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

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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 status 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?

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

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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).

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 against 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 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

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, *Iconologia*. 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.

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 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

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 scept'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"

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.⁷

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 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,

7. See A. Heschel, *The Prophets* (1962).

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 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

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.

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

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

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 Sozialphilosophie* 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 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.* 665; 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 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

reluctance to litigate, their distaste 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 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

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 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.

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

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*."²³

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 spontane-

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.

23. *Id.*

24. *Id.* at 33.

ously 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.

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

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.

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

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 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

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.

35. *Id.* at 138.

36. *Id.* at 139.

37. *Id.* at 140.

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 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, deposite 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"

38. *Id.* at 148.

39. *Id.* at 149.

40. *Id.* at 150.

41. *Id.* at 94.

42. *Id.* at 95.

43. *Id.*

44. *Id.* at 141.

and "self" mean much the same thing is 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 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:

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.

50. *Supra*, note 15 at 139.

<i>Differentiation</i>	<i>Identification</i>
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 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

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).

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 experience is too complex to be analyzed 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:

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

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

[T]he Western mind is: analytical, 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 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.⁵⁶

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."⁵⁷ 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)."⁵⁸ 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)."⁵⁹

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. Pickens, *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.

56. Cited by N. Jacobsen, *Buddhism and the Contemporary World* (1983) at 84.

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

58. T. P. Kasulis, *Zen Action Zen Person* (1981) at 44.

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

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 , 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 frame-work 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

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. Weisstud, eds., *The Western Idea of Law* (1983) chs. 3 and 4.

theorists such as Nozick and Rawls,⁶² Dworkin and Hart⁶³ or Hayek and Bay,⁶⁴ the dispute between judicial activists and conservatives;⁶⁵ the contrast between formal justice and social or distributive justice,⁶⁶ and between liberty and equality,⁶⁷ and the range of the political spectrum between the poles of statism and libertarianism:⁶⁸ 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.

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

67. 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.

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*.

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."⁷⁰ 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."⁷¹ "The culture that made the death camps possible," he writes, "was not only indigenous to the West but was an outcome, albeit unforeseen and un-

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 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.

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

71. *Id.* at 27.

intended, of its fundamental . . . traditions."⁷² 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 and cultures serve to demonstrate this. The Greeks failed to extend freedom and equality to their women and slaves.⁷³ Classical Stoic Rome retained slavery and tolerated the most cruel abuses.⁷⁴ The English tradition of liberty failed to prevent imperialism, and the Americans practiced cultural and sometimes even physical genocide on their aboriginal inhabitants.⁷⁵ 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*.⁷⁶ 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

72. *Id.* at 31.

73. 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).

74. *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."

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

76. 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 Citizen: 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).

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,⁷⁷ while in Cambodia, the Marxist Khmer Rouge slaughtered between one and three million of their own citizens.⁷⁸

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.⁷⁹ 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.⁸⁰ 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.⁸¹

77. 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).

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

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

80. E. Easwaran, *A Man to Match His Mountains* (1984).

81. 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,

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

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 *buraku-min* 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.

82. Rubenstein, *supra*, note 70.

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 mechanisms.⁸³ 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.⁸⁴ Legalism or rulism can equally be a disease of non-western legal systems. China, for example, has gone through periods of extreme legalism.⁸⁵

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

83. See *supra*, note 14 for a selection of articles discussing this debate.

84. 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.

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

adversarial confrontation and litigation.⁸⁶ 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.

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

86. 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].

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. McLellen, 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.

for all human beings,⁸⁹ 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 Confuciansim 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

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 the juridical 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.

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 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".⁹³ 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

93. 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.

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 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 how the male child makes

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. 1 (1936) 29-69.

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

101. See I. Takamura, *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).

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 pre-occupation 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 gap between primitive societies and the archaic civilizations which are their

104. *Id.* at 131.

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

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 of 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

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

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.

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 was 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 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,

112. Heisaku Furusawa, *Zaiaku ishigi no nishu*, (Two Kinds of Feeling of Guilt) (1931); S. Yamamoto & K. Okonogi, *Nihonjin no Shakai Byori* (Social Pathology of the Japanese) (1982) at 68-88. I am grateful to professor Yoshiyuki Matsumura who drew my attention to 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."

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. . . ." ¹¹³ 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, 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,

113. 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).

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.

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

117. *Id.* at 25-32.

118. *Supra*, note 111.

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 wishfulfillment 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 Western 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.

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

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.

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 legal and political tradition is taken over, including the western views of substantive justice or transcendent 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.

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.

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

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,

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).

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 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.¹²⁸

Freud's suggested solution to the problem posed by Einstein appears to correspond somewhat with the Japanese concept of *amae*. Thus the cure

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.

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

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.