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Citation	Osaka University Law Review. 1987, 34, p. 37-46
Version Type	VoR
URL	https://hdl.handle.net/11094/8262
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FEELING AND REASON AS A RECURRENT TOPIC
OF LEGAL CULTURE:
A COMMENT ON PROFESSOR J.C.SMITH'S PAPER*

*Mitsukuni Yasaki***

First, I would like to express my admiration for professor J.C. Smith's grasp of the depth and scope of the Japanese concepts of self and we-consciousness, especially after such a short visit to Japan.¹ I agree with him concerning the relevance of psychology, psychoanalysis, and psychiatry in the study of legal and political theory. However, I feel there is something in his argument that remains to be examined and discussed.

As the title of Professor Smith's article² indicates, his purpose in contrasting Japanese and Western ideas of the self is to find a possible reconciled unity. In doing so, he emphasizes the "emotion", "feeling" and "compassion" shared by the Japanese, and its contrast to Western "reason". In order to understand Japan, Westerners must recognize its emotional foundation, reflected by the Buddha of Justice at the Supreme Court of Japan. Indeed, this is a surprisingly beautiful image that we ourselves might have sought, and simply generalized. I admit that simplification and generalization are useful, and shortly I shall use them, too.

Simplification, however, often leads to over-simplification and tends to disregard the multiplicity or pluralistic aspects of matters we are dealing with. I do not accuse Professor Smith of this, exactly, but I smell something of it in his argument, as well as in Dr. Doi's *Anatomy of Dependence*³ which underlies Professor Smith's thesis. Let me say as follows:

I. FEELING AND REASON

1. "Feeling" is certainly to be emphasized for the purpose of this comparative study especially since this is the age of the so-called rehabilitation of practical philosophy, and the gradual decline of the emphasis on reason. If a culture overemphasizes feelings and emotion beyond their useful

limits, however, it risks the reappearance of nightmares such as Militarism and Nationalism in Japan, and Nazism in Germany. This might be a surprising suggestion. Professor Smith did not raise such a possibility. Perhaps he refrained out of goodwill or perhaps such consideration were outside the scope of his academic intention. The forces of our time, however, are so complicated and flexible, social values founded on emotion might produce those nightmares again. It is still necessary for us to practice the restraint of reason while permitting feeling its meaning and role.

2. Dr. Doi's *Anatomy of Dependence* shows us a fascinating scenario. Dependence (that is, *amae*) is stated in the following ways:

[As the infant's mind] develops it gradually realizes that itself and its mother are independent existences, and comes to feel the mother as something indispensable to itself; it is the craving for close contact thus developed that constitutes, one might say, *amae*.⁴

This mother-child relationship, he said, will "be observed in all babies, whether from East or West."⁵ Dr. Doi also pointed out that the *amae* relationship is common not only to the Japanese psyche, but also to the Japanese social world. To begin with, Dr. Doi used a reductive method to find *amae* in the mother-child relationship; he then used a method of enlargement to explain the relevance of *amae* in the social world. In this argument, he is both very skillful and persuasive. However, I feel that he goes too far in both the reduction and the enlargement. Are there not several factors besides *amae* proper to express the emotional nature of the Japanese? Is there not a very complex *social structure*⁶ with many different aspects despite the apparent homogeneity in Japan? The same questions apply, to some extent, to Professor Smith's ideas.

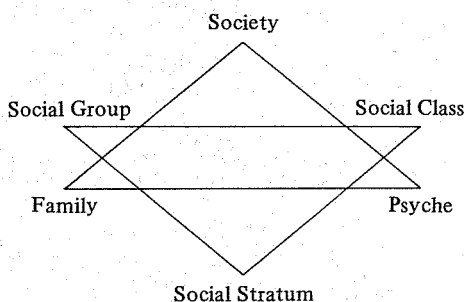
3. On the table at page 13, Professor Smith describes the Eastern, including the Japanese mentality as a combined weak I-consciousness and strong we-consciousness, in clear contrast with the Western mentality of weak we-consciousness and strong I-consciousness.⁷ Such a generalization should be supplemented or supported by careful consideration of each society's different layers, and the individual mentalities of those belonging to different professional or social groups. Even within social groups we may discern a sub-group which shares a common consciousness. The *Shōwa hitoketa-generation* or "residents in a too-crowded city zone", or an alumni

circle of a famous, time-honoured university are a few examples of a social group which shares a strong inner bond consciousness against outsiders.

4. A related problem is that of the self within the social group. After the end of World War II the dominant trend for both Japanese and foreign scholars was to see individuals as submerged in social groups under the pressure of Japanese tradition. Therefore, to emancipate them from these traditional bonds and to encourage individuality were considered urgent tasks at that time. During the reconstruction of Japanese society, in an atmosphere of peace and democracy, however, that trend gradually reversed and became a reexamination and reevaluation of the warm human relationships of the traditional Japan. In a sense, the latter trend emphasizes the quantitative difference between the Japanese and Western mentalities, while the former emphasized the qualitative. It seems to me both Professor Smith's and Dr. Doi's ideas approach the latter. As far as the Japanese mentality is concerned, I think both approaches are still necessary.

5. To search for a way from psyche to society I draw at first the following figure.

Figure 1



There are at least three possible implications:

(1) Direct line from Psyche to Society.

In such a case, other factors like Family, Social Group, and so on are looked through, but not disregarded. We may find in (1) a model of so-called "civil society" consisting of equal and free individuals where the civil (nation) State will be overlapped with Society.

(2) Triangle from Psyche through Family to Society.

In this case, Family plays a bridging role between Psyche and Society. Patriarchalism may be a good example of (2).

An example of this may well be seen in our contemporary society, a so-called pluralistic society.

3. "Star" or "Diamond" Figure consisting of all elements, that is, Psyche—Family—Society—Social Stratum—Social Group—Social Class.

(3-A) As a variant of (3) we may find a pluralistic, but democratically organized State as not so far from Society, while (3B) may be appearing around us, for instance, as a next step I shall pay attention to law and mercy in our contemporary society, the regulatory State supported by corporatism or paternalism.

II. LAW AND MERCY

Professor Smith's main interest is to reconcile law and mercy. This interest becomes immediately apparent if we remember his admiration of the statue of Justice placed along one of the walls in the Supreme Court of Japan.⁸ That statue has a head of Buddha and no blindfold. He says, the "unconstrained gaze of the Buddha suggests that emotions such as compassion can be consistent with the rule of law".⁹

What he intends in this description and evaluation is to make a clear contrast of the Eastern and Western ideas of law. To return to the statue, on the Western 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".¹⁰

Emotions can be consistent with the rule of law in Japan, but not in the West. He shows, generally speaking, a great interest in the Japanese attitude towards that problem of law and mercy. It seems to indicate Professor Smith's real commitment to such a Japanese direction of problem-resolution. I must wonder again why this is so.

He noticed in the Western law a kind of dilemma. For instance, 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.

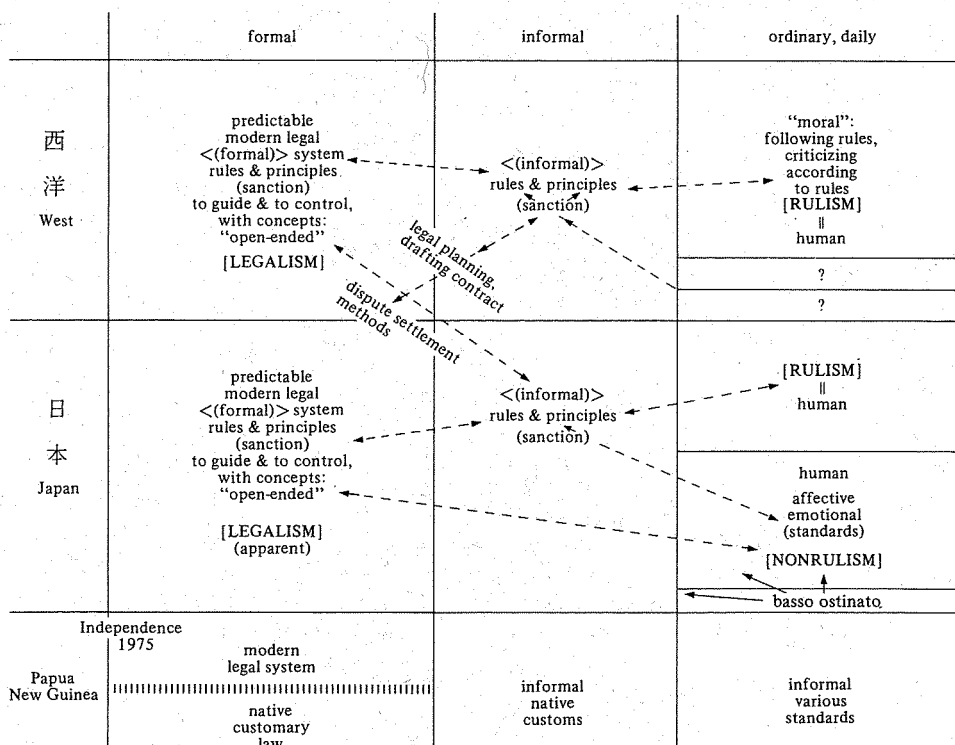
One of the most basic tenets of this set is the right of equality before the Law. By assuming the existence of such a right, matters of sex, order of birth, family membership, race or skin colour become irrelevant for the purposes of our moral and legal rights and duties. . . . However, our gender identity, order of birth, family, colour and race are critical matters in formulating the We-consciousness which is an essential part of our concept of self. Thus the conceptual framework within which we formulate a part of our I-consciousness conflicts with the kind of conceptual framework within which we develop our We-consciousness. The result is substantial dialectical tension within the western psyche".¹¹

From this aspect he proceeds as follows: the "western legal and political tradition has attempted to achieve a sense of community identification through transcendental ideals 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. . . . 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."¹²

Again, we find his focus of interest is directed to a true community, and in turn, to emotion. Through the path described above, he reached an ideal of "a true person of no status"¹³ (Mu i shin jin). This ideal itself looks like very attractive. But how can we connect the reality of man-made law in man-made or less-made society with such an ideal must still remain a hard problem to resolve.

We must notice, moreover, that such a dilemma in the West also is easily seen in Japan since "Japan inherits these contradictions in its Post-World War I Constitution".¹⁴ As far as this aspect of the problem is concerned, the Japanese situation is not far from the Western. To understand the situation as we have been involved in it, I feel it useful for me and the readers to use several figures.

Figure 2.



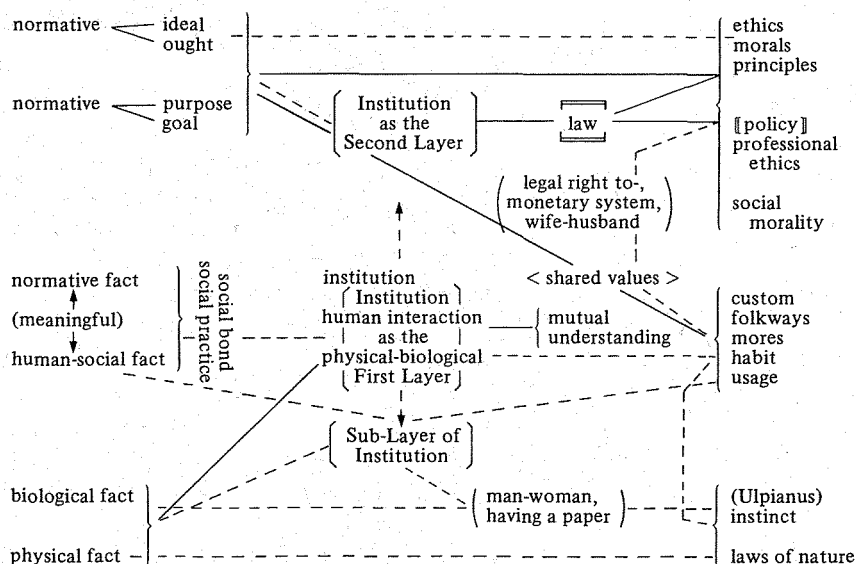
This figure shows, at first glance, Japanese law as akin to Western law to a considerable degree. But the connection is on the formal level. The formal level is not sharply edged, but is connected with the informal level, even the daily level, through various channels. One example is legal rules and principles with *open-ended* concepts.¹⁵ As open-ended, these concepts may well be used to respond to social demands of an extremely different nature. Social demands, people's expectations are rich in variety, often conflicting with each other even in one country, not to mention in each different countries like Japan and the Western countries. Arising in an ordinary life, these expectations gradually take the form of informal rules, principles, eventually to be taken seriously on the formal level, for example, through judicial interpretation or judicial law making. In Japan, as is often pointed out, these are in a sense the emotional foundation of the formal law and administration of justice. But this may also be the case with in the West.

What is worth noticing is that following ordinary rules or criticizing according to rules is morality on the daily level in the West, especially in the U.S (Rulism), while *partly* it is the case with Japan, *partly* another side of Japanese daily life is based on emotion and human relatedness. It is the last point which Professor Smith emphasizes as to Japan. I agree with him on this point, but I am not of the same opinion as him in so far as I recognize a *partial* possibility of "rulistic" daily life existing in Japan. It seems to me that even in Japan, the ordinary, daily level does not exhaustively consist of emotion.

I would say that a nuance may be much more understandable if we add the situation of a country like Papua-New Guinea where many tribal customs still maintain a strong binding force while the formal law of the Western type, too, has been imported and partly accepted for many years.^{16,17}

Informal rules and principles I have no intention of explaining in detail, but I merely reserved a space for these in order to take into consideration various informal rules, principles, standards of social groups from gigantic corporations in our highly industrialized society through the legal profession, medical profession. to ordinary people (living law).

Figure 3.

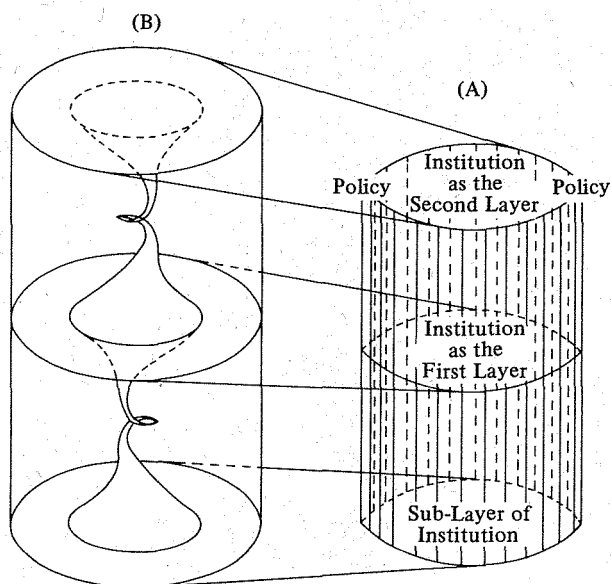


We can see the same problem from a bit different angle in Fig. 3. It shows the formal and informal level mentioned above replaced respectively by institution as the second layer and first layer which are accompanied, and as a result characterized, by many surroundings.¹⁸ The right side we can count a number of standards from abstract to concrete, and *vice versa*. The left side shows simply how two institutions are related to fact and value.

Bifurcation of fact and value has been developed in the Western history of ideas and certainly well considered. Here in Fig. 3., however, we can find a gradual development from mere physical fact through meaningful fact, normative fact to normative ought while taking it for granted to give a meaning to bifurcation. A line or dotted line is a mere indication of complex relation of left-central-right or up-middle-down.

We may find a further question about a relation of Fig. 1 with Fig. 3. Figure 1 is to be read on the level of institution as the first layer. As Figure 1 is also to be interpreted in an extension to the State level, it leads to and is dynamically connected with institution as the second layer. Here we can again reread the formal modern Western type of law as well as the right system as surrounded by Figure 1, particularly backed up by the State, and at the same time informal living law in our daily ordinary life as by Figure 1, that is, Psyche-Family-social Stratum etc.

Figure 4.



I would like to make a tentative conclusion by using Fig. 4. As you see, this is a figure for showing each three different institutions (second, first and sub-layers) apt to modify themselves, and therefore interrelated with each other. But it is certain that strength or depth of interrelation delicately depends on and changes according to the surroundings which can not be found in Fig. 4 which is very simplified. What I tried to explain in Fig. 3. may well be reread here in a dynamic relation.¹⁹ Institution as the second layer including formal law in Japan appears ambivalent, that is, independent of and dependent on the first layer (no need to mention sub-layer) and *vice versa*. Even though appearing ambivalent, it gives us an image of what a reality is. A recurrent topic of legal culture, feeling and reason, as keenly discussed by Prof. Smith may be much more clarified if it would be carefully examined again from this perspective.^{20,21}

Reference

* This is a paper written for the purpose of Item 3 (collaborative research) of Agreement Between Faculty of Law, Univ. of British Columbia and Faculty of Law, Osaka Univ. Professor Smith's paper originally appeared in 20 U.B.C. LAW REV., 341, 1986, and according to the purpose above it is now published again in this volume of O.U. LAW REV. under his permission.

** Professor of General Jurisprudence, Faculty of Law, Osaka Univ., L.L.D. Tokyo Univ., 1968.

1. Prof. Smith did research with us at O.U. Faculty of Law from May to June, 1983.
2. Smith, *Ajase and Oedipus: Ideas of the Self in Japanese and Western consciousness*, 34 O.U.L.R., 1 1987.
3. T. Doi, *THE ANATOMY OF DEPENDENCE*, trans. J. Bester, Kōdansha International, 1973.
4. *Id.* at 74.
5. *Id.* at 74.
6. C. Nakane, *JAPANESE SOCIETY*, C.E. Tuttle Co., 8, 1984.
7. *See supra* note 2, at 18.
8. The statue was sculptured by Mr. Katsuzō Entsuba, sculptor, in Japan.
9. *See supra* note 2, at 2.
10. *Id.* at 2.
11. *Id.* at 16.
12. *Id.* at 21.
13. *Id.* at 15, 24
14. *Id.* at 18.
15. One example is "open texture" as often used in H.L.A. Hart's *THE CONCEPT OF LAW*, 1961.
16. *See* M. Yasaki, *LEGAL STRUCTURE OF OUR DAILY WORLD* (Nichijōsekai no hō kōzō), Misuzu-shobō, 293, 1987.
17. *See* Yasaki, *The Comprehension of Social Relationships With Regard to the Necessity and Possibility of Order as a Problem in the Sociology of Law*, in: *Japanisches und europäisches Rechtsdenken-Versuch einer Synthese philosophischer Grundlagen*, RECHTSTHEORIE herg. von M. Yasaki, A. Troller, J. Llompart, Heft 2/3, 225, 1985.
18. *See supra* note 16 at 88, note 17 at 219. As to the Figure 3, I was much influenced by P.S. Atiyah's idea in *LAW AND MODERN SOCIETY*, 51, 1983. *See* Yasaki, *Significance of "Legal Consciousness" in Regard to Social Facts and Social Institutions*, 31 O.U.L.R., note 13 at 10, 1980.
19. *See supra* note 16 at 2. *See also* Yasaki, *Law and Liberalism in the Process of Moderniza-*

tion of Japan note 28, at 34. — A paper read and discussed at SYMOSIUM ON VARIETIES OF LIBERALISM, Princeton, May 9-11, 1985. Moreover, cf. A. Salzman, *Conference Report*, 20-21, 1986.

20. I wrote another paper in this volume — *Theory, Institution, and Practice as a Topic of Legal Culture: A Comment on Professor R.B. Parker's Paper*, 34 O.U.L.R., 73 1987. As its subtitle indicates, it is different from this paper. Content and course of discussion of that paper is not overlapping, but often interrelated with this paper for Prof. Smith. I hope reader, if possible, to read both.

21. A reader might make a question: Does not the bifurcation in these figures of Institution as the Second Layer and Institution as the First Layer imply my idea still now depending on that of reason and feeling. While admitting such a way of thinking remaining, I would say again that the Second does not always precede the First, but *vice versa*. Rather, I should like to point out interesting problems immanent in a vast area in our social relationship which perhaps fits to the area to be covered by feeling as Prof. Smith so emphasized. To grasp a few points, let me cite the following statement: "While the vertical (*tate no*) type of human relationship symbolic of an earlier kind of community was certainly manipulated by the central, or local governments as a convenient means for the realization of their purposes, e.g., militaristic expansionism (by mixing up belief in the Tennō-worship with the unique folkloric religion of each community), the horizontal (*yoko no*) type of mutual human relationship was immanent in the same community life, and so far it did not always conflict with such a way of life and enabled each individual to be conscious of his or her subjectivity, autonomy, independence, and responsibility insofar as this self-consciousness did not conflict with the realities of community life organized around the *tate no* principle, a kind of social organization generally perceived to be at odds with the categories of self-actualization associated with individualistic liberalism. Although this mixture of the horizontal type of mutual human relationships in the larger context of a vertical social organization was often seen in the rural agricultural communities as Kunio Yanagida has pointed out, is not just a thing of the past, but still, even now, is said to be alive and active, not only in these agricultural areas, but also in several contemporary movements, or new waves of social activism, such as town people's or citizen's movements around air pollution, public nuisance, and the environment on general. The idea of Yanagida, adumbrated here is only one of several contemporary evaluations or interpretations of the question of community (*Kyōdō tai*), and one of the several divergent themes". See *supra* note 19 at 26-27, and note 20 at 82.