the law can be changed from one day to the next, the men to whom it is applied and those who have to apply it in the future cannot be changed this way."[28] Japan was destined to remain a long time subject to social rules that were quite foreign to the received law.

The modern codes predicated a bourgeois society in which every individual is presumed free and equal with everyone else, in which all legal relationships constitutive of rights and obligations are formed by the individuals themselves, and where legal relationships are created by the exercise of the individual's free will. This is of course an ideal which no real society fully attains, though it is true that any modern society worthy of the name does attain the ideal to a greater or lesser degree. There was no

[28] Koschaker, *Europa und das römische Recht*, p. 145.

important difference between the archetypal society on which the French Civil Code was based and the society to which it applied, which is why the school of exegesis was able to dominate French legal thought till the end of the nineteenth century. Japanese society, on the other hand, retained an essentially archaic morality from the preceding period after the reception of Western law. There was a great gap between the society presumed by the modern-style codes and that which existed almost independently of them. Japanese society had no knowledge of ideas of right and duty before the reception, and so the school of *Begriffs-jurisprudenz* prospered in Japan after the promulgation of the codes. Japanese jurists did not concern themselves with the actual life of the people because this life followed rules of quite a different kind from those of state law. Even the people did not want the state law to be interpreted for their benefit, so that judges contented themselves with giving logical coherence to their decisions without trying to convince the parties. A former professor commenting on the judicial practice of the prewar judges said, "A good judge was considered to be the one who disposed of contrary arguments by saying that they were ill-founded in as few words as possible. The judge's merit was in his being able to formulate his decisions in an extremely laconic manner and in his having some knowledge of the German language."

Why was Japanese society able to continue in this way for such a long time in spite of the rapid progress of modern capitalism? The development of capitalism in Japan was dominated from the beginning by political rather than economic considerations. The Meiji Restoration of 1868 was not brought about by the bourgeoisie. The lower ranking samurai, who were the main engineers of the political reform, had absolutely no intention of abandoning the feudal principles which they considered constituted a morality far superior to the European. They understood that they could not preserve Japan's independence without recourse to the material means that the Western powers controlled, but they believed that it was possible to adopt the material civilization of Europe and to harmonize it with Oriental morality. Even the most progressive intellectuals toward the end of

the Edo period expressed this idea, and their motto was "Western techniques, Oriental morality." As a consequence the Meiji government intended to modernize Japan only to the extent necessary to make it an equal of the great powers of the world. It was necessary to be wealthy and strong; thus the basic principle of government was embodied in the motto *fukoku kyohei* (rich country and strong military).

The adoption of capitalism proceeded not just from the economic point of view but also from the political and military points of view. From its inception Japanese capitalism was encircled by a martial halo, but being in its infancy it was weak both bodily and spiritually. It did not have enough energy to grow healthily. The initial accumulation of capital was insufficient, there was no spirit of liberalism, and free competition was unknown. All the modern industrial enterprises were promoted by the government and then given by way of concession to individuals subject to the diligent protection of the state. The Japanese bourgeoisie was nurtured by the government, and was, in a sense, the favorite daughter of absolutism. There was neither liberalism nor individualism in its spirit. What a difference between that and the *Geist des Kapitalismus* of which Max Weber speaks. The Japanese never thought that the state could be a necessary evil. They did not even realize that the state could be founded on social contract, and it is perhaps in this that their chauvinism lies.

The historical conditions were obviously favorable to the survival of the former morality, but there is yet another factor that prevented the breakdown of the previous structuring of Japanese society. Japanese capitalism was unable to make use of sophisticated machines in its early stages, so it had to resort to the labor of women and children. The rural population was therefore partially absorbed by industry, but even when the great industrial enterprises needed workers, those who had originally come from the country returned to the country in periods of unemployment. The result was that the rural areas were an asylum for the unemployed and sheltered a very large number of inhabitants living in conditions little better than those of the preceding era. Agricultural exploitation was maintained usually

by the labor of the members of each peasant family, and the mechanization of agriculture was retarded by this abundance of manpower. Naturally, the tempo of life remained static and society changed little.[27] As a result Japanese capitalism, prospering as it did at the expense of the peasants and workers, was unable to find any worthwhile internal market and was obliged to seek an outlet for its goods in external markets, which helped to accentuate its militaristic character.

The government for its part profited one hundred percent from the situation and tried to reinforce the outlook of the people through the national education system. In 1890 an imperial rescript was issued defining the fundamental principles of public education. These principles rested on Confucianism and emphasized loyalty to the emperor and filial piety as cardinal virtues. The state was conceived as a large family in which a hierarchical order was operative. At the top of the hierarchy was the emperor, the compassionate father of the nation. He was a divine man, literally an incarnate divinity. Not only was he omnipotent but he was himself the source of morality. On all national festivals a solemn ceremony took place in all schools for the cult of the emperor. All those present had to give adoration to the imperial image and then in an impressive voice the principal of the school would read the Imperial Rescript on Education. Thus the whole nation was indoctrinated from childhood with the idea that Japan was a holy country guarded by godly ancestors and the emperor himself and could never be conquered by its enemies. This sacred and mystical character of the Japanese state was called *kokutai* (the form of the state) and the slightest fault committed against *kokutai* was severely punished as a crime of *lèse-majesté*. The old customs were linked to *kokutai* and criticism of them, even of a purely scientific nature, was severely repressed as a dangerous idea.[28]

[27] This state of affairs continues today in the backward areas of Japan. R. Guillain, Tokyo correspondent of *Le Monde*, published very interesting articles on this subject in *Le Monde*, 27–30 December, 1962.

[28] This is the sole reason why scientific historical studies ran into almost insurmountable difficulties in the prewar period. All critical research incompatible with the traditional myths was severely repressed. Many excellent historians were put out of jobs because they studied Japanese history from a critical viewpoint. It is only since the war that the history of ancient Japan is being clearly established.

After World War I jurists had begun a critical and sociological study of law, and also a very lively movement toward democracy was growing among a large section of the populace. This tendency coincided with the movement for social rights in Europe, but in Japan it was nothing more than the beginning of true liberalism and democracy. The dominant class feared this development, and in 1925 it had a law, which is well known in Japan for its severity, voted by the Diet. This was the *chian-iji-ho*, the law on the maintenance of the public security. The first article provided: "Those who have associated to reform the *kokutai* or to deny the private property regime as well as those who have knowingly cooperated with them, will be punished by imprisonment with or without hard labor for a term not exceeding ten years." This law was used, with the assistance of the police and the special secret police, *tokubetsu koto keisatsu*,[29] to repress progressive ideas.[30] Originally it was used to repress communist activities, but in the end it was used to stifle any idea that could, in the eyes of the ruling class, constitute the slightest danger to the existing political regime.

Such was the cultural milieu in which the reception of Western laws was undertaken. It is easy to see what a great gulf existed between the social structure presupposed by the received legal system and that which operated in Japan. Rationalism, which is the soul of modern law, was for the Japanese only a beautiful borrowed garment which hid a traditional psychology imbued with mystic sentimentalism. The *homo juridicus* on which modern law was based was a man who thought mathematically and logically and had no concern for the delicacy of the subtle nuances of concrete life. Those who were not used to the abstraction of objective things were embarrased by a fashion of thought which admitted only two colors, black and white. The Japanese, a man of poetry, had great difficulty adapting to legal rationalism, but eventually he began to understand this law which guaranteed him his liberty and personal dignity.

[29] Also called *tokko*.

[30] A very large number of intellectuals were victims of the *tokko* because of their progressive ideas.

4

4

From; Hideo TANAKA, The Japanese Legal System
(University of Tokyo Press, 1976)

CONSTITUTION OF THE EMPIRE OF JAPAN, 1889
[Meiji Constitution]*

Promulgated on February 11, 1889; Put into effect on November 29, 1890 (based upon the 4th paragraph of the Edict); Superseded by the Constitution of Japan on May 3, 1947.

Imperial Oath Sworn in the Sanctuary in the Imperial Palace (*Tsuge-bumi*)

We, the Successor to the prosperous Throne of Our Predecessors, do humbly and solemnly swear to the Imperial Founder of Our House and to Our other Imperial Ancestors that, in pursuance of a great policy co-extensive with the Heavens and with the Earth, We shall maintain and secure from decline the ancient form of government.

In consideration of the progressive tendency of the course of human affairs and in parallel with the advance of civilization, We deem it expedient, in order to give clearness and distinctness to the instructions bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors, to establish fundamental laws formulated into express provisions of law, so that, on the one hand, Our Imperial posterity may possess an express guide for the course they are to follow, and that, on the other, Our subjects shall thereby be enabled to enjoy a wider range of action in giving Us their support, and that the observance of Our laws shall continue to the remotest ages of time. We will thereby to give greater firmness to the stability of Our country and to promote the welfare of all the people within the boundaries of Our dominions; and We now establish the Imperial House Law and the Constitution. These Laws come to only an exposition of grand precepts for the conduct of the government, bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors. That we have been so fortunate in Our reign, in keeping with the tendency of the times, as to accomplish this work, We owe to the glorious Spirits of the Imperial Founder of Our House and of Our other Imperial Ancestors.

We now reverently make Our prayer to Them and to Our Illustrious Father, and implore the help of Their Sacred Spirits, and make to Them solemn oath never at this time nor in the future to fail to be an example to Our subjects in the observance of the Laws hereby established.

May the heavenly Spirits witness this Our solemn Oath.

Imperial Rescript on the Promulgation of the Constitution

Whereas We make it the joy and glory of Our heart to behold the prosperity of Our country, and the welfare of Our subjects, We do hereby, in virtue of the supreme power We inherit from Our Imperial Ancestors, promulgate the present immutable fundamental law, for the sake of Our present subjects and their descendants.

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* The following is the semi-official translation, which appeared in Count H. Itô, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN (M. Itô transl. 1889).

The Imperial Founder of Our House and Our other Imperial Ancestors, by the help and support of the forefathers of Our subjects, laid the foundation of Our Empire upon a basis, which is to last forever. That this brilliant achievement embellishes the annals of Our country, is due to the glorious virtues of Our Sacred Imperial Ancestors, and to the loyalty and bravery of Our subjects, their love of their country and their public spirit. Considering that Our subjects are the descendants of the loyal and good subjects of Our Imperial Ancestors, We doubt not but that Our subjects will be guided by Our views, and will sympathize with all Our endeavours, and that, harmoniously cooperating together, they will share with Us Our hope of making manifest the glory of Our country, both at home and abroad, and of securing forever the stability of the work bequeathed to Us by Our Imperial Ancestors.

Preamble [or Edict] (*jōyu*)

Having, by virtue of the glories of Our Ancestors, ascended the Throne of a lineal succession unbroken for ages eternal; desiring to promote the welfare of, and to give development to the moral and intellectual faculties of Our beloved subjects, the very same that have been favoured with the benevolent care and affectionate vigilance of Our Ancestors; and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate, in pursuance of Our Imperial Rescript of the 12th day of the 10th month of the 14th year of Meiji, a fundamental law of the State, to exhibit the principles, by which We are guided in Our conduct, and to point out to what Our descendants and Our subjects and their descendants are forever to conform.

The right of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to Our descendants. Neither We nor they shall in the future fail to wield them, in accordance with the provisions of the Constitution hereby granted.

We now declare to respect and protect the security of the rights and of the property of Our people, and to secure to them the complete enjoyment of the same, within the extent of the provisions of the present Constitution and of the law.

The Imperial Diet shall first be convoked for the 23rd year of Meiji and the time of its opening shall be the date, when the present Constitution comes into force.

When in the future it may become necessary to amend any of the provisions of the present Constitution, We or Our successors shall assume the initiative right, and submit a project for the same to the Imperial Diet. The Imperial Diet shall pass its vote upon it, according to the conditions imposed by the present Constitution, and in no otherwise shall Our descendants or Our subjects be permitted to attempt any alteration thereof.

Our Ministers of State, on Our behalf, shall be held responsible for the carrying out of the present Constitution, and Our present and future subjects shall forever assume the duty of allegiance to the present Constitution.

CHAPTER I. THE EMPEROR

Article 1. The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.

Article 2. The Imperial Throne shall be succeeded to by Imperial male descendants, according to the provisions of the Imperial House Law.

Article 3. The Emperor is sacred and inviolable.

Article 4. The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitutions.

Article 5. The Emperor exercises the legislative power with the consent of the Imperial Diet.

Article 6. The Emperor gives sanction to laws, and orders them to be promulgated and executed.

Article 7. The Emperor convokes the Imperial Diet, opens, closes, and prorogues it, and dissolves the House of Representatives.

Article 8. The Emperor, in consequence of an urgent neccessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, Imperial Ordinances in the place of law.

(2) Such Imperial Ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said Ordinances, the Government shall declare them to be invalid for the future.

Article 9. The Emperor issues or causes to be issued, the Ordinances necessary for the carrying out of the laws, or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no Ordinance shall in any way alter any of the existing laws.

Article 10. The Emperor determines the organization of the different branches of the administration, and salaries of all civil and military officers, and appoints and dismisses the same. Exceptions especially provided for in the present Constitution or in other laws, shall be in accordance with the respective provisions (bearing thereon).

Article 11. The Emperor has the supreme command of the Army and Navy.

Article 12. The Emperor determines the organization and peace standing of the Army and Navy.

Article 13. The Emperor declares war, makes peace, and concludes treaties.

Article 14. The Emperor declares a state of siege.

(2) The conditions and effects of a state of siege shall be determined by law.

Article 15. The Emperor confers titles of nobility, rank, orders and other marks of honor.

Article 16. The Emperor orders amnesty, pardon, commutation of punishments and rehabilitation.

Article 17. A Regency shall be instituted in conformity with the provisions of the Imperial House Law.

(2) The Regent shall exercise the powers appertaining to the Emperor in His name.

CHAPTER II. RIGHTS AND DUTIES OF SUBJECTS

Article 18. The conditions necessary for being a Japanese subject shall be determined by law.

Article 19. Japanese subjects may, according to qualifications determined in laws or ordinances, be appointed to civil or military or any other public offices equally.

Article 20. Japanese subjects are amenable to service in the Army or Navy, according to the provisions of law.

Article 21. Japanese subjects are amenable to the duty of paying taxes, according to the provisions of law.

Article 22. Japanese subjects shall have the liberty of abode and of changing the same within the limits of the law.

Article 23. No Japanese subject shall be arrested, detained, tried or punished, unless according to law.

Article 24. No Japanese subject shall be deprived of his right of being tried by the judges determined by law.

Article 25. Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent.

Article 26. Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolate.

Article 27. The right of property of every Japanese subject shall remain inviolate.

(2) Measures necessary to be taken for the public benefit shall be provided for by law.

Article 28. Japanese subjects shall, ~~within limits not prejudicial to peace and order~~, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.

Article 29. Japanese subjects shall, ~~within the limits of law~~, enjoy the liberty of speech, writing, publication, public meetings and associations.

Article 30. Japanese subjects may present petitions, by observing the proper forms of respect, and by complying with the rules specially provided for the same.

Article 31. The provisions contained in the present Chapter shall not affect the exercises of the powers appertaining to the Emperor, in times of war or in cases of a national emergency.

Article 32. Each and every one of the provisions contained in the preceding Articles of the present Chapter, that are not in conflict

Debs. v. US (1919 ~~1930~~) limiting anti-war party speech.

Schenck v. US (1919) (Holmes, Fire in movie theater)

with the laws or the rules and discipline of the Army and Navy, shall apply to the officers and men of the Army and of the Navy.

CHAPTER III. THE IMPERIAL DIET

Article 33. The Imperial Diet shall consist of two Houses, a House of Peers and a House of Representatives.

Article 34. The House of Peers shall, in accordance with the Ordinance concerning the House of Peers, be composed of the members of the Imperial Family, of the orders of nobility, and of those who have been nominated thereto by the Emperor.

Article 35. The House of Representatives shall be composed of Members elected by the people, according to the provisions of the Law of Election.

Article 36. No one can at one and the same time be a Member of both Houses.

Article 37. Every law requires the consent of the Imperial Diet.

Article 38. Both Houses shall vote upon projects of law submitted to it by the Government, and may respectively initiate projects of law.

Article 39. A Bill, which has been rejected by either the one or the other of the two Houses, shall not be brought in again during the same session.

Article 40. Both Houses can make representations to the Government, as to laws or upon any other subject. When, however, such representations are not accepted, they cannot be made a second time during the same session.

Article 41. The Imperial Diet shall be convoked every year.

Article 42. A session of the Imperial Diet shall last during three months. In case of necessity, the duration of a session may be prolonged by the Imperial Order.

Article 43. When urgent necessity arises, an extraordinary session may be convoked in addition to the ordinary one.

(2) The duration of an extraordinary session shall be determined by Imperial Order.

Article 44. The opening, closing, prolongation of session and prorogation of the Imperial Diet, shall be effected simultaneously for both Houses.

(2) In case the House of Representatives has been ordered to dissolve, the House of Peers shall at the same time be prorogued.

Article 45. When the House of Representatives has been ordered to dissolve, Members shall be caused by Imperial Order to be newly elected, and the new House shall be convoked within five months from the day of dissolution.

Article 46. No debate can be opened and no vote can be taken in either House of the Imperial Diet, unless not less than one-third of the whole number of Members thereof is present.

Article 47. Votes shall be taken in both Houses by absolute majority. In the case of a tie vote, the President shall have the casting vote.

Article 48. The deliberations of both Houses shall be held in public. The deliberations may, however, upon demand of the Government or by resolution of the House, be held in secret sitting.

Article 49. Both Houses of the Imperial Diet may respectively present addresses to the Emperor.

Article 50. Both Houses may receive petitions presented by subjects.

Article 51. Both Houses may enact, besides what is provided for in the present Constitution and in the Law of the Houses, rules necessary for the management of their internal affairs.

Article 52. No Member of either House shall be held responsible outside the respective Houses, for any opinion uttered or for any vote given in the House. When, however, a Member himself has given publicity to his opinions by public speech, by documents in print or in writing, or by any other similar means, he shall, in the matter, be amenable to the general law.

Article 53. The Members of both Houses shall, during the session, be free from arrest, unless with the consent of the House, except in cases of flagrant delicts, or of offenses connected with a state of internal commotion or with a foreign trouble.

Article 54. The Ministers of State and the Delegates of the Government may, at any time, take seats and speak in either House.

CHAPTER IV. THE MINISTERS OF STATE AND THE PRIVY COUNCIL

Article 55. The respective Ministers of State shall give their advice to the Emperor, and be responsible for it.

(2) All Laws, Imperial Ordinances, and Imperial Rescripts of whatever kind, that relate to the affairs of the State, require the countersignature of a Minister of State.

Article 56. The Privy Councillors shall, in accordance with the provisions for the organization of the Privy Council, deliberate upon important matters of State, when they have been consulted by the Emperor.

CHAPTER V. THE JUDICATURE

Article 57. The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.

(2) The organization of the Courts of Law shall be determined by law.

Article 58. The judges shall be appointed from among those, who possess proper qualifications according to law.

(2) No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment.

(3) Rules for disciplinary punishment shall be determined by law.

Article 59. Trials and judgments of a Court shall be conducted publicly. When, however, there exists any fear, that such publicity may be prejudicial to peace and order, or to the maintenance of public morality, the public trial may be suspended by provisions of law or by the decision of the Court of Law.

Article 60. All matters, that fall within the competency of a special Court, shall be specially provided for by law.

Article 61. No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by a Court of Law.

CHAPTER VI. FINANCE

Article 62. The imposition of a new tax or the modification of the rates (of an existing one) shall be determined by law.

(2) However, all such administrative fees or other revenue having the nature of compensation shall not fall within the category of the above clause.

(3) The raising of national loans and the contracting of other liabilities to the charge of the National Treasury, except those that are provided in the Budget, shall require the consent of the Imperial Diet.

Article 63. The taxes levied at present shall, in so far as they are not remodelled by a new law, be collected according to the old system.

Article 64. The expenditure and revenue of the State require the consent of the Imperial Diet by means of an annual Budget.

(2) Any and all expenditures overpassing the appropriations set forth in the Titles and Paragraphs of the Budget, or that are not provided for in the Budget, shall subsequently require the approbation of the Imperial Diet.

Article 65. The Budget shall be first laid before the House of Representatives.

Article 66. The expenditures of the Imperial House shall be defrayed every year out of the National Treasury, according to the present fixed amount for the same, and shall not require the consent thereto of the Imperial Diet, except in case an increase thereof is found necessary.

Article 67. Those already fixed expenditures based by the Constitution upon the powers appertaining to the Emperor, and such

expenditures as may have arisen by the effect of law, or that appertain to the legal obligations of the Government, shall be neither rejected nor reduced by the Imperial Diet, without the concurrence of the Government.

Article 68. In order to meet special requirements, the Government may ask the consent of the Imperial Diet to a certain amount as a Continuing Expenditure Fund, for a previously fixed number of years.

Article 69. In order to supply deficiencies, which are unavoidable, in the Budget, and to meet requirements unprovided for in the same, a Reserve Fund shall be provided in the Budget.

Article 70. When the Imperial Diet cannot be convoked, owing to the external or internal condition of the country, in case of urgent need for the maintenance of public safety, the Government may take all necessary financial measures, by means of an Imperial Ordinance.

(2) In the case mentioned in the preceding clause, the matter shall be submitted to the Imperial Diet at its next session, and its approbation shall be obtained thereto.

Article 71. When the Imperial Diet has not voted on the Budget, or when the Budget has not been brought into actual existence, the Government shall carry out the Budget of the preceding year.

Article 72. The final account of the expenditures and revenues of the State shall be verified and confirmed by the Board of Audit, and it shall be submitted by the Government to the Imperial Diet, together with the report of verification of the said Board.

(2) The organization and competency of the Board of Audit shall be determined by law separately.

CHAPTER VII. SUPPLEMENTARY RULES

Article 73. When it has become necessary in future to amend the provisions of the present Constitution, a project to the effect shall be submitted to the Imperial Diet by Imperial Order.

(2) In the above case, neither House can open the debate, unless not less than two-thirds of the whole number of Members are present, and no amendment can be passed, unless a majority of not less than two-thirds of the Members present is obtained.

Article 74. No modification of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet.

(2) No provision of the present Constitution can be modified by the Imperial House Law.

Article 75. No modification can be introduced into the Constitution, or into the Imperial House Law, during the time of a Regency.

Article 76. Existing legal enactments, such as laws, regulations, Ordinances, or by whatever names they may be called, shall, so far as they do not conflict with the present Constitution, continue in force.

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THE CONSTITUTION OF JAPAN, 1946*

Promulgated on November 3, 1946; Put into effect on May 3, 1947.

We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution.

Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith.

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.

We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.

We, the Japanese people, pledge our national honor to accomplish these high ideals and purposes with all our resources.

CHAPTER I. THE EMPEROR

Article 1. The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.

Article 2. The Imperial Throne shall be dynastic and succeeded to in accordance with the Imperial House Law passed by the Diet.

Article 3. The advice and approval of the Cabinet shall be re-

* The following is the official translation.

quired for all acts of the Emperor in matters of state, and the Cabinet shall be responsible therefor.

Article 4. The Emperor shall perform only such acts in matters of state as are provided for in this Consitution and he shall not have powers related to government.

(2) The Emperor may delegate the performance of his acts in matters of state as may be provided by law.

Article 5. When, in accordance with the Imperial House Law, a Regency is established, the Regent shall perform his acts in matters of state in the Emperor's name. In this case, paragraph one of the preceding article will be applicable.

Article 6. The Emperor shall appoint the Prime Minister as designated by the Diet.

(2) The Emperor shall appoint the Chief Judge of the Supreme Court as designated by the Cabinet.

Article 7. The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people:

(i) Promulgation of amendments of the constitution, laws, cabinet orders and treaties;
(ii) Convocation of the Diet;
(iii) Dissolution of the House of Representatives;
(iv) Proclamation of general election of members of the Diet;
(v) Attestation of the appointment and dismissal of Ministers of State and other officials as provided for by law, and of full powers and credentials of Ambassadors and Ministers;
(vi) Attestation of general and special amnesty, commutation of punishment, reprieve, and restoration of rights;
(vii) Awarding of honors;
(viii) Attestation of instruments of ratification and other diplomatic documents as provided for by law;
(ix) Receiving foreign ambassadors and ministers;
(x) Performance of ceremonial functions.

Article 8. No property can be given to, or received by, the Imperial House, nor can any gifts be made therefrom, without the authorization of the Diet.

CHAPTER II. RENUNCIATION OF WAR

Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.

(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

CHAPTER III. RIGHTS AND DUTIES OF THE PEOPLE

Article 10. The conditions necessary for being a Japanese national shall be determined by law.

Article 11. The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.

Article 12. The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.

Article 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Article 14. All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

(2) Peers and peerage shall not be recognized.

(3) No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

Article 15. The people have the inalienable right to choose their public officials and to dismiss them.

(2) All public officials are servants of the whole community and not of any group thereof.

(3) Universal adult suffrage is guaranteed with regard to the election of public officials.

(4) In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.

Article 16. Every person shall have the right of peaceful petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations and for other matters, nor shall any person be in any way discriminated against for sponsoring such a petition.

Article 17. Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official.

Article 18. No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited.

Article 19. Freedom of thought and conscience shall not be violated

Article 20. Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State nor exercise any political authority.

(2) No person shall be compelled to take part in any religious acts, celebration, rite or practice.

(3) The State and its organs shall refrain from religious education or any other religious activity.

Article 21. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

(2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

Article 22. Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.

(2) Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.

Article 23. Academic freedom is guaranteed.

Article 24. Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.

(2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual diginity and the essential equality of the sexes.

Article 25. All people shall have the right to maintain the minimum standards of wholesome and cultured living.

(2) In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

Article 26. All people shall have the right to receive an equal education correspondent to their ability, as provided by law.

(2) All people shall be obligated to have all boys and girls under their protection receive ordinary educations as provided for by law. Such compulsory education shall be free.

Article 27. All people shall have the right and the obligation to work.

(2) Standards for wages, hours, rest and other working conditions shall be fixed by law.

(3) Children shall not be exploited.

Article 28. The right of workers to organize and to bargain and act collectively is guaranteed.

Article 29. The right to own or to hold property is inviolable.

(2) Property rights shall be defined by law, in conformity with the public welfare.

(3) Private property may be taken for public use upon just compensation therefor.

Article 30. The people shall be liable to taxations as provided by law.

Article 31. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

Article 32. No person shall be denied the right of access to the courts.

Article 33. No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, the offense being committed.

Article 34. No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

Article 35. The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33.

(2) Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

Article 36. The infliction of torture by any public officer and cruel punishments are absolutely forbidden.

Article 37. In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

(2) He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense.

(3) At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

Article 38. No person shall be compelled to testify against himself.

(2) Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.

(3) No person shall be convicted or punished in cases where the only proof against him is his own confession.

Article 39. No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.

Article 40. Any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law.

CHAPTER IV. THE DIET

Article 41. The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.

Article 42. The Diet shall consist of two Houses, namely the House of Representatives and the House of Councillors.

Article 43. Both Houses shall consist of elected members, representative of all the people.

(2) The number of the members of each House shall be fixed by law.

Article 44. The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.

Article 45. The term of office of members of the House of Representatives shall be four years. However, the term shall be terminated before the full term is up in case the House of Representatives is dissolved.

Article 46. The term of office of members of the House of Councillors shall be six years, and election for half the members shall take place every three years.

Article 47. Electoral districts, method of voting and other matters pertaining to the method of election of members of both Houses shall be fixed by law.

Article 48. No person shall be permitted to be a member of both Houses simultaneously.

Article 49. Members of both Houses shall receive appropriate annual payment from the national treasury in accordance with law.

Article 50. Except in cases provided by law, members of both Houses shall be exempt from apprehension while the Diet is in session, and any members apprehended before the opening of the session shall be freed during the term of the session upon demand of the House.

Article 51. Members of both Houses shall not be held liable outside the House for speeches, debates or votes cast inside the House.

Article 52. An ordinary session of the Diet shall be convoked once per year.

Article 53. The Cabinet may determine to convoke extraordinary sessions of the Diet. When a quarter or more of the total members of either House makes the demand, the Cabinet must determine on such convocation.

Article 54. When the House of Representatives is dissolved, there must be a general election of members of the House of Representatives within forty (40) days from the date of dissolution, and the Diet must be convoked within thirty (30) days from the date of the election.

(2) When the House of Representatives is dissolved, the House of Councillors is closed at the same time. However, the Cabinet may in time of national emergency convoke the House of Councillors in emergency session.

(3) Measures taken at such session as mentioned in the proviso of the preceding paragraph shall be provisional and shall become null and void unless agreed to by the House of Representatives within a period of ten (10) days after the opening of the next session of the Diet.

Article 55. Each House shall judge disputes related to qualifications of its members. However, in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two-thirds or more of the members present.

Article 56. Business cannot be transacted in either House unless one-third or more of total membership is present.

(2) All matters shall be decided, in each House, by a majority of those present, except as elsewhere provided in the Constitution, and in case of a tie, the presiding officer shall decide the issue.

Article 57. Deliberation in each House shall be public. However, a secret meeting may be held where a majority of two-thirds or more of those members present passes a resolution therefor.

(2) Each House shall keep a record of proceedings. This record shall be published and given general circulation, excepting such parts of proceedings of secret session as may be deemed to require secrecy.

(3) Upon demand of one-fifth or more of the members present, votes of the members on any matter shall be recorded in the minutes.

Article 58. Each House shall select its own president and other officials.

(2) Each House shall establish its rules pertaining to meetings, proceedings and internal discipline, and may punish members for disorderly conduct. However, in order to expel a member, a majority of two-thirds or more of those members present must pass a resolution thereon.

Article 59. A bill becomes a law on passage by both Houses, except as otherwise provided by the Constitution.

(2) A bill which is passed by the House of Representatives, and upon which the House of Councillors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two-thirds or more of the members present.

(3) The provision of the preceding paragraph does not preclude the House of Representatives from calling for the meeting of a joint committee of both Houses, provided for by law.

(4) Failure by the House of Councillors to take final action within sixty (60) days after receipt of a bill passed by the House of Representatives, time in recess excepted, may be determined by the

House of Representatives to constitute a rejection of the said bill by the House of Councillors.

Article 60. The Budget must first be submitted to the House of Representatives.

(2) Upon consideration of the budget, when the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within thirty (30) days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet.

Article 61. The second paragraph of the preceding article applies also to the Diet approval required for the conclusion of treaties.

Article 62. Each House may conduct investigations in relation to government, and may demand the presence and testimony of witnesses, and the production of records.

Article 63. The Prime Minister and other Ministers of State may, at any time, appear in either House for the purpose of speaking on bills, regardless of whether they are members of the House or not. They must appear when their presence is required in order to give answers or explanations.

Article 64. The Diet shall set up an impeachment court from among the members of both Houses for the purpose of trying those judges against whom removal proceedings have been instituted.

(2) Matters relating to impeachment shall be provided by law.

CHAPTER V. THE CABINET

Article 65. Executive power shall be vested in the Cabinet.

Article 66. The Cabinet shall consist of the Prime Minister, who shall be its head, and other Ministers of State, as provided for by law.

(2) The Prime Minister and other Ministers of State must be civilians.

(3) The Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet.

Article 67. The Prime Minister shall be designated from among the members of the Diet by a resolution of the Diet. This designation shall precede all other business.

(2) If the House of Representatives and the House of Councillors disagrees and if no agreement can be reached even through a joint committee of both Houses, provided for by law, or the House of Councillors fails to make designation within ten (10) days, exclusive of the period of recess, after the House of Represengatives has made designation, the decision of the House of Representatives shall be the decision of the Diet.

Article 68. The Prime Minister shall appoint the Ministers of

State. However, a majority of their number must be chosen from among the members of the Diet.

(2) The Prime Minister may remove the Ministers of State as he chooses.

Article 69. If the House of Representatives passes a non-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign en masse, unless the House of Representatives is dissolved with ten (10) days.

Article 70. When there is a vacancy in the post of Prime Minister, or upon the first convocation of the Diet after a general election of members of the House of Representatives, the Cabinet shall resign en masse.

Article 71. In the cases mentioned in the two preceding articles, the Cabinet shall continue its functions until the time when a new Prime Minister is appointed.

Article 72. The Prime Minister, representing the Cabinet, submits bills, reports on general national affairs and foreign relations to the Diet and exercises control and supervision over various administrative branches.

Article 73. The Cabinet, in addition to other general administrative functions, shall perform the following functions:

(i) Administer the law faithfully; conduct affairs of state;
(ii) Manage foreign affairs;
(iii) Conclude treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet;
(iv) Administer the civil service, in accordance with standards established by law;
(v) Prepare the budget, and present it to the Diet;
(vi) Enact cabinet orders in order to execute the provisions of this Constitution and of the law. However, it cannot include penal provisions in such cabinet orders unless authorized by such law.
(vii) Decide on general amnesty, special amnesty, commutation of punishment, reprieve, and restoration of rights.

Article 74. All laws and cabinet orders shall be signed by the competent Minister of State and countersigned by the Prime Minister.

Article 75. The Ministers of State, during their tenure of office, shall not be subject to legal action without the consent of the Prime Minister. However, the right to take that action is not impaired hereby.

CHAPTER VI. JUDICIARY

Article 76. The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

(2) No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.

(3) All judges shall be independent in the exercise of their con-

science and shall be bound only by this Constitution and the laws.

Article 77. The Supreme Court is vested with the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs.

(2) Public procurators shall be subject to the rule-making power of the Supreme Court.

(3) The Supreme Court may delegate the power to make rules for inferior courts to such courts.

Article 78. Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges shall be administered by any executive organ or agency.

Article 79. The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.

(2) The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.

(3) In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.

(4) Matters pertaining to review shall be prescribed by law.

(5) The judges of the Supreme Court shall be retired upon the attainment of the age as fixed by law.

(6) All such judges shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

Article 80. The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court. All such judges shall hold office for a term of ten (10) years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law.

(2) The judges of the inferior courts shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

Article 81. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

Article 82. Trials shall be conducted and judgment declared publicly.

(2) Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein

the rights of people as guaranteed in Chapter III of this Constitution are in question shall always be conducted publicly.

CHAPTER VII. FINANCE

Article 83. The power to administer national finances shall be exercised as the Diet shall determine.

Article 84. No new taxes shall be imposed or existing ones modified except by law or under such conditions as law may prescribe.

Article 85. No money shall be expended, nor shall the State obligate itself, except as authorized by the Diet.

Article 86. The Cabinet shall prepare and submit to the Diet for its consideration and decision a budget for each fiscal year.

Article 87. In order to provide for unforeseen deficiencies in the budget, a reserve fund may be authorized by the Diet to be expended upon the responsibility of the Cabinet.

(2) The Cabinet must get subsequent approval of the Diet for all payments from the reserve fund.

Article 88. All property of the Imperial Household shall belong to the State. All expenses of the Imperial Household shall be appropriated by the Diet in the budget.

Article 89. No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.

Article 90. Final accounts of the expenditures and revenues of the State shall be audited annually by a Board of Audit and submitted by the Cabinet to the Diet, together with the statement of audit, during the fiscal year immediately following the period covered.

(2) The organization and competency of the Board of Audit shall be determined by law.

Article 91. At regular intervals and at least annually the Cabinet shall report to the Diet and the people on the state of national finances.

CHAPTER VIII. LOCAL SELF-GOVERNMENT

Article 92. Regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy.

Article 93. The local public entities shall establish assemblies as their deliberative organs, in accordance with law.

(2) The chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities.

Article 94. Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.

Article 95. A special law, applicable only to one local public entity, cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law.

CHAPTER IX. AMENDMENTS

Article 96. Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.

(2) Amendments when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution.

CHAPTER X. SUPREME LAW

Article 97. The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.

Article 98. This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

(2) The treaties concluded by Japan and established laws of nations shall be faithfully observed.

Article 99. The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution.

CHAPTER XI. SUPPLEMENTARY PROVISIONS

Article 100. This Constitution shall be enforced as from the day when the period of six months will have elapsed counting from the day of its promulgation.

(2) The enactment of laws necessary for the enforcement of this Constitution, the election of members of the House of Councillors and the procedure for the convocation of the Diet and other preparatory procedures for the enforcement of this Constitution may be executed before the day prescribed in the preceding paragraph.

Article 101. If the House of Councillors is not constituted before the effective date of this Constitution, the House of Representatives shall function as the Diet until such time as the House of Councillors shall be constituted.

Article 102. The term of office for half the members of the House of Councillors serving in the first term under this Constitution shall be three years. Members falling under this category shall be determined in accordance with law.

Article 103. The Ministers of State, members of the House of Representatives, and judges in office on the effective date of this Constitution, and all other public officials, who occupy positions corresponding to such positions as are recognized by this Constitution shall not forfeit their positions automatically on account of the enforcement of this Constitution unless otherwise specified by law. When, however, successors are elected or appointed under the provisions of this Constitution, they shall forfeit their positions as a matter of course.

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6

AJASE AND OEDIPUS: IDEAS OF THE SELF IN JAPANESE AND WESTERN LEGAL CONSCIOUSNESS

J. C. SMITH†

Justice and Mercy

The Supreme Court of Japan is one of the most impressive buildings in the city of Tokyo, and there is probably no finer edifice of a court of last resort anywhere in the world. One of the most striking features about this structure, to western eyes at least, is not the massive foyer, the size of the huge granite blocks, nor the fine woods and tapestries of the beautiful court rooms, but the statue of Justice, inconspicuously placed along one of the walls. While many court houses display the figure of the robed woman with scales in one hand and a sword in the other, that of the Supreme Court of Japan is truly unique; the head of the sculpture is the head of the Buddha.

Given the separation of church and state provided by the *Constitution of Japan*,[1] one would not interpret this as signifying any particular unity of the religious and the secular. Rather, it seems to symbolize for the legal world the familiar idea of "Western forms and Japanese soul".[2] One cannot help but wonder: is this union a reconciled unity or an unreconciled dialectic? Do the diverse parts make up a new harmony or do they operate together in tension as a contradiction?

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[1] *Constitution of Japan* (1947), Art. 20.

[2] *Wa kon yo sai*. See generally, G. B. Sansom, *The Western World and Japan* (1950) at 339-51 and 395-410; J. W. Hall, "Changing Conceptions of the Modernization of Japan" at 7, and M. B. Jansen, "Changing Japanese Attitudes Toward Modernization" at 43, both in M. B. Jansen, ed., *Changing Japanese Attitudes Toward Modernization* (1965).

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Prevailing social power structures often appear as natural and inevitable, and history is generally interpreted to produce this impression. I do not, as some Marxists might, wish to attack this tendency, which seems to be an aspect of all social ideologies. I would, however, concur with the Marxists in their recognition of the importance of identifying contradictions in order to gain a fuller understanding of historical development.

All cultures contain historical contradictions. It is important to identify these in order to gain a fuller understanding of historical development. In particular, the nature of the relationship between diverse cultural elements is central to a proper understanding of the ethical and legal consciousness of a culture.[3] If Japan has managed to reconcile the traditional spirit of its culture with western legal forms, it may well have a solution to problems which have long haunted the West. On the other hand, if the synthesis joins two contradictions, we might anticipate that certain aspects of traditional Japanese culture will be eroded as a result.

Another feature of the statue highlights this question. The head of the Buddha, unlike its western counterparts has no blindfold. On a conventional statue of Justice the scale symbolizes the formal, impartial nature of law, the sword the inevitability of the penalties and remedies prescribed by law following transgression agninst it, and the blindfold the exclusion of all factors, feelings, prejudices and emotions which deflect the full operation of the law.[4] The meaning of the blindfold is implicit in the western maxim *fiat justitia, ruat coelum* (let justice be done though the heavens fall) or, in an earlier form, *ruat mundus* (though the world comes to ruin). The blindfold signifies that the consequences of strictly applying the law must be shut out of our vision lest they influence the path of justice. This opposition, which is posited between the operation of justice and its consequences, is alien to the Japanese. The unconstrained gaze of the

[3] See text accompanying notes 7 and 8, *infra*.

[4] There are, of course, many versions of the Statue of Justice. A particularly interesting example can be found in Cesare Ripa's seventeenth-century work on iconography, *Iconoglia*. The figure is seated with the sword in one hand and the scales in her lap. In the background is the figure of King Zaleucus and his son, each having one eye gouged out. The king had passed a particularly severe law against adultery which his son had broken. His commitment to justice allowed no way for the penalty to be avoided. The most which he could do within the confines of justice was to sacrifice one of his own eyes for one of his son's in order that his son would not be totally blind. The text states that, "She (Justice) is blindfolded, for nothing but pure reason ... should be used in making judgments." See C. Ripa, *Baroque and Rococo Pictorial Imagery*, trans. E. A. Maser (1971) illustration #120.

Buddha suggests that emotions such as compassion can be consistent with the rule of law.

Such a suggestion runs counter to fundamental assumptions within the western legal tradition, which are reflected not only in the symbolism of the traditional figures of Justice which adorn so many of the court rooms of the western world, but also in western religion, morality, philosophy, art and literature. These assumptions reflect a bifurcated view of justice and mercy. Mercy must function outside the legal system. Thus, judges cannot pardon. The prerogative of mercy belonged historically to the Crown, and is now exercised by the executive, its successor. The delegation to the Chancellor of the power to override the common law enabled a strong element of mercy to function in correlation with, but externally to, the law. When the office of the Chancellor evolved into the Courts of Chancery administering the law of equity, this element of mercy disappeared, so that in the mid-eighteenth century Dickens chose the Court of Chancery as the recipient of his savage attack on the mercilessness of the legal system.[5]

In the novel *Billy Budd*, Herman Melville has touched a chord in the western collective psyche, and provides us with a clear example of the consequence of this bifurcation of justice and mercy.[6] The

[5] C. Dickens, *Bleak House* (1853).

[6] H. Melville, *Billy Budd, Sailor* (1924). *Billy Budd* has been discussed from several standpoints. See, for example, T. Stafford, *Billy Budd and the Critics* (1961); H. Franklin, "From Empire to Empire: *Billy Budd, Sailor*" in A. Lee, ed., *Herman Melville; Reassessments* (1984) at 199. The structure of the narrative of *Billy Budd* would indicate that Melville's primary artistic aim was to reveal the social mythology which masks the inability of law to combine justice with compassion. There are many other references to the tension between justice and mercy in the western literary tradition. A famous example is furnished by William Shakespeare in "The Merchant of Venice" Act IV, Scene I, lines 182-201:

> The quality of mercy is not strained;
> It droppeth as the gentle rain from heaven
> Upon the place beneath. It is twice blest;
> It blesseth him that gives and him that takes.
> 'Tis mightiest in the mightiest; it becomes
> The thronèd monarch better than his crown.
> His sceptre shows the force of temporal power,
> The attribute to awe and majesty,
> Wherein doth sit the dread and fear of kings;
> But mercy is above this sceptr'red sway;
> It is enthroned in the heart of kings,
> It is an attribute to God himself,
> And earthly power doth then show likest God's
> When mercy seasons justice. Therefore, Jew,
> Though justice be thy plea, consider this:
> That, in the course of justice, none of us
> Should see salvation. We do pray for mercy,
> And that same prayer doth teach us all to render
> The deeds of mercy. . . ."

story is set aboard a British warship at sea in 1797, when England was at war with revolutionary France. The plot contains three main characters: Billy Budd, first mate Clegg and Captain Devere. Billy Budd is a Christ-like figure who embodies goodness. Clegg is basically an evil man; Captain Devere is a kind and compassionate officer who runs his ship efficiently but humanely. The plot is simple, as befits these archetypal figures. Clegg, who is disturbed by Budd's inherent innocence and goodness, attempts to destroy him by accusing him of fomenting a mutiny. When confronted with this accusation in the presence of Clegg, Budd, whose only defect is that he is a stutterer, is unable to articulate his outraged denial. In frustration, he strikes Clegg with his fist. Clegg hits his head when he falls, and dies.

Killing an officer — indeed, merely striking an officer — was a capital offence in the British navy during this period. Yet, as Melville is at pains to point out, Billy Budd's moral guilt is minimal. He was accused of a crime which could cost him his life, and, given his stutter, was defending himself in the only way he could. Captain Devere is thus on the horns of an excruciating dilemma; he loves the beautiful and innocent Billy Budd as a son, but knows that if the law is not followed he will lose control of the crew. In the end Captain Devere obeys the law, does his "duty" and hangs Billy Budd. Although he is a good man, he cannot save Billy Budd; he cannot show mercy and still remain Captain. By having the officers of the court martial consider and eventually reject the various arguments which they themselves raise in attempting to save Billy Budd, Melville reveals two related, fundamental contradictions in the Judeo-Christian tradition, one pertaining to God, the other to law. God can be just, or He can be loving and merciful, but He cannot be both. Reflecting this dichotomy, the law can be either just or merciful, but not both. This contradiction between a God of justice and law and a God of love and mercy is reflected in the Judaic religious tradition in the dichotomy of "the Law and the Prophets". The law was administered by priests who taught duty to strict rules of obedience, while the prophets were the voice of compassion and righteousness, and were often critics of the law.[1]

The very strength of the Judaic tradition lay in the dialectical process which kept these contradictions in balance. There is always the danger that emotions will change. Love can turn to hatred and compassion to cruelty. The ties of the priests to the legal tradition

[1] See A. Heschel, *The Prophets* (1962).

kept the prophetic tradition from the excesses which often accompany charismatic leadership, and kept it within a consistent and logical structure. The prophets, on the other hand, when acting as critics of the priests and the law, produced in ancient Israel one of the most humane systems of law that the world has ever seen.[8]

This dialectical tension is vividly reflected in the teachings of Jesus of Nazareth, the last and greatest in the line of prophets who constituted the prophetic tradition of Judaism. On the one hand he bitterly denounced the priests and lawyers, the servants of the law. On the other, he asserted that the law was not to pass away, but was to be fulfilled.[9]

Paul, the author of the greatest part of the body of scripture which makes up the New Testament, also devoted much of his thought and writing to the relationship between prophetic and legal justice. Paul attempted to solve the contradiction implicit in the concept of a God of compassion and a God of love by postulating the doctrine of the atonement whereby Jesus took upon himself all the sins (law breaking) of the peoples of the world and paid with his death the penalty of the law. Jesus' meeting the demands of the law allowed God to show compassion through forgiveness.

When Christianity was no longer a Jewish sect but had become a world religion in its own right, this belief in the reconcilability of prophetic justice with the law facilitated the move towards a unification of the church and state, which witnessed the end of the prophetic tradition.[10]

It is somewhat ironic that the most Christ-like figure to appear in the twentieth century is Mohandas Gandhi, a product of the eastern spiritual tradition who, in the manner of an Old Testament prophet, decried the injustice of a western Christian nation. A further irony is that Gandhi was a lawyer, and appeared to find no contradiction between his views of law and of compassion and mercy.

It is of value, in understanding the difference between Japanese and western legal consciousness, to contrast briefly the view of law implicit in *Billy Budd* with that which is implicit in an incident which Gandhi relates in his autobiography, concerning his early

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[8] See R. de Vaux, *Ancient Israel*, vol. 1 (1961) at 143-52; Y. Kaufmann, *The Religion of Israel* (1977) at 316-40.

[9] See *The New Testament*, Matthew chs. 5 and 23.

[10] See J. Danielou, "Christianity as a Jewish Sect" in A. Toynbee, ed., *The Crucible of Christianity* (1969) at 262-82, and J. H. Randall, *Hellenistic Ways of Deliverance and the Making of the Christian Synthesis* (1970) at 135-44.

years of legal practice in South Africa.[11] Gandhi tells of a dispute arising out of a complicated business transaction in which his client stood either to lose or gain a substantial sum of money. Gandhi soon realized that the technical law was all on his side, and that his client should be successful in any forthcoming law suit. However, he was cognizant of the fact that the parties to the suit were related and that both belonged to the same community. Also, if the case proceeded, both would suffer the costs of extensive litigation. He therefore persuaded the parties to submit the case to an arbitrator in whom they both had confidence. This was done and, as expected, his client won. Still Gandhi was not satisfied, because if his client were to seek the immediate execution of the whole award the other party would be put into bankruptcy. Gandhi pleaded with his client to spread the payments in modest amounts over a lengthy period of time. In the end, his client reluctantly accepted these arrangements and Gandhi was able to write that "both were happy over the result, and both rose in the public estimation." He then went on to say that "[m]y joy was boundless. I had learnt the true practice of law ... I realized that the true function of a lawyer was to unite parties riven asunder."[12]

While the dialectical tension between law and feeling permeates western legal consciousness, no such contradiction is to be found in Gandhi's view of law. His view, in turn, seems very compatible with Japanese legal consciousness.[13] Much has been written by both Japanese and non-Japanese about the unique perspective with which the Japanese view law.[14] Their reluctance to litigate, their distaste

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[11] M. K. Gandhi, *An Autobiography; The Story of My Experiments With Truth*, trans. M. Desai (1957) at 131-34.

[12] *Id.* at 134.

[13] See for example, Y. Noda, "The Character of the Japanese People and Their Conception of Law" in H. Tanaka, ed., *The Japanese Legal System* (1976) at 301-10.

[14] See for example, M. Yasaki, "Legal Culture in Japan, Modern-Traditional" (1985) *Archiv Fur Rechts-und Sozialphilosphie* 168; M. Yasaki, "Law and *Shakai-Tsunen* as a Legal Form of Consensus Idea" (1982) 29 Osaka U.L.Rev. 1; M. Yasaki, "Significance of 'Legal Consciousness' in Regard to Social Facts and Social Institutions" (1984) 31 Osaka U.L.Rev. 1; A. von Mehren, "Some Reflections on Japanese Law" (1958) 71 Harv. L. Rev. 1486; T. Kawashima, "Dispute Resolution in Japan" in A. von Mehren, ed., *Law in Japan* (1963) 41; D. F. Henderson, *Conciliation and Japanese Law: Tokugawa and Modern* (1965); M. Maruyama, "Patterns of Individuation and the Case of Japan: A Conceptual Scheme" in Jansen, *supra*, note 2 at 489; T. Kawashima, "The status of the individual in the notion of law, right and social order in Japan" at 429, both in C. Moore, ed., *The Status of the Individual in East and West* (1968); J. Dator, "Measuring Attitudes Across Cultures" at 71 and T. Kawashima, "Individualism in Decision-Making in

for adversarial procedures, their avoidance of confrontation, their preference for mediation and their desire to make agreements only in general terms, leaving unforeseen contingencies to be worked out through consultation and negotiation, have been widely discussed and need not be elaborated upon here. An examination of this literature enables one to recognize that the maintenance of social harmony, reflected in warm human relationships, is of prime importance to the Japanese. To the Japanese, as to Gandhi, business relationships arise out of human relations. The aim of dispute settlement is the restoration of social harmony. This harmony rests in a sense of identity within a community, which is generated mainly by emotional means.[15]

Amae and *Jibun*

According to one of Japan's most eminent psychiatrists, Dr. Takeo Doi, "the chief characteristic of the Japanese . . ." is best expressed by the concept of *amae*. *Amae* "is a thread that runs through all the various activities of Japanese society . . . [and is the foundation of] the spiritual culture of Japan."[16] It is clear from Dr. Doi's classical

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the Supreme Court of Japan" at 103, both in G. Shubert & D. Danelski, eds., *Comparative Judicial Behaviour* (1969); C. Stevens, "Modern Japanese Law as an Instrument of Comparison" (1971) 19 Am. J. Comp. L. 685; R. Benjamin, "Images of Conflict Resolution and Social Control: American and Japanese Attitudes Toward the Adversary System" (1975) 19 J. of Conflict Resolution 123; Tanaka, *id.*; F. Upham, "Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits" (1976) 10 L. & Soc'y Rev. 579; Y. Noda, *Introduction to Japanese Law*, trans. A. Angelo (1976). For a contrary view see J. Haley, "The Myth of the Reluctant Litigant" (1978) 4 J. of Japanese Studies 359. M. Galanter, in "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 U.C.L.A. Rev. 4 at 5, argues that "the familiar contention that American legal institutions are overwhelmed by an unprecedented flood of litigation which is attributable to the excessive litigiousness of the population" is not supported by the data.

[15] T. Doi, *The Anatomy of Dependence*, trans. J. Bester (1973) at 76.

[16] *Id.* at 26. While some writers and commentators have taken issue with Dr. Doi on various points, I have been unable to find any serious challenge to his book and its thesis. See for example T. Lebra, *Japanese Patterns of Behaviour* (1976) at 54, where the author states, "the role of expressing *amae*, called *amaeru*, must be complemented and supported by the role that accepts another's *amae*. The latter role is called *amayakasu*. Doi did not take into consideration the necessity of role complementarity between *amaeru* and *amayakasu*, perhaps because of the role asymmetry in the therapeutic relationship, where the therapist is inhibited from indulging the *amae* wish of the patient." Points such as these are matters of expansion rather than refutation. D. Mitchell, in *Amaeru* (1976) uses Dr. Doi's thesis to explain "The Expression of Reciprocal Dependency Needs in Japanese Politics and Law." While some have attacked this book for being simplistic or superficial, the criticism has generally not been of Doi's thesis, but of Mitchell's particular application of

study of the Japanese psyche, *The Anatomy of Dependence*, that *amae* is intimately related to the emotions.

Amae, according to the Foreword of *The Anatomy of Dependence*, "refers, initially, to the feeling that all normal infants at the breast harbor towards the mother."[17] It is the noun form of the verb *amaeru* which is defined in the Foreword as follows:

> It is the behaviour of the child who desires spiritually to "snuggle up" to the mother, to be enveloped in an indulgent love, that is referred to in Japanese as *amaeru* (the verb; *amae* is the noun). By extension, it refers to the same behavior, whether unconscious or deliberately adopted, in the adult. And by extension again, it refers to any situation in which a person assumes that he has another's goodwill, or takes a possibly unjustifiably optimistic view of a particular situation in order to gratify his need to feel at one with, or indulged by, his surroundings.[18]

The term *amae* is used to describe the feeling people have when they wish to be dependent upon and seek another's indulgence.[19] Dr. Doi points out that there is no similar term to be found in European languages, but that *amae* means the same thing as was meant by Michael Balint when he termed the phrase "passive object love".[20] According to Balint, "all the European languages fail to distinguish between active love and passive love."[21] Dr. Doi writes:

> I believe that *amae* was traditionally the Japanese ideology — not in its original sense of "the study of ideas" but in its modern sense of a set of ideas, or leading concept, that forms the actual or potential basis for a whole social system — and still is to a considerable extent today.[22]

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it. For example, see H. Wagatsuma, Book Review (1979) 39 J. of Asian Studies 173, and E. Tsurumi, Book Review (1978) 51 Pacific Affairs 310. Of interest to Japanese readers will be H. Otsuka, T. Kawashima & T. Doi, *Amae to shakai kagaku* ('Amae' and Social Science) (1976) (as yet untranslated).

[17] *Supra*, note 15 at 7.

[18] *Id.* at 8.

[19] *Id.*

[20] M. Balint, *Primary Love and Psychoanalytic Technique* (1965) at 56, 105, 108 and 233. Balint points out that it was Sandor Ferenczi who first coined the phrase and developed the idea of "passive object-love". For a comparison of the psychology of dependency in western culture see for example, J. P. Gurian & J. M. Gurian, *The Dependency Tendency* (1983); A. Memmi, *Dependence*, trans. P. Facey (1984); H. Parens & L. Saul, *Dependence In Man* (1971).

[21] Balint states, "In one respect, however, all European languages are the same — again as far as I know them. They are all so poor that they cannot distinguish between the two kinds of object-love, active and passive." Balint, *id.* at 56.

[22] *Supra*, note 15 at 57.

Dr. Doi goes on to state that he has become increasingly convinced "that what has traditionally been referred to vaguely as the 'Japanese spirit' or the 'soul of Yamato,' as well as more specific 'ideologies' such as emperor worship and respect for the emperor system can be interpreted in terms of *amae*."[22]

Amae, according to Dr. Doi, is the major component of *ninjō* which he roughly translates into English as human feeling.[24] *Giri*, or social obligation, exists "in a kind of organic relationship" to *ninjō*. *Ninjō* occurs spontaneously in relationships such as those between parent and child or between siblings. *Giri*, which is found in the relationship between master and pupil, or between friends and neighbours, "continually aspires toward *ninjō*." *Giri*, states Dr. Doi, is the vessel while *ninjō* is the content.[25] He concludes:

> It will be clear from the preceding that both *giri* and *ninjō* have their roots deep in *amae*. To put it briefly, to emphasize *ninjō* is to affirm *amae*, to encourage the other person's sensitivity towards *amae*. To emphasize *giri*, on the other hand, is to stress the human relationships contracted via *amae*. Or one might replace *amae* by the more abstract term "dependence," and say that *ninjō* welcomes dependence whereas *giri* binds human beings in a dependent relationship. The Japanese society of the past, in which *giri* and *ninjō* were the predominant ethical concepts, might without exaggeration be described as a world pervaded throughout by *amae*.[26]

In chapter four of *The Anatomy of Dependence*, entitled "The Pathology of *Amae*", Dr. Doi describes some of the pathological states of mind which can arise among Japanese living within what he calls "[t]he world of *amae*".[27] Among these are *taijin kyōfu* (anxiety in dealing with other people),[28] *higaisha ishiki* (sense of being a victim),[29] and in particular, *jibun ga nai*, (to have no self).[30] It is the latter which is of particular jurisprudential interest because the concept of the self, or of the person, is of special significance in legal and political theory.

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[22] *Id.*

[24] *Id.* at 33.

[25] *Id.* at 34. See also H. Minami, *Psychology of the Japanese People*, trans. A. Ikoma (1971) at 157-68; M. Masatsuga, *The Modern Samurai Society* (1982) at 89-92.

[26] *Supra*, note 15 at 35.

[27] *Id.* at 28-64.

[28] *Id.* at 104-27.

[29] *Id.* at 127-32.

[30] *Id.* at 132-41.

According to Dr. Doi, expressions such as *jibun ga aru* (to have self) and *jibun ga nai*, (to have no self) are probably peculiar to the Japanese. "The interesting question . . .", he states, "is why [the] Japanese [language] should go out of its way to remark on this presence or absence",[31] since western languages, at least, contain no precise equivalent.[32] "In the languages of the West the use of the first person pronoun is considered in itself adequate proof of the existence of a self."[33] These two Japanese expressions of self define the relationship of the individual to the group. "If the individual is submersed completely in the group, he has no *jibun*, . . . [but] an individual is said to have a *jibun* when he can maintain an independent self that is never negated by membership in the group."[34] Dr. Doi goes on to point out that an individual can also develop a sense of having no self as a result of being totally isolated from the group, and that some people so fear such a state of affairs that they

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[31] *Id.* at 133. Any people's collective view of the self is bound to be complex. This paper is attempting to focus only on a few aspects of the self from a comparative point of view. For a fuller discussion of the self in Japanese consciousness, see Minami, *supra*, note 25 at 1-33; C. Moore, ed., *The Japanese Mind* (1967); Masatsuga, *supra*, note 25 at 44-101; N. Hajime, "Consciousness of the individual and the universal among the Japanese" at 161; H. Ichiro, "The appearance of individual self-consciousness in Japanese religions and its historical transformations" at 227, F. Tesshi, "The individual in Japanese ethics" at 301, K. Masaaki, "The status and role of the individual in Japanese society" at 361, and T. Kawashima, "The status of the individual in the notion of law, right, and social order in Japan" at 429, all in Moore, *supra*, note 14. See also R. Smith, *Japanese Society* (1983) at 68-105 and Lebra, *supra*, note 16 at 156-68.

[32] A western example of the kind of emotion which would correspond to *amae* is to be found in the *New Testament*, in the First Epistle of Paul to the Corinthians. One translation reads:

> I may speak in tongues of men or of angels, but if I am without love, I am a sounding gong or a clanging cymbal. I may have the gift of prophecy, and know every hidden truth; I may have faith strong enough to move mountains; but if I have no love, I am nothing. I may dole out all I possess, or even give my body to be burnt, but if I have no love, I am none the better. Love is patient; love is kind and envies no one. Love is never boastful, nor conceited, nor rude; never selfish, not quick to take offense. Love keeps no score of wrongs; does not gloat over other men's sins, but delights in the truth. There is nothing love cannot face; there is no limit to its faith, its hope and its endurance . . . In a word there are three things that last for ever; faith, hope, and love; but the greatest of them all is love. (*The New English Bible*, I Cor. 13: 1-13)

In the traditional King James version of the New Testament, the Greek word *agape* is translated as "charity", a word that hardly conveys the true meaning of this passage, and is evidence of the fact that the English language does not contain a term adequate to this concept. One of the dictionary meanings of *agape* is "non-sexual love."

[33] *Supra*, note 15 at 133.

[34] *Id.* at 134.

will often put up with anything in order to remain within the group.[35]

Dr. Doi concludes that "man cannot possess a self without previous experience of *amaeru*";[36] at the same time noting that while submersion in the group may mean loss of the self it does not follow that one can produce a self by behaving selfishly and independently of the group. He further points out that while the problem of the development of the self "can be observed in a peculiarly clear form in the Japanese," and the awareness of having a self may be easier for the Westerner than for the Japanese, "in the West one finds a completely reverse phenomenon in which the individual while in his heart of hearts harboring an extremely complex feeling toward the 'absence of self,' or being in some cases aware, essentially, that he has no 'self,' behaves as though he does in fact have one."[37]

In comparing the western psyche with the Japanese, Dr. Doi deals with the western pathology of alienation, a condition which "has its ultimate origin in the discovery that man was mistaken in believing ... that he could stand on his own feet and be self-sufficient through reason alone."[38] "Men sense a drying-up of the springs of life, and in order to recover what has been lost they determine that they will return, as it were, to their naked selves, will live once more by feeling rather than reason. And in this new quest they are being led ... to *amae*."[39] "When the infant is left by its mother," he writes, "it feels an uneasiness, a threat to its very life; and it seems likely that it is precisely this feeling that lies at the heart of what is described by modern man as 'human alienation.' "[40]

There is no question that the idea and concept of individual freedom is a part of western consciousness, and that the demand for freedom is closely interrelated with the emphasis in western culture on individuality. Dr. Doi goes on to ask this penetrating question: "Is the freedom of the individual, that magnificent article of faith for the modern western world, really to be believed in, or is it merely an illusion cherished by one section of the population of the West?"[41] He suggests that the incisive analyses of Marx, Nietzsche and Freud

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[35] *Id.* at 138.
[36] *Id.* at 139.
[37] *Id.* at 140.
[38] *Id.* at 148.
[39] *Id.* at 149.
[40] *Id.* at 150.
[41] *Id.* at 94.

have seriously undermined faith in freedom and that the West "as we see it today is caught in a morass of despair and nihilism."[42] The western idea of freedom, if it is to mean something more than the simple gratification of individual desires, must entail "solidarity with others through participation" and must ultimately mean something very similar to the Japanese idea of *amae*.[43] He writes:

> In short, despite the precedence he (Western man) gives in theory to the individual over the group, there must exist inside him a psychological desire to "belong". This is, in other words, *amae*. And this desire, one suspects, is gradually coming to the surface of the consciousness now that the Western faith in freedom of the individual is breaking down.[44]

The "I" and the "We"

Psychoanalysis, the term coined by Freud, is concerned with the analysis of the soul, or what Jung termed the "self". The terms "psyche", "soul" and "self" mean much the same thing in psychoanalytic usage, and may be taken to be interchangeable.[45] It is not surprising that Freud produced an ego psychology, since the subjects of his analysis were psyches which developed in a western cultural context. This explains why the *ego* (Latin), *ich* (German) or the "I" (English) played such a prominent role in Freud's analysis of the self.[46] According to Freud, part of the ego resides in the unconscious, which justifies our postulating an "I-consciousness" and an "I-unconsciousness".[47] Jung, having delved into eastern religion, philosophy, art and mythology, developed the idea of the collective unconscious which he contrasted with the personal unconscious.[48] Dr. Robert Pos uses the term "the We-unconscious" instead of the term "collective unconscious". He contrasts this with the "I-unconscious".[49]

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[42] *Id.* at 95.

[43] *Id.*

[44] *Id.* at 141.

[45] See B. Bettelheim, *Freud and Man's Soul* (1982) at 70-78.

[46] *Id.* at 53-56.

[47] See *Standard Edition of the Complete Psychological Works of Sigmund Freud*, "The Ego and the Id," vol. 19 (1961) 1 at 18; "New Introductory Lectures on Psychoanalysis," vol. 22 (1964) at 69-80.

[48] See generally, in *The Collected Works of C. G. Jung*, 2d ed., vol. 7 (1966) "On the Psychology of the Unconscious" 1 at 64-79, "The Relations Between the Ego and the Unconscious" 120 at 127-38. In vol. 9:1 of the same edition see "The Concept of the Collective Unconscious" 42-53.

[49] Dr. Robert Pos, Clinical Professor of Psychiatry at the University of British Columbia, and Director of Clinical Services of the Forensic Psychiatry Institute of British Columbia.

This then allows us to replace the *ego* or *ich* with the I-conscious. From Dr. Doi's analysis of the Japanese psyche it is clear that we need to add "We-conscious" if we are to have a psychoanalytic framework of analysis of the psyche which allows cross-cultural comparisons.

Dr. Doi's thesis is that "man cannot possess a self without previous experience of *amaeru*."[50] At the same time, however, he recognizes the importance of freedom and autonomy (which is a part of the spiritual legacy of western culture) for a richer and fuller development of the self. This is to say that a well-developed self should have both a strong I-consciousness and a strong We-consciousness. Keeping in mind the existence of the unconscious, we can use the following model to analyze the processes of identification and differentiation, in terms of which individuals develop their own sense of self:

Differentiation	*Identification*
I-conscious	We-conscious
I-unconscious	We-unconscious

The process of development of the self commences in infancy as the child starts to recognize its separateness from the mother. I-consciousness is produced by differentiating the self from the external world, including other persons. When a child individuates itself from its mother, it develops an awareness of gender differentiation which the child will later learn is culturally identified with its biological sex.[51] As the child separates itself from its mother, it begins to learn that it is a member of a family. While identifying his or her self with the family, the child is differentiating itself from other persons, including its parents and siblings. In gender-polarized human societies, it is extremely difficult for any child to develop a sense of

[50] *Supra*, note 15 at 139.

[51] See for example S. Bem, "Gender Schema Theory: A Cognitive Account of Sex Typing" (1981) 88 Psych. Rev. 354; M. Mahler, F. Pine & A. Berman, *The Psychological Birth of the Human Infant* (1975); J. Money & A. Ehrhardt, *Man and Woman, Boy and Girl: The Differentiation and Dimorphism of Gender Identity from Conception to Maturity* (1974); A. Oakley, *Sex, Gender, and Society* (1972); R. J. Stoller, *Sex and Gender*, vol. 1; *The Development of Masculinity and Femininity* (1974); L. Duberman, *Gender and Sex in Society* (1975).

self without a distinct gender identification. Gender identification comes about through identification with the gender groupings of male and female. Thus I-consciousness and We-consciousness develop in harmony with each other. Differentiation from others takes place in terms of the varying sets of group identities, and therefore inevitably involves identification. Our sex, family, extended family, tribe, language group and nationality are all a part of our personal identity. The relationship between the "I" and the "We", therefore, is distorted when it is construed as a dialectic between two conflicting poles in terms of which we must strike a balance. There can be no "I" without a "We", nor conversely, a "We" without a set of "I"s.

A strong sense of the "I" component is developed within people when they are allowed, encouraged and taught to be autonomous individuals, freely making their own choices and taking responsibility for them. The western tradition has always recognized the close link between freedom or liberty and responsibility.[52] Taking responsibility for one's actions, however, means choosing those actions in terms of their possible effect on other people. A strong sense of the "We" is developed when a person receives love and support within the family, and co-operation, fellowship, good feeling and compassion from the group. At the same time, few people can develop a strong sense of the "I" without having a sense of appreciation and status within the group, since our evaluation of ourselves will generally reflect to some degree that of the group. It is, of course, possible to have a strong I-consciousness in conjunction with a very weak We-consciousness. Such persons will suffer from some form of pathology such as alienation. The psychopath who is incapable of empathy for anyone else and who judges all action only in terms of his or her own immediate wants or desires is a classic example.

There is little evidence of any physical difference between the brains of the various races of humanity. Rather, differences are best explained in terms of cultural experience. T. P. Kasulis writes,

> the assumption that people in different cultures actually think differently in some inherent way is untenable ... [T]he difference among traditions derives not from variance in inherent thinking patterns, but from differences in what is thought *about*.... In summation, there is no prima facie reason to abandon the hypothesis that the logical form of rationality is the same around the world. Rather, the divergence between cultures lies in the traditional concerns of rationality, and therefore, the experiences to which logic is applied. Human

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[52] S. Coval & J. C. Smith, *Law and Its Presuppositions* (1986) chs. 1-3; R. Wolff, *In Defense of Anarchism* (1970).

experience is too complex to be analzed all at once. A tradition must be selective, choosing certain points to be examined first and others deferred until some later time. But once the initial topics are chosen, their complexity leads to ever further analysis and enrichment. New terms are developed and the answer to one question carries in its wake the beginnings of the next question. A tradition seldom has the leisure to return to those experiences initially bracketed from consideration. At the same time, in each culture certain forms of human experience come to be understood as being particularly profound or revealing. The experiences even become intensified as they are self-consciously named and analyzed. In short, each culture specializes, as it were, in the cultivation and analysis of particular human possibilities. This is why intellectual traditions diverge as much as they do.[53]

To the degree that the East views the self differently than the West, that difference will be echoed in the networks of institutions and conceptual structures upon which various cultures have developed a view of the world:

> [T]he Western mind is: analtyical, discriminative, differential, inductive, individualistic, intellectual, objective, scientific, generalizing, conceptual, schematic, impersonal, legalistic, organizing, power-wielding, self-assertive, disposed to impose its will upon others, etc. Against these Western traits those of the East can be characterized as follows: synthetic, totalizing, integrative, non-discriminative, deductive, nonsystematic, dogmatic, intuitive, ... nondiscursive, subjective, spiritually individualistic and socially group-minded, etc.[54]

Within the eastern tradition, Buddhism, which has had a profound impact on the development of the Japanese psyche, has produced the most well-articulated doctrine of the self.[55] The Buddhist tradition recognizes the temporal, passing, impermanent and changing nature of the ego, and by so doing finds the true self through identification with universal oneness. According to the Lama Anagarika Govinda:

> He who wants to follow the Path of the Buddha must give up all thoughts of "I" and "mine". But this giving up does not make us

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[53] T. P. Kasulis, "Reference and Symbol in Plato's *Cratylus* and Kukai's *Shojijissogi*" (1982) 32 Philosophy East and West 393 at 404.

[54] "Lectures on Zen Buddhism" in D. Suzuki, E. Fromm & R. de Martino, eds., *Zen Buddhism and Psychoanalysis* (1960) 1 at 5. See also H. Nakamura, *Ways of Thinking of Eastern Peoples* (1964); F. S. C. Northrop, *The Meeting of East and West* (1946).

[55] See for example S. Picken, *Buddhism, Japan's Cultural Identity* (1982); H. Shinsho, "Buddhism of the One Great Vehicle (Mahayana)" at 33 and U. Yoshifumi, "The Status of the Individual in Mahayana Buddhist Philosophy" at 164, both in Moore, *supra*, note 31; S. Ando, *Zen and American Transcendentalism* (1970) at 7-52; Suzuki, *supra*, note 54 at 24-43.

> poorer; it actually makes us richer, because what we renounce and destroy are the walls that kept us imprisoned; and what we gain is that supreme freedom, according to which every individual is essentially connected with all that exists, thus embracing all living beings in his own mind, taking part in their deepest experience, sharing sorrow and joy.[86]

Govinda further states that "all individuals . . . have the whole universe as their common ground, and this universality becomes conscious in the experience of enlightenment, in which the individual awakens into his true all-embracing nature."[87] Kasulis writes, "the rejection of the self as an independent agent separate from the web of interconnected conditioned causes is called in Sanskrit the doctrine of *anatman* ('no-ego'; . . . *muga* in Japanese)."[88] The great Zen teacher Rinzai is reported to have related that "in this clump of raw flesh . . . there is a true person of no status continually entering and exiting (your sense organs)."[89]

The Individual and the Community

Even a cursory examination of the major institutional and cultural streams of East and West reveals that the concept of the self in the West is very different from that in the East. The institutions and belief systems which have helped formulate I-consciousness/unconsciousness and We-consciousness/unconsciousness in the West, tend to be contradictory. The stress on individualism in western culture is a product of a belief system, a central feature of which is a set of fundamental or natural rights which guarantee or protect personal liberty by preventing wrongful interference. One of the most basic tenets of this set is the right of equality before the law. By assuming the existence of such a right, matters of sex, order of birth, family membership, race or skin colour become irrelevant for the purposes of our moral and legal rights and duties. From the moral point of view we are simply autonomous agents, from the political point of view we are merely citizens, and at law we are "legal" persons. In western law the legal person can be usefully conceived as a variable in a formulaic equation. Thus a contract can be conceived in the abstract as a legal relationship between any two persons, P_1 and P_2,

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[86] Cited by N. Jacobson, *Buddhism and the Contemporary World* (1983) at 84.

[87] A. Govinda, *Creative Meditation and Multi-Dimensional Consciousness* (1976) at 10.

[88] T. P. Kasulis, *Zen Action Zen Person* (1981) at 44.

[89] *Mu i shin jin*, *id.* at 51. See also Suzuki, *supra*, note 54 at 32.

in regard to any particular pattern of behaviour not prohibited by law.[60]

However, our gender identity, order of birth, family, colour and race are critical matters in formulating the We-consciousness which is an essential part of our concept of self. Thus the conceptual framework within which we formulate a part of our I-consciousness conflicts with the kind of conceptual framework within which we develop our We-consciousness.

The result is substantial dialectical tension within the western psyche. Consider, for example, the conceptual structure of fundamental rights and the corresponding idea of a social order based on a universal law of reason rooted in Stoicism and classical Roman law. This structure is in contradiction with the democratic view of law as reflecting the will of the majority which is to be normatively evaluated in terms of transcendental ideals of the good or the just rooted in turn in Platonic and Aristotelian ideas of the state. This fundamental conflict between individual rights and the will of the majority still permeates western law and politics.[61] The debates between theorists such as Nozick and Rawls,[62] Dworkin and Hart[63] or Hayek and Bay;[64] the dispute between judicial activists and conservatives;[65] the contrasts between formal justice and social or distributive justice,[66] and between liberty and equality;[67] and the

[60] See D. Derham, "Theories of Legal Personality" in L. Webb, ed., *Legal Personality and Political Pluralism* (1958) at 5; F. Lawson, "The Creative Use of Legal Concepts" (1957) 32 N.Y.U. L. Rev. 909 at 913-16.

[61] J. C. Smith & D. N. Weisstub, "The Evolution of Western Legal Consciousness" (1979) 2 Int. J. of L. & Psych. 215; J. C. Smith & D. N. Weisstub, eds., *The Western Idea of Law* (1983) chs. 3 and 4.

[62] R. Nozick, *Anarchy, State, and Utopia* (1974); J. Rawls, *A Theory of Justice* (1971).

[63] R. Dworkin, *Taking Rights Seriously* (1977); H. L. A. Hart, *Essays In Jurisprudence and Philosophy* (1983) at 49-87 and 123-58.

[64] F. Hayek, *The Constitution of Liberty* (1960), and *Rules and Order*, vol. 1 of *Law, Legislation, and Liberty* (1973); C. Bay, *From Contract to Community* (1978) at 29, and "Hayek's Liberalism: The Constitution of Perpetual Privilege" (1971) 1 The Political Science Reviewer 93.

[65] J. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 Harv. L. Rev. 129 at 143-44; L. Hand, *The Bill of Rights* (1958) at 11-15; A. Bickel, *The Least Dangerous Branch* (1962); C. McCloskey, "Judicial Review in a Democracy: A Dissenting Opinion" (1966) 3 Hous. L. Rev. 354; S. Halpern & C. Lamb, eds., *Supreme Court Activism and Restraint* (1982).

[66] For an example of an analysis of formal justice see J. C. Smith, *Legal Obligation* (1976) at 88-108 and 233-43. For an analysis of social or distributive justice, see for example D. Miller, *Social Justice* (1976); B. Ackerman, *Social Justice in the Liberal State* (1980); Rawls, *supra*, note 62. See also P. Ingram, "Procedural Equality" and P. Day, "Procedural Equality: A Reply to

range of the political spectrum between the poles of statism and libertarianism:[66] these exemplify the bifurcated conceptual framework within which western legal and political institutions function. Within a truly consistent democracy the will of the majority rules supreme. Minority rights can have no meaning in the face of the "will of the people".

Utilitarianism, which postulates the ideal of the greatest good for the greatest number, is the natural ethical counterpart to democratic political theory. Given that good is taken to mean pleasure, and that the people concerned are the best judges of what pleases them, then law can be taken to be the will of the majority produced through the political legislative process. On the other hand, a theory of law from which a doctrine of fundamental rights can be derived entails a concept of law which is deduced from principles which exist independently of what people think about them. Thus, the institution of a democratically elected legislature limited by a bill of fundamental rights enforced by judicial review is not the product of a unified political and legal perspective. Rather it is a dialectical synthesis which allows us to continue to live with the contradictions, and to benefit from the energy which is a product of this dialectical tension.[69] Japan inherits these contradictions in its post-World War II *Constitution*.

Mr. Ingram" in S. Guest & A. Milne, *Equality and Discrimination: Essays in Freedom and Justice* (1985) at 39-59.

[66] Liberty and equality (in an egalitarian sense as contrasted with the more formal concept of equality as is entailed in the idea of equality before the law) are conversely related in that the more government controls the acquisition of goods and services in order to achieve an equitable distribution, the more it must interfere and regulate market transactions and individual consumption. On the other hand, the fewer restrictions placed by government on these economic processes, the greater will be the development of economic inequalities between citizens. See for example D. Raphael, *Justice and Liberty* (1980) at 57-73; J. Lucas, *On Justice* (1980) at 197-207.

[68] For a defence of a social order founded on the state, see M. Sandel, *Liberalism and the Limits of Justice* (1982); M. Sandel, "The Procedural Republic and the Unencumbered Self" in (1984) 12 Political Theory 81 at 82; Rawls, *supra*, note 62. For a defence of no state or merely a minimal state, see: Wolff, *supra*, note 52; Nozick, *supra*, note 62; M. Rothbard, *The Ethics of Liberty* (1982). See also W. Lang, "Marxism, Liberalism and Justice" in E. Kamenka & A. Tay, *Justice* (1979) at 116-48.

[69] See Coval & Smith, *supra*, note 52. T. Lowi's, *The End of Liberalism*, 2d ed. (1979) furnishes an analysis of the political process in the United States which allows one to follow this dialectic in American political life. The dialectic has taken a different course in Canada. In 1960 the Canadian Parliament passed the *Canadian Bill of Rights*, R.S.C. 1960, c. 44 as an ordinary act of the legislature. In *The Queen* v. *Drybones* [1970] S.C.R. 282, in a six to three judgment the Court took the position that the *Canadian Bill of Rights* gave the courts the power to declare an act, or part thereof, of Parliament to be invalid if it infringed a provision of the *Bill of Rights*. In *A.G. of Canada*

The philosophical, religious and spiritual traditions of the East, by viewing the ego as illusionary, and by focusing on the relatedness of all persons and things, facilitates a strong We-consciousness and a weak I-consciousness in the formulation of a concept of the self. In the West the focus on individual agency with its related doctrines of autonomy, freedom and responsibility leads to a view of the self with a strong I-consciousness but a weak We-consciousness.

The illusory nature of freedom in the western tradition and the alienation which is characteristic of western man stems at least in part from the lack of an emotional foundation for We-consciousness in the West. This is illustrated by R. L. Rubenstein, in his brilliant but sadly neglected *The Cunning of History*, who argues that the holocaust was not an aberration of history resulting from a temporary madness of a particular set of people at a particular time, but rather "was an expression of some of the most significant political, moral, religious and demographic tendencies of Western civilization in the twentieth century."[10] The bureaucratic process which produced the holocaust, according to Rubenstein, "can be understood as a structural and organizational expression of the related processes of secularization, disenchantment of the world, and rationalization."[11] "The culture that made the death camps possible," he writes, "was not only indigenous to the West but was an outcome, albeit unforeseen and unintended, of its fundamental . . . traditions."[12] The holocaust, slavery and the condition of industrial workers in nineteenth-century England are all examples of objectification of human beings. Rubenstein shows that in order to treat people as objects their humanity must first be denied; in other words, they must be excluded from our We-consciousness.

At an intellectual level the western legal and political traditions proclaim the equality and brotherhood of all mankind, but no strong emotional basis has evolved to sustain a We-consciousness which goes much beyond the immediate family. Examples from a variety of eras

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v. *Lavell* [1974] S.C.R. 1349, the Supreme Court of Canada reversed itself on this point. The issue was finally resolved by political means with the adoption of the Canadian *Charter of Rights and Freedoms* as Part I of the *Constitution Act, 1982*. Even so, section 33 provides that Parliament or any provincial legislature can declare legislation operative notwithstanding sections 2 or 7 to 15 of the *Charter*, which contain most of the fundamental freedoms.

[10] *The Cunning of History: The Holocaust and the American Future* (1978) at 6.

[11] *Id.* at 27.

[12] *Id.* at 31.

and cultures serve to demonstrate this. The Greeks failed to extend freedom and equality to their women and slaves.[13] Classical Stoic Rome retained slavery and tolerated the most cruel abuses.[14] The English tradition of liberty failed to prevent imperialism, and the Americans practiced cultural and sometimes even physical genocide on their aboriginal inhabitants.[15] Also, the Americans maintained the institution of slavery in the South with laws which permitted and legalized extreme cruelty, in spite of the *Declaration of Independence* and the *Bill of Rights*.[16] Slavery was not abolished in the United States until individuals, compelled by human compassion, created a groundswell of feeling which made political action necessary and possible. The advancement which the Black civil rights movement made in the late 1950s and early sixties resulted from a short-lived wave of compassion which led to concrete changes in the law. These facilitated further progress after the wave of emotion had ebbed. People who participated in the civil rights movement of that period still vividly remember the strong emotional bond which brought black and white together in marches and political protests. The song, "We Shall Overcome" became a focus for that feeling. Finally, notwithstanding the highest ideals of Marxist egalitarianism, millions of people have died in the *Gulag* slave labour camps of the Soviet Union,[17] while in Cambodia, the Marxist Khmer Rouge slaughtered between one and three million of their own citizens.[18]

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[13] See for example P. Slater, *The Glory of Hera* (1968); S. Pomeroy, *Goddesses, Whores, Wives and Slaves: Women in Classical Antiquity* (1975) at 57-87; W. Westermann, "Slavery and the Elements of Freedom in Ancient Greece" at 17, M. Finley, "Was Greek Civilization Based on Slave Labour?" at 53, R. Schlaifer, "Greek Theories of Slavery from Homer to Aristotle" at 93, and G. Vlastos, "Slavery in Plato's Republic" at 133, all in M. Finley, ed., *Slavery in Classical Antiquity* (1960).

[14] *Institutes of Roman Law by Gaius*, trans. E. Poste (1904) at 37. Poste, in his commentary on the law relating to slavery, writes that "the condition of the slave was at its worst in the golden period of Roman history" and at 38 states that "Roman law to the end, unlike other legislations which have recognized forms of slavery, refused to admit any rights in the slave."

[15] See for example D. Brown, *Bury My Heart at Wounded Knee* (1970).

[16] W. Jordan, *The White Man's Burden* (1974) at 59-64, 81-83, 150-52; M. Tushnet, *The American Law of Slavery* (1981). Three classic studies of slavery in America are: F. Tannenbaum, *Slaves and Citizens: The Negro in the Americas* (1947); S. Elkins, *Slavery: A Problem in American Institutional and Intellectual Life*, 3d ed. (1976); D. Davis, *The Problem of Slavery in Western Culture* (1966).

[17] See A. I. Solzhenitsyn, *The Gulag Archipelago*, vol. I (1974), vol. II (1975), vol. III (1978); A. Shifrin, *The First Guidebook to Prisons and Concentration Camps of the Soviet Union* (1980).

[18] W. Shawcross, *The Quality of Mercy: Cambodia, Holocaust and Modern Conscience* (1984) at 45-69.

By appealing to the deep spiritual roots of Hinduism, Islam and Christianity, Mohandas Gandhi, a single individual, generated an emotional wave which brought about the withdrawal of the British from India in a way that would not have been possible through force of arms or political manoeuvring.[10] His Muslim friend and associate Abdul Ghaffar Khan used similar methods and social forces to lead 100,000 fierce Pathans, who in taking an oath of non-violence achieved power far beyond that which the possession of arms had given them.[10] The lesson of history is clear. Progress towards the goals of universal freedom and respect seldom goes beyond what can be achieved through an emotional sense of identity with others. Although the western legal and political tradition has broken conceptual barriers and paradigms which retarded the extension of the emotional sense of solidarity and identification which generates We-consciousness, this tradition in itself is seldom able to generate that emotion. This is so because the western social paradigm is, by its nature, an obstacle to We-consciousness. The twentieth century marks the westernization of the world: as non-western countries have industrialized to protect themselves and to compete, they have found it necessary to adopt western technology and western forms of social and political organization. Yet no other century has seen the slaughter, cruelty and violence which the twentieth century has produced.[11]

The western legal and political tradition has attempted to achieve a sense of community identification through transcendental ideals of

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[9] See for example: E. Erikson, *Gandhi's Truth* (1969); W. H. Shirer, *Gandhi* (1979); L. Collins & D. Lapierre, *Freedom At Midnight* (1976).

[10] E. Easwaran, *A Man to Match His Mountains* (1984).

[11] G. Eliot, in *Twentieth Century Book of the Dead* (1972) at 211-34 estimates that approximately one hundred million people have been slaughtered as the direct result of official government action or decree. If one tries to duplicate his calculations, starting with the Turkish genocide of the Armenians at the beginning of the century, adding the casualties of World War I, and continuing through with the estimates of other wars, revolutions, slave labour and death camps, Eliot's startling figure appears to be fairly accurate. To dwell on one detail, the presence of torture tells a great deal about the nature of societies and states, and the relationship of the individual to the state. The revival of torture in the twentieth century and its widespread use by persons and institutions as an instrument of government also provides a good indication that western civilization has failed to develop strong emotional bonds between people. See for example the Amnesty International Report, *Torture in the Eighties* (1984), and E. Peters, *Torture* (1985) at 74-187. When we compare societies, nations and cultures, Japanese society, held together by the emotional bonds which are the product of the world of *amae* is truly a unique social phenomenon. And even if it is the case that the *burakumin* and Japanese residents of Korean ancestry have not been fully brought into the circle of *amae*, it still remains, in our fragmented world, a success yet to be achieved by other peoples.

morality, justice or goodness. Such ideological paths to community inevitably fail, since conflicting theories or views of what is the good, and the tendency of people to interpret the good or justice in terms of their own self interests, prevent a shared consensus regarding the ideals which the community should reflect. The inevitable failure of people to achieve their ideals even when a consensus can be reached tends to fracture rather than consolidate a sense of community. In any case, logic, argument and intellectualization cannot in themselves produce the emotional basis for the sense of We-consciousness which must exist for true community.

Nothing brings to our awareness more clearly the vast chasm between the ideals of western civilization and its realities than does the holocaust. This terrible event haunts the consciousness of western man because the holocaust marks the breaking of a "hitherto unbreachable moral and political barrier in the history of Western civilization".[82]

There is no contradiction between I-consciousness and We-consciousness when the latter is based on emotional identificaion or feeling, since community based on feeling is consensual community and is therefore consistent with the autonomy of the individual. The dichotomy between individuality and community which plays such a major role in western political theory is a rather artificial distinction when we take into account that the very thought processes of consciousness which make the concept of the individual possible, entail language, which is a social phenomenon impossible outside of the context of a community. Part of the problem is the tendency to think of community only in political terms, so that communities not based on political organization are ignored. Consequently we only look for political solutions to social ills. The rich variety of communities and social practices which exist independently of the political process and which contribute greatly to human welfare tend to be discounted in academic kinds of analyses.

There is no contradiction between autonomy and the fundamental rights which furnish its necessary condition, and the resolution of disputes through mediation. It has been argued that traditional Japanese law and dispute resolution methods did not involve rights consciousness and consequently there is a discontinuity between the western legal system, which Japan has adopted in the process of modernization, and traditional Japanese dispute settlement mechan-

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[82] Rubenstein, *supra*, note 70.

isms.[44] Much stress is put on the fact that Japan has far fewer lawyers per capita, fewer law suits and a greater tendency to use mediation over litigation, than is to be found in other countries having a western legal system. The prevailing view reflected in this literature is that the western legal tradition entails universal rules, while the Japanese legal tradition stresses the uniqueness of each particular situation, and therefore the uniqueness of the particular resolution of the dispute. The problem with this literature is that American legal consciousness is treated as representative of western legal consciousness, with the result that people fail to realize that rights consciousness does not necessarily entail litigiousness consciousness. The methods of dispute settlement are among the least important aspects of western law. Arbitration and mediation are becoming widespread in America as forms of dispute settlement, particularly in the areas of labour, commercial and matrimonial law. This experience reflects no basic discontinuities or contradictions. Western law is consistent with many different forms of dispute settlement mechanisms, including mediation.

That which makes western law truly unique is its individualistic concept of the self, and the idea of individual liberty which is derived from it.[45] Legalism or rulism can equally be a disease of non-western legal systems. China, for example, has gone through periods of extreme legalism.[46]

Since autonomy entails no transcendental norms of social justice or the good other than those which are necessary to guarantee the freedom of action of each individual, to the extent that it is consistent with the freedom of action of others, it is inconsistent with what Professor Shklar calls "legalism" and what Professor Yasaki calls "rulism," which invites adversarial confrontation and litigation.[47] Also, there is no contradiction between autonomy and Buddhism. To respect the agency of people is to respect the uniqueness and spontaneous creativity of human life.

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[44] See *supra*, note 14 for a selection of articles discussing this debate.

[45] See in general F. S. C. Northrop, *The Complexity of Legal and Ethical Experience* (1959) at 106, 143-64 and 183-215; Smith & Weisstub, *The Western Idea of Law*, *supra*, note 61; J. C. Smith, "The Unique Nature of the Concepts of Western Law" (1968) 46 Can. Bar Rev. 191.

[46] See T. Ch'u, *Law and Society in Traditional China* (1965) at 226-79; *The T'Ang Code*, trans. W. Johnson (1979).

[47] J. Shklar, *Legalism* (1964) at 1; M. Yasaki, "Legal Culture in Japan, Modern-Traditional" (Paper delivered at the 11th World Congress of the International Association for Philosophy of Law and Social Philosophy, Helsinki, 1983) [unpublished].

The idea of freedom, however, in the western legal and political tradition is very different from that of freedom in the Buddhist tradition. The western idea of freedom stresses freedom in relation to human action, and entails two types of liberty: freedom from wrongful interference with human action, and freedom to do what one wants to do so far as is consistent with the freedom of others from interference. The idea of freedom in the Buddhist tradition relates less to action itself, and more to freedom from illusory limitations which, if shed, would transform human actions.[87]

Autonomy and fundamental rights, contrary to the view of the Marxists, do not necessarily entail a reification of the "I".[88] Compassion and feeling lead to seeing the "I" in the "We" and the "We" in the "I"; in other words, to a proper view of the self wherein the "I" and the "We" are in balance. The western juridical tradition defines the "I" in terms which are universal for all human beings,[89]

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[87] See N. Jacobson, *supra*, note 56 at 85-117. At 86-87, Jacobson describes the difference between the western concept of freedom and that which is implicit in Buddhism as follows:

> The legacy of European learning impresses upon the minds of men and women everywhere the conclusions which a few tens of thousands — almost exclusively nonpigmented, male, middle-class, and Occidental — have found helpful in their drive for values. We of this universe are now confronted with the task of freeing life on this good earth from these assumptions and one-sided perspectives which have carried the baton of civilization during the last three hundred years, assumptions and viewpoints which have placed the fertility of human experience at large under a strange enthrallment to second and third-hand conclusions regarding the nature and meaning of life ... The chief role of Buddhism now is to increase the freedom men and women can enjoy from the pathological compulsions of life. The Buddhist legacy is prepared to participate in opening the lives of millions to new flexibility in discovering the meaning of life, thus providing ways of curing people of the egocentricity and narcissism that mount to pathological heights of self-worship in some parts of the present world.

[88] K. Marx, "On the Jewish Question" in D. McLellan, ed. & trans., *Karl Marx Early Texts* (1971) at 104. Marx writes, "Thus none of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community." Marxists are correct in assuming that fundamental rights permit persons to be egoistic and selfish. However, it does not follow from this that egoism will be the inevitable result of recognizing fundamental rights. Nor does it follow that their denial removes a barrier to achieving community. The failure of communist political systems to eradicate egoistic man, so ably analyzed by Milovan Djilas in *The New Class* (1957), would indicate that the emotional foundations necessary for the sense of We-consciousness which is required for the development of a non-egoistic self, cannot be achieved through a political solution, whether of the right or left, libertarian or egalitarian.

[89] The western juridical tradition of the autonomy of the individual, equality before the law and law as the rule of reason rather than the will of individuals or any class of individuals, contains no meaning for social hierarchy. The dialectical tensions within the western legal and political traditions referred to in notes 61-69 *supra*, are a product of the contradiction between

and the Buddhist tradition reveals what is true or non-illusory or real within the "I" and furnishes another basis for universality in the oneness of all life. Just as there is no meaning in the western juridical tradition for social hierarchy, there is likewise no meaning for social hierarchy in the Buddhist tradition with its concept of the self as *mu i shin jin* — "true person without status".[90] Consequently, Buddhism is always found in conjunction with some other conceptual structure which can provide such a meaning. The concept of the true self is very similar if not almost identical in philosophical Hinduism and Taoism. Hinduism, however, derives meaning for social hierarchy from its stress on status and caste; Taoism coexisted with Confucianism which provided a basis for status and hierarchy; and Shintoism has served a similar function in Japan. Thus the eastern religious and political traditions contain a fundamental contradiction which, although different, runs parallel to a similar contradiction in the West.

Paternalism and Maternalism

Whether there is a contradiction between autonomy and *amae* is a difficult issue. Since in its narrowest usage in ordinary Japanese discourse, *amae* refers to the desire which a child has to cling to its mother, *amae* appears to represent a relationship where one wishes to lose autonomy by relying on a substitute mother figure.[91] From this view *amae* points to dependency, whereas western culture stresses an autonomy based on equality between agents. The relationship between mother and child is very complex, however, and neither should autonomy and *amae* be posited as simple opposites. Both autonomy and *amae* presuppose certain psychological states of mind. According to Doi, *amae* also implies some awareness of individualism. The collectiveness which is so characteristic of Japanese society always co-existed with the ambition to be first, or outstanding, and it never denied the possibility of acting on one's own.[92] If these states can be said to be consistent with each other, then it is highly likely that the concepts which presuppose them can also co-exist without contradiction. Therefore, to investigate the relationship between

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the juridicial paradigm and the political paradigm which was evolved by the Greeks in order to legitimize the continuation of human domination rendered illegitimate by the juridical paradigm.

[90] See *supra*, notes 56-59.

[91] *The Kodansha Encyclopedia of Japan*, vol. 1 at 48.

[92] See T. Doi, *Omote to ura* (Front and Back) (1985) at 55.

autonomy and *amae* it is necessary to explore the psychology underlying these concepts.

A particularly striking illustration of the psychological aspect of autonomy is provided by the oldest reference to freedom which exists in any written text. This is a Sumerian document *circa* 2350 B.C. The word which the Sumerians used to refer to the concept of freedom was *amargi*, which means literally "return to the mother".[92] The experts on ancient Sumerian culture admit that they have absolutely no idea why, when "we find the word 'freedom' used for the first time in man's recorded history", this particular figure of speech came to be used.[94]

To understand why and how "return to the mother" came to mean freedom we would need to know what one was turning from in "the return". This first appearance of the word *amargi* was in a Sumerian document which "records a sweeping reform of a whole series of prevalent abuses, most of which could be traced to a ubiquitous and obnoxious bureaucracy consisting of the ruler and his palace coterie", and which also "provides a grim and ominous picture of man's cruelty toward man on all levels — social, economic, political and psychological".[95]

What the turning was from is revealed by the context within which the word *amargi* or freedom appears; it was a turning from law and the authority of kingship. But what did the "return to the mother" consist of, and why was this state equated with freedom? An examination of the preliterate history of this area as reconstructed through archaeological evidence and the earliest recorded myths suggests an answer. The earliest Sumerians worshipped the Goddess Inanna.[96] Evidence suggests that women held a high status which was gradually lost with the development of patriarchy in the form of a transition to the worship of male gods, kingship and the rise of law. Throughout much of Europe and the Middle East (as well as many other parts of the world) are to be found numerous female figurines and sculpture, dating from the upper Paleolithic period into the Bronze Age, and even beyond, which suggest an age of matriarchal consciousness when a goddess was worshipped and

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[92] S. Kramer, *The Sumerians* (1963) at 79.

[94] *Id.*

[95] *Id.*

[96] S. Teubal, *Sarah the Priestess: The First Matriarch of Genesis* (1984) at 77-131; E. Fisher, *Woman's Creation: Sexual Evolution and the Shaping of Society* (1979) at 267-80; W. Thompson, *The Time Falling Bodies Take To Light: Mythology, Sexuality, and the Origins of Culture* (1981) at 159-208.

women were held in high esteem and played an important, if not leading, cultural and societal role.[97]

The archaeological evidence uncovered at the site of the ancient town of Catal Huyuk in Anatolia, for example, which covered approximately thirty-two acres and had a population of several thousand people, furnishes evidence of a period in which women were afforded a high status of such a nature as to be inconsistent with a patriarchal culture. For example, women and children were buried under the large central platforms of houses while men were buried in smaller corner spaces along with their hunting weapons.[98]

Many of the ancient Japanese myths suggest that Japanese society was also probably matriarchal originally. These myths are to be found in the *Kojiki* and *Nihon Shoki*.[99] The first ruler of the world was the Sun Goddess Amaterasu Omikami, who was the direct ancestor of the first Emperor of Japan. The earliest indication of the existence of Japan in Chinese literature stated that the country was ruled by a female by the name of Himiko.[100] Itsue Takamura studied matrimonial systems in ancient Japan and came to the conclusion that early Japan was matriarchal and matrilineal.[101] Freedom as "the return to the mother" would mean, therefore, a return to *The Mother*, that is to matriarchal consciousness, which would mean a return from kingship to collective social order, from law to custom and from "masculine political power" to "feminine cultural authority".[102]

Freud believed that the evolution of human culture followed a similar pattern to the evolution of the individual human psyche; consequently, human history can be interpreted in terms of the Oedipus complex.[103] Freud's theory of the Oedipus complex explains

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[97] See in general, E. Neuman, *The Great Mother*, trans. R. Manhiem, 2d ed. (1963); E. O. James, *The Cult of the Mother Goddess* (1959); M. Gimbutas, *The Goddesses and Gods of Old Europe* (1982); M. Stone, *When God Was A Woman* (1976).

[98] See J. Mellaart, *Catal Huyuk: A Neolithic Town in Anatolia* (1967). For a critique of Mellaart see I. Todd, *Catal Huyuk in Perspective* (1976). See also M. French, *Beyond Power* (1985) at 46; Thompson, *supra*, note 96 at 138-50.

[99] See S. Iida, ed., *Nihon shoki shinko* (New Lectures on Japanese Tales) vol. I (1936) 29-69.

[100] Chin Jin, ed., *Gishi wajin den* (Chinese Literature on Japan).

[101] See I. Takamure, *Bokeisei no kenkyu* (A Study on Matrilineage) (1938) and *Sho seikon no kenkyu* (A Study on Marriage as an Incorporation of the Groom to the Bride's Family) (1953).

[102] Thompson, *supra*, note 96 at 149.

[103] S. Freud, "Totem and Taboo," *Standard Edition*, *supra*, note 47, vol. 13 (1964).

how the male child makes the transition from a continuity with and an affection for the mother, in which the child sees the father cast as a rival, to a positive identification with the father accompanied by a disparagement of women. In this way the age of matriarchal consciousness can be viewed as the parallel of the period of the male child's close identification with the mother, and the rise of patriarchy as the equivalent of the male child's shift of allegiance from the mother to the father. Freud himself did not take this view of matriarchy. He accepted that historically there had been such a period, but he believed that this was only a temporary development in the stages of patriarchy which arose after the killing of the father by the brothers when they renounced control over women in order to be able to live at peace with one another.[104] Some of Freud's staunchest supporters, however, would disagree with him on this question. N. O. Brown, for example, writes:

> The proper starting point for a Freudian anthropology is the pre-Oedipal mother. What is given by nature, in the family, is the dependence of the child on the mother. Male domination must be grasped as a secondary formation, the product of the child's revolt against the primal mother, bequeathed to adulthood and culture by the castration complex. Freudian anthropology must therefore turn from Freud's preoccupation with patriarchal monotheism; it must take out of the hands of Jungian *Schwärmerei* the exploitation of Bachofen's great discovery of the religion of the Great Mother, a substratum underlying the religion of the Father — the anthropological analogue to Freud's discovery of the Oedipal mother underlying the Oedipal father, and comparable, like Freud's, to the discovery of Minoan-Mycenaean civilization underlying Greek civilization.[105]

It is the fear of castration which spurs the shift from a positive view of the mother and a negative view of the father to a positive view of males and a negative view of females. The father is internalized in the form of the super-ego, and the Oedipus complex is transcended when the individual is able to escape the father complex by the development of a strong ego through the renunciation of illusion, and the acceptance of the reality principle. The development of the myth of the social contract to ensure equality between brothers after the killing of the primal father could then be said to correspond to the escape from the father complex as the male's own ego matures.

Eli Sagan, in his study of the complex cultures which bridge the

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[104] *Id.* at 131.

[105] N. Brown, *Life Against Death* (1959) at 126.

gap between primitive societies and the archaic civilizations which are their successors, compares the development of these societies with the pre-Oedipal stages of the development of infants.[106] Using Margaret S. Mahler's three stages of the psychological birth of the self in the human infant: autism, symbiosis and separation and individuation,[107] Sagan shows that human societies themselves go through parallel processes, with comparable psychic trauma, when they separate from the kinship system as monarchy develops. He has thus developed a psychoanalytic social theory based on a triadic interrelationship between society, the family and the individual psyche.[108] His model is equally applicable to psychoanalytic jurisprudence.

Jerome Frank, among others, has explained law in Freudian terms as a father substitute.[109] Law can thus be viewed as the public projection of the super-ego. The individual male's escape from the father complex is facilitated by the creation of institutional substitutes, the primary one being the state. To the degree that people require father substitutes in the form of institutional domination, they still remain under the influence of the Oedipus complex.

Professor Takeyoshi Kawashima, relying in part on Frank's Freudian analysis of law, contrasts the western view, which he terms "paternalism", with that of the Japanese, which is paternalism moderated by the psychology of *amae* which he terms "maternalism". According to Professor Kawashima, this is the source of the Japanese dislike for the rigid application of rules and the desire to achieve social harmony through warm human relations.[110] For him, at least, there appears to be no conflict between *amae* and autonomy. He writes that:

> the Japanese traditionally expect that in principle social obligations will be fulfilled by a voluntary act on the part of the person under obligation, usually with particular friendliness or benevolence ... The actual value of social obligation depends upon the good will and favour of the obligated person....[111]

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[106] E. Sagan, *At the Dawn of Tyranny: The Origins of Individualism, Political Oppression and the State* (1985).

[107] M. Mahler, F. Pine & A. Bergman, *supra*, note 55.

[108] *Supra*, note 106 at 348.

[109] J. Frank, *Law and the Modern Mind* (1930).

[110] Otsuka, Kawashima & Doi, *supra*, note 16 at 146 and 188-92.

[111] T. Kawashima, "The status of the individual in the notion of law, right, and social order" in Moore, *supra*, note 14 at 430.

What *amae* and autonomy have in common, and what therefore makes them consistent with each other, is voluntariness.

Where a dependency relationship is maintained on the basis of human feeling, all of the parties to the relationship are in it of their own free will, given that some need makes one of them dependent upon the other. The persons who are dependent upon others retain their autonomy so long as the people upon whom they are dependent do not take advantage of their dependency to force them to act contrary to their will.

The maternal principle was first expounded by the pioneer of Japanese psychoanalysis, Heisaku Furusawa.[112] He describes the psyche of the Japanese male in terms of what he calls the "Ajase complex". Ajase was the prince of Osha Castle in ancient India. In the actual Buddhist text, the story is about a father and son relationship in which the son kills his father but is forgiven by his father from heaven. In the story as modified by Furusawa and Okonogi to match the Japanese psyche, Ajase was the son of King Binbashara who was converted to Buddhism by his wife Idake. Idake feared that the king might lose interest in her as her features were not as they used to be. She thought that the only way to guarantee his continued affection was to have a son. She was told by a prophet that a wizard living in the forest would die in three years time, and would be reincarnated as her son. As she was too anxious to wait three years, she contrived to cause the wizard's death and become pregnant. The prophet had also told her that the son would kill his father. Fearing the spite of the yet to be born wizard-son, and having second thoughts, she sought to abort the unborn child, which was later delivered in a tower. Ajase was lovingly raised by his parents and only discovered the secret of his conception and birth at maturity. After much agony of spirit caused by the loss of his idealistic view of his mother, Ajase decided to kill Idake. At the moment of formulating this resolution, Ajase was swept with guilt, causing him to shake with fever and to break out into malignant sores which produced a terrible smell. Because of the stench, everyone deserted him except his mother, who

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[112] Heisaku Furusawa, *Zaiaku ishiki no nishu*, (Two Kinds of Feeling of Guilt) (1931); S. Yamamoto & K. Okonogo, *Nihonjin no Shakai Byori* (Social Pathology of the Japanese) (1982) at 68-88. I am grateful to professor Yoshiyuki Matsumura who drew my attention the Ajase complex in his paper, "The Role of Law in Western and Eastern Societies" (unpublished). He there states that "this story of Ajase is similar to *mabuta no haha* (literally, 'mother of eyelids', meaning the mother from whom he has been separated since his childhood, a popular drama in Japan) and presents the original form of the common mother-child experience through which we Japanese must pass without fail to reach maturity."

forgave him for resolving to kill her. With a silent and loving devotion she nursed and cared for him. Ajase, now aware of his mother's sacrifice and suffering, in turn forgave her, and mother and son recovered their original oneness.

The Ajase complex does not seem to be an alternative to the Oedipus complex, but is rather a culturally different expression of it, in the sense that both represent in mythic form the painful process of genderization which humans endure in the passage from infancy to adulthood. The Ajase myth marks a reconciliation with the mother which is missing in the western form of the complex. The maternal principle, reflected in the permeations of *amae* through Japanese culture, is absent in the West.

Freud believed that since women do not experience castration anxiety, they maintain a pre-Oedipal attachment to their mothers and consequently do not fully develop super-egos. "I cannot evade the notion", wrote Freud, "that for a woman the level of what is ethically normal is different from what it is in men ... they show less sense of justice ... and are more often influenced in their judgements by feelings...."[112] The Swiss child psychologist Jean Piaget noted that boys displayed an inclination to follow rules, and a facility in their application, while girls tended to be more pragmatic and less inclined to follow rules slavishly in their games and behaviour.[114] The Harvard psychologist, Lawrence Kohlberg, devised a scale of levels of moral development in terms of facility in the use of rules and logical consistency in reaching moral judgments, upon which he tested men and women, and concluded that women fell substantially lower on the scale.[115] Carol Gilligan, a Harvard colleague of Kohlberg, confirms that there is a difference between the way boys and girls, and men and women, approach moral disputes and rules; however, in her study *In A Different Voice*, she strips away the aura of superiority which is given to the masculine mode.[116]

Gilligan, who worked with Kohlberg in some of his research with children, discusses a typical reaction of a boy, Jake, and a girl, Amy,

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[112] S. Freud, "Some Psychical Consequences of the Anatomical Distinction Between the Sexes", *Standard Edition*, *supra*, note 47, vol. 19 (1961) at 257-58.

[114] J. Piaget, *The Moral Judgement of the Child* (1965), *Six Psychological Studies*, trans. A. Tenser (1967), *Structuralism*, trans. and ed. C. Maschler (1970).

[115] L. Kohlberg, *The Philosophy of Moral Development* (1981); "A Cognitive Developmental Analysis of Sex-Role Concepts and Attitudes" in E. Maccoby, ed., *The Development of Sex Differences* (1966) at 82-173.

[116] C. Gilligan (1982).

to a moral dilemma which Kohlberg posed to a group of eleven year olds to measure their moral development. The dilemma was whether a man who requires a drug to save his wife's life, and can not afford to purchase it, should steal it. Jake was clear that the man should steal the drug because a life was more valuable than property. Amy, on the other hand, considered neither property nor law, but was more concerned about the various human relationships which were involved in the situation. She responded, "if he stole the drug, he might save his wife then, but if he did, he might have to go to jail, and then his wife might get sicker again, and he couldn't get more of the drug, and it might not be good. So, they should really just talk it out and find some other way to make the money." Gilligan comments,

> seeing in the dilemma not a math problem with humans but a narrative of relationships that extends over time, Amy envisions the wife's continuing need for her husband and the husband's continuing concern for his wife and seeks to respond to the druggist's need in a way that would sustain rather than sever the connection.[117]

There would appear to be some striking similarities between the approach and attitude of the Japanese to dispute settlement and rules and that taken by women in the West, which seem to justify Kawashima's use of the term maternal principle and its connection to *amae*, in contrast to the paternal principle.[118] The paternal principle dictates the obedience of an inferior in a hierarchical social order to a superior who has the authority to lay down rules for which obedience can be demanded as a duty. The maternal principle reflects the nurturing relationship whereby a dependent person can impose upon the love or emotionally-based good will of another for the satisfaction of a need. Each principle leads to a different form of We-consciousness. The paternal principle encourages individuals to define their selves in terms of their place in a hierarchical social order, while the maternal principle seeks a definition of the self in terms of relationships of dependency and mutual dependency. Autonomy, therefore, is inconsistent with the paternal principle, but consistent with the maternal. To the degree that *amae* represents the maternal principle, it is consistent with autonomy. When, however, paternalistic relations of domination are set in terms of *amae*, contradictions arise.

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[117] *Id.* at 25-32.

[118] *Supra*, note 111.

All of this must inevitably lead to the conclusion that the contradiction in western legal consciousness between legal justice on the one hand, and mercy, love, emotion or what has been called prophetic justice in the Judeo-Christian tradition, on the other, has its origins at least in part in gender bifurcation. Thus we can conclude that there is a fundamental relationship between western legal consciousness and the Oedipus complex. The identification of law with authority, authority with the father, and the father with the state, while at the same time identifying love, mercy and emotion with the mother, and excluding the mother from power, helps insure the separation of law and human emotion which is so characteristic of the western legal tradition.

The Ajase complex explains why the influence of *amae* permeates Japanese legal consciousness, rather than coalescing as a contradictory pole, as in the western tradition, even though Japan also has a patriarchal culture. In the Ajase complex the son returns to the mother. The reconciliation of the son to the mother is thus reflected in the particular view which the Japanese take of law, rules, justice and dispute settlement.

Freud, however, considered a return to the mother as an impediment to the development of the self. He viewed it as a form of wish-fulfillment which left one within the grips of the Oedipus complex, never able to transcend it. This accounts in part for his positive evaluation of the masculine and his negative evaluation of the feminine,[119] and furnishes a possible explanation for the difficulty experienced by some Japanese in fully developing a sense of the self.

It would appear that this leaves us in something of a dilemma. The maternal principle, *amae*, or some similar emotional foundation for We-consciousness is a necessary condition for human freedom. If we attempt to meet the needs arising from our interdependency through the paternal principle, we lose much of our autonomy. If, on the other hand, we follow the maternal principle alone, there is a danger that the self will not fully mature.

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[119] See J. Van Herik, *Freud on Femininity and Faith* (1982). In a brilliant analysis of the Oedipus complex, she shows that Freud's theories of gender, religion and the Oedipus complex are all interrelated and inseparable. Because females are already "castrated" since they lack a penis, there can be no fear of castration which will drive them through the complex. Rather they remain in a pre-Oedipal state which Freud equates with wish-fulfillment. Judaism is a more advanced religion because it renounces wish-fulfillment and is thus closer to the reality principle, while Christianity remains an expression of wish-fulfillment. Thus the asymmetry which Freud finds between male and female he finds also reflected in the contrast between Judaism and Christianity.

Reconciliation and Transcendence

The way out of this dilemma is through transcending the Oedipus and Ajase complexes. The Oedipus complex is fully transcended only when the gender gulf is healed within the individual psyche. Only then can the "I" and the "We" be in proper balance in a fully developed self. The male must return to the mother, but only after the "I" is strong enough that the centre of the self can withstand the loss of boundaries entailed in reconciliation with the feminine. Similarly, the Ajase complex can only be transcended when the return to the mother takes place after the self is strong enough to retain its boundaries. The Ajase complex produces the world of *amae* where We-consciousness is strong and I-consciousness is weak, a world of feeling with little autonomy. The Oedipus complex produces a world of authority and law, with little feeling, and where freedom is an illusion. So long as human emotions, qualities and abilities are bifurcated along gender lines, and the care and nurturing of children are left exclusively to women, we will be in the grips of these or similar complexes.[120]

As stated by Sagan, "the development of the psyche is the paradigm for the development of culture and society."[121] The psychological problems of the separation-individuation process of the individual psyche of the child unfolds in the context of a protective and nourishing mother who nevertheless represents "psychological death, the loss of boundaries"[122] under the shadow of the paternal power of the father who exercises authority over both child and mother. It is in this context of authority, power and dependency that we must seek the keys to understanding the evolution of legal consciousness in both East and West.

For me, the Buddha of Justice found in the great hall of the Supreme Court Building symbolizes autonomy with feeling, and calls for a view of the self in which both I-consciousness and We-consciousness are strong and in balance. In assimilating fundamental rights Japan need not lose the traditional sense of *amae* which, according to Dr. Doi, is the core of the Japanese soul. Individuality should be possible without alienation. If, however, the entire western

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[120] See D. Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* (1976); N. Chodorow, *The Reproduction of Mothering* (1978); A. Rich, *Of Woman Born* (1976).

[121] *Supra*, note 106 at 364.

[122] J. Benjamin, "Shame and Sexual Politics" (1982) 27 New German Critique 151 at 155.

legal and political tradition is taken over, including the western views of substantive justice or transcendant goodness, along with western ideologies such as utilitarianism or Marxism, which reflect these ideals, then a dialectical tension will exist which will inevitably erode the sense of community which the Japanese presently enjoy.

The cultural bifurcation between East and West has its origins in a paradigmatic shift which took place in both cultures with the recognition that sensed experience is subjective; that is to say, relative to the observer. The shifts, however, went in opposite directions. In the East, the awareness developed that the sensed properties of objects such as colour, temperature, texture and so on were the products of human experience, so reality was sought in the recognition that the differentiations of experience were illusory and that only pure undifferentiated experience out of which the differences arose was real. This was the Brahman without differences in Hinduism, Nirvana in Buddhism, and the Tao in China.

The paradigmatic shift which gave birth to western culture occurred with the Greeks with the evolution of science, mathematics and philosophy. Unlike the East, which sought ultimate reality in terms of pure experience unadulterated by conceptual thought, the Greeks sought ultimate reality in terms of theoretical constructs of a cosmic order of universal law which they sometimes referred to as the logos. The success of the Greeks in mathematical astronomy, in the formulation of the laws of harmony in terms of mathematical relations, and the formulation of geometry into a logical deductive system culminating in *Euclid's Elements*, laid the foundation for their faith in reason, which faith took its ultimate form in Stoicism. It was Stoicism which gave birth to the western juridical tradition. The basic epistemological presuppositions of Stoic science and Stoic morals and law are thus much the same.[123]

With the radical transformations in twentieth century physics, stemming in particular from Einstein's theories of relativity, Heisenberg's uncertainty principle, and Bohr's concept of complementarity, there appears to be a convergence between the views of ultimate reality of East and West. This convergence has been the subject matter of a spate of books in the last few years.[124]

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[123] See Smith, Smith & Weisstub and Northrop, *supra*, note 84.

[124] See Northrop, *supra*, note 54; F. Capra, *The Tao of Physics* (1975); M. Talbot, *Mysticism and the New Physics* (1981); G. Zukav, *The Dancing Wu Li Masters* (1979); H. Yukawa, *Creativity and Intuition* (1973); A. de Riencourt, *The Eye of Shiva* (1980).

It should be kept in mind that there is no single quantum view of reality, in that quantum physics does not give us "a single metaphor for how the universe actually works", in the way Newtonian physics did. In fact, a number of possible views of reality are consistent with quantum physics, and not all of these are consistent with eastern metaphysics. A number, however, are, including the most influential, called "the Copenhagen Interpretation", which came out of Niels Bohr's Copenhagen Institute.[125]

The point I wish to make is that a convergence between the eastern and western world views has clearly started to take place, although some versions of each are more compatible than others. If a convergence between eastern and western metaphysics is possible, and this would certainly appear to be the case for some branches of western metaphysics, then a convergence should be possible between any moral or ethical theories which can be derived from them and which share similar basic presuppositions.

Legal and political theory contain both express and implicit ideas about the self. Our conceptions of the self are a product of our mental life. This being true, it is folly for legal and political theorists to ignore psychology, psychoanalysis and psychiatry.[126] Albert Einstein attested to the importance of psychoanalytic social theory for stable world political order when in 1932 he wrote to Sigmund Freud, seeking some solution, solace or hope in the face of his knowledge of the potential for the release of atomic energy, and the threat of impending war in Europe.[127] In response Freud wrote:

> Our mythological theory of instincts makes it easy for us to find a formula for *indirect* methods of combating war. If willingness to engage in war is an effect of the destructive instinct, the most obvious plan will be to bring Eros, its antagonist, into play against it. Anything that encourages the growth of emotional ties between men must operate against war. These ties may be of two kinds. In the first place they may be relations resembling those towards a loved object, though without having a sexual aim. There is no need for psychoanalysis to be ashamed to speak of love in this connection, for religion

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[125] See N. Herbert, *Quantum Reality* (1985).

[126] See for example Smith & Weisstub, *supra*, note 61; J. C. Smith, "The Sword and Shield of Perseus: Some Mythological Dimensions of the Law" (1983) 6 Int'l J. of L. & Psych. at 235, "Gods and Goddesses of the Quadrant: Some Further Thoughts on the Mythological Dimensions of the Law" (1985) 7 Int'l J. of L. & Psych. at 219; E. Fromm, *Escape From Freedom* (1941); S. Milgram, *Obedience to Authority* (1974); M. Moore, *Law and Psychiatry* (1984).

[127] Letter from Einstein to Freud (30 July 1932) in "Why War", *Standard Edition*, *supra*, note 47, vol. 22 (1964) 194 at 199.

itself uses the same words: 'Thou shalt love thy neighbour as thyself.' This, however, is more easily said than done. The second kind of emotional tie is by means of identification. Whatever leads men to share important interests produces this community of feeling, these identifications. And the structure of human society is to a large extent based on them.[134]

Freud's suggested solution to the problem posed by Einstein appears to correspond somewhat with the Japanese concept of *amae*. Thus the cure recommended by one of Japan's leading psychiatrists for the alienation suffered by western man, and the solution to war postulated by the greatest psychologist produced by the western world, also converge.

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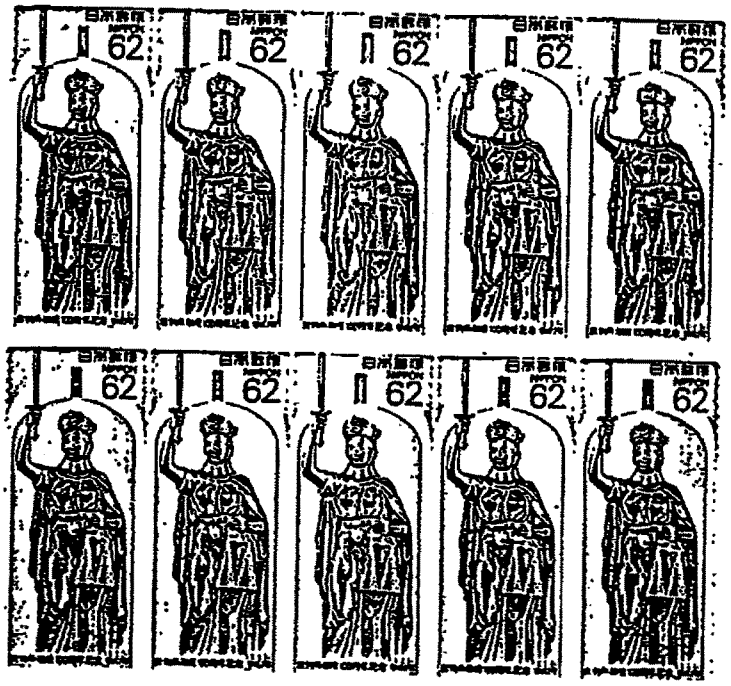
[134] *Id.* at 212. See also "Civilization and Its Discontents", *id.*, vol 21 (1961) ch. 5, 57 at 108-16.



Postage stamps issued to commemorate the centennial of Japan's judiciary 1890 - 1990

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