An Overview of the Japanese Legal System

Elliott J. Hahn

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An Overview of the Japanese Legal System*

_Elliott J. Hahn**_

I. INTRODUCTION

Trade between the United States and Japan is growing at such a rapid pace¹ that it is incumbent on those involved in private international law to be well-versed in the Japanese legal system. This Article is intended to be of service to one seeking an overview of that system. The basic lesson for the reader is that the legal system of Japan differs significantly from that of the United States. This difference arises from the disparate views of Americans and Japanese as to the fundamental purpose of a legal system. Upon reflection, it is perhaps not surprising

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Editor's Note: Throughout this Article, the author has relied on various source materials for which no English translations are available. In such cases, the _Journal_ has relied upon the author's expertise in place of the _Journal_'s independent verification of the citation.


_U.S. Trade with Japan, 1976 - 1981_ (in millions of dollars, f.a.s. value basis, seasonally unadjusted)

<table>
<thead>
<tr>
<th>Year</th>
<th>Exports*</th>
<th>Change Over Year-Earlier Period</th>
<th>Imports</th>
<th>Change Over Year-Earlier Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>$10,529</td>
<td>3.8%</td>
<td>$18,550</td>
<td>19.6%</td>
</tr>
<tr>
<td>1978</td>
<td>12,885</td>
<td>22.4</td>
<td>24,458</td>
<td>31.8</td>
</tr>
<tr>
<td>1979</td>
<td>17,579</td>
<td>36.4</td>
<td>26,243</td>
<td>7.3</td>
</tr>
<tr>
<td>1980</td>
<td>20,790</td>
<td>18.3</td>
<td>30,714</td>
<td>17.0</td>
</tr>
<tr>
<td>1981</td>
<td>21,823</td>
<td>5.0</td>
<td>37,612</td>
<td>22.5</td>
</tr>
</tbody>
</table>

* Domestic and foreign merchandise, including Department of Defense shipments.
that Americans and Japanese perceive the purpose to be so different. This perception arises from a history and culture that in each country's case is strikingly dissimilar. As a result, Japanese legal practitioners perform functions far different from those performed by practitioners in the United States. Consequently, Japanese legal training does not at all parallel legal training in the United States. In fact, law itself plays a far different role in Japanese society than in the United States. This author hopes that heightened awareness of these differences will help Americans achieve a better understanding of the people and practices in Japan, and will help improve and increase the transnational relations of the two nations.

II. Development of the Japanese Legal System: A Mixture of the Old and the New

Even before the beginning of what most historians term "modern" Japan, i.e., the Meiji Era in 1868, Japan had developed a system of commercial law based almost entirely on custom. Despite the influence of traditional Chinese law on other areas of its legal system, such as public and criminal law, Japan's commercial law system was almost entirely indigenous. These customs were known and used by the Japanese commercial sector; whenever a problem arose, commercial customs were enforced by various self-regulatory guilds, trade associations and, ultimately, by the courts.

Until the Meiji Era, there were no lawyers in Japan, at least as we use the term in the United States. Nor was there any specialized legal training in counseling others or in representing them in court. In fact, the legal and political systems in concert with Japanese social values exerted a strong, virtually overwhelming, pressure on the people to resolve their problems by themselves and without the aid of a third party.

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2 The Japanese group their periods of history since 1868 by the name of the ruling emperor. Thus, the title Meiji Era denotes the period of history when the Emperor Meiji was the ruler of Japan. The current period in Japan is the Showa Era.


4 The importation of Chinese ideas by the Japanese legal system has been described by one commentator as one of the "great watersheds in the development of Japanese law." George, The Right of Silence in Japanese Law, in The Constitution of Japan, Its First Twenty Years, 1947-67 257 (D. Henderson ed. 1968).

5 See, e.g., Stevens, supra note 3, at 1259.

6 There were people, though, who became experienced in the ways of the courts and who did counsel litigants. These were the inn-keepers of Tokyo (then called Edo) who listened to the tales of the litigants who had journeyed to Edo to have their cases heard and gradually developed an expertise in this area. Brown, A Lawyer By Any Other Name: Legal Advisors in Japan, in Legal Aspects of Doing Business in Japan 201, 222 (1983).
The Tokugawa governments\textsuperscript{7} adopted Confucianism, and its doctrines of social hierarchy and \textit{wa} (harmony), as a state orthodoxy in an effort to prevent commercial disputes from reaching any formal stage. Confucianism imposes a duty on individuals to serve their superiors and on all society to maintain social harmony.\textsuperscript{8} The Tokugawa governments used these tenets as societal pressures to force potential litigants to settle their problems by themselves, refrain from litigation and preserve the harmony of society.\textsuperscript{9} To have one's own rights emphasized in court meant telling another that he or she had erred. The Tokugawa system abhorred such judgements. By viewing the pursuit of individual rights in court as a disruption of societal harmony, the system strongly discouraged litigation. Thus, conciliation dominated civil procedure in the Tokugawa period.\textsuperscript{10} Societal harmony was the all-important objective and the rights of the individual mattered little. In fact, the concept of individual rights was so alien to the Japanese of the Tokugawa era that they had no word to express it. And, in addition the Japanese certainly could not envision individual rights against the state itself.\textsuperscript{11}

Although at first glance a vestige of an earlier age, the Tokugawa society's emphasis on the settlement of disputes by the parties themselves without resort to litigation has important ramifications today.

\textsuperscript{7} The years 1503 to 1868 are known in Japanese history as the Tokugawa era. In 1503 Tokugawa Ieyasu unified rule in Japan and, as the shogun, exercised political domination. This era continued under his family's rule until the Meiji Restoration in 1868. \textit{See} G. Sansom, \textit{History of Japan} 1334-1615 (1961); G. Sansom, \textit{History of Japan} 1615-1867 (1963).

\textsuperscript{8} Professor Dan Fenno Henderson has dramatically shown how this societal pressure not to take one's disputes to court worked in a typical case. D. Henderson, \textit{Conciliation and Japanese Law: Tokugawa and Modern} 127-70 (1965).

\textsuperscript{9} \textit{Id.}

\textsuperscript{10} \textit{Id.}

\textsuperscript{11} Not only could the Japanese during the Tokugawa era not envision the concept of individual rights, but incredibly enough, no word in the Japanese language at the time expressed the concept of individual rights. Noda, \textit{Nihon-Jin No Seikaku To sono Ho-Kannen} (The Character of the Japanese People and Their Conception of Law), 140 Misuzu 2, 14-26 (1971), translated and quoted in \textit{The Japanese Legal System: Introductory Cases and Materials} 305 (H. Tanaka ed. 1976) [hereinafter cited as Tanaka]. Thus, when Rinsho Mitsukuri was commissioned to translate the French Civil Code into Japanese for possible adoption in Japan, he was at a loss as to how the French expression \textit{droits civil} could be translated into Japanese. Mitsukuri described the situation as follows:

Whereupon at that time I translated the words \textit{droits civil} as \textit{minken} [people's powers or authority] there was an argument over what did I mean by saying that the people have power \textit{[ken]}. Even though I tried to justify it as hard as I could, there was an extremely furious argument.

Mukai and Toshitani, \textit{The Progress and Problems of Compiling the Civil Code in the Early Meiji Era}, \textit{1 Law in Japan: An Annual} 25, 38 n.23 (1967). Mitsukuri's recitation of this episode indicates how difficult it was for many Japanese to accept the concept of people having "rights." \textit{Kenri}, the word that Mitsukuri eventually decided to use as the Japanese equivalent of \textit{droits civil}, has retained the meaning given it by Mitsukuri. Tanaka, \textit{supra}, at 305.
Many Japanese still hold this traditional precept. As a result, the American who wishes to maintain a successful long-term business relationship with the Japanese must put aside his or her Western law-oriented emphasis on the rights and duties of the parties delineated by a contract. For the Japanese, determining whose rights are at stake in a dispute is not nearly as important as preserving the *wa*, the harmony between the parties.\footnote{See Hahn, Negotiating Contracts With the Japanese, 14 CASE W. RES. J. INT'L LAW 377 (1982).} Whereas Americans resolve disputes by looking to the language of the contract itself to define the rights and duties, many Japanese think the contract language is secondary to the spirit of trust between the parties. The Japanese believe that parties should work out problems amicably—in a spirit of trust and cooperation that often disregards what the contract says and sometimes even contradicts explicit contract language.

Traditional Japanese contracts are strange animals, indeed, to American lawyers. The documents are short, often one page recitals of the parties’ rights and obligations, in which the parties broadly agree to negotiate in good faith any problem that may arise.\footnote{Kawashima, The Legal Consciousness of Contract in Japan, 7 LAW IN JAPAN: AN ANNUAL 1, 15-16 (1974). One Japanese professor has observed that in Japan, “[n]ot only are there many instances where written agreements are not drafted, but even when written agreements are drafted, their contents are generally very simple and in many cases include only the most important elements.” Id. The Chinese are similar in their traditional antipathy toward lengthy contracts. One American lawyer has commented that “the Chinese are always asking why we want so much detail . . . . They say, ‘Can’t we just shake hands? If we have a problem, we’ll work it out.’” Ross, S.F. Firms Make Presence Felt in Chinese Capital, Los Angeles Daily J., Nov. 3, 1981, at 1, col. 2.} Just as the Japanese of the Tokugawa era believed that the importance of the harmony of society overrode the rights of the individual, so today many Japanese still believe that vindication of one’s rights in a contract dispute causes a rending of the atmosphere of trust in the business relationship. Japanese therefore emphasize negotiation of the dispute in a spirit of harmony to ensure maintenance of an atmosphere of trust. They sacrifice individual rights of the parties in business relations in order to continue and strengthen the harmony inherent in a successful business relationship.

Americans should note, however, that the larger Japanese companies—such as Mitsui, Mitsubishi and Sumitomo—have “learned” from their American counterparts how important contractual language may be for defining party duties. With regard to international contracts, the Japanese have changed their attitudes somewhat. They have moved from their traditional reliance on *wa*, and relegating of the contract
language to a secondary role, to another, more Western view. Nevertheless, the Tokugawa/Confucian emphasis on wa, trust and internal resolution of problems by the parties remains a crucial factor in maintaining strong business relationships with the Japanese. The Japanese will shun the American who threatens litigation at the first sign of trouble. If strict adherence to contract language will result in confrontation, the Japanese will compromise their goal. The American who values a relationship with the Japanese must work to resolve matters in a spirit of amicability and trust.

After the Meiji Restoration in 1868, the new Japanese government took steps to import a Western law system. It took this action to end the onus of two treaties imposed upon Japan by the Western nations. The treaties put Japan in a position inferior to the Western nations' and were considered by the Japanese to be a slur upon the country's sovereignty. One treaty dealt with customs and duties, imposed high tariffs on Japanese goods imported by the West, and also imposed low tariffs on Japanese imports of Western goods. The other provided that, because of Japan's "barbaric" legal system, Westerners accused of crimes in Japan would be tried not in Japan but in their home countries; as a result, the worst penalty usually imposed on a foreigner was literally only a slap on the wrist. When Japanese leaders asked the Western nations how these two treaties could be changed, they were told that one task they needed to accomplish was to adopt a "modern," i.e. Western, legal system. Consequently, the Japanese journeyed to France, Germany, England and the United States to find a model for Japan. In the end, the Western legal system that most heavily influenced Japan's was the civil law system of Germany.

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14 Professor Haley of the University of Washington School of Law has written that in Japan, one's reputation for trustworthiness is such an integral feature of the business landscape that it "can become a necessity of life." Haley, Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions, 8 J. JAPANESE STUD. 265, 279 (1982).
15 Some observers have commented that it is not just the Japanese, but Eastasians in general who strongly tend to emphasize compromise rather than confrontation in all their relationships. See, e.g., R. HOFHEINZ & K. CALDER, THE EAST ASIA EDGE 112 (1982).
16 See, e.g., Y. NODA, INTRODUCTION TO JAPANESE LAW 42 (A. Angelo trans. 1976).
20 See Y. Noda, supra note 16, at 42.
21 During his study in Europe, Prince Herobrimi developed a great admiration for Bismarck, and it was after Herobrimi's return that the Japanese adopted the German system as a model. It was argued that the German system with its strong monarchy and control by the elite was the best prototype for Japan. Henderson, Some Aspects of Tokugawa Law, 27 WASH. L. REV. 85, 91 (1952). It is the belief of the author that one reason why the common law system of the United
After World War II, the United States' legal system exerted a strong influence on Japan. Japan's current Constitution, put into effect in 1947, reflects that American influence. The Japanese corporate, civil rights, securities regulation, income tax, and labor laws also carry strong overtones of American law, as did the antitrust laws initially after 1945. Thus, today's Japanese commercial legal system is a unique hybrid of civil law (Germany) and common law (United States) systems grafted onto a legal system based on the customs and values that have existed in Japan for hundreds of years.

III. Legal Practitioners in Japan: Education, Training and Professional Roles

The paucity of attorneys in today's Japanese business law system surprises Americans. Japan has roughly 12,000 lawyers in a population of approximately 110 million. The state of California alone has more lawyers, and a population only one-fifth of Japan's. The United States has twice as many people as Japan and fifty times as many lawyers. Thus, while the United States has one attorney per 515 people, Japan has one attorney per 9,662 people.

The main reason why Japan has so few lawyers is that there is only one law school in the entire country: the Legal Training and Research Institute in Tokyo. To be admitted to the practice of law in Japan, one must graduate from that school. A unique feature of the Institute is that its students are considered employees of the Ministry of Justice. As such, they receive a salary paid by the government during their time of study there. The high intelligence of Japan's attorneys is easily inferred from the statistic that the Institute accepts less than two percent of those who apply for admission each year. Last year, for example, 30,000 Japanese took the entrance examination and only

\[22\] See, e.g., LAW IN JAPAN—THE LEGAL ORDER IN A CHANGING SOCIETY (A. von Mehren ed. 1963).
\[24\] Id.
\[25\] Id.
\[27\] If one has taught law for five years in Japan, this rule can be waived. BENGOSHI Ho [Lawyers' Law], art. 5(3), LAW No. 205 of 1948.
\[28\] The salary is approximately the same as that received by newly appointed public officials who are university graduates. RULES CONCERNING LEGAL APPRENTICES, arts. 2-3 (SUPREME COURT RULE No. 15, 1948).
approximately 500 were admitted—a figure that is normal for the Institute.\textsuperscript{29} The exam itself is given only once a year; failure to pass it, however, does not preclude one from taking it the next time.\textsuperscript{30} In fact, the average entrant into the Institute does not pass the exam until five years after graduating from college.\textsuperscript{31}

The examination to enter the Legal Training and Research Institute is open only to the Japanese. Article 4 of the Bengoshi Ho (Lawyers' Law) is the governing statute. It states that "any person who has

\begin{center}
\begin{tabular}{|c|c|c|c|}
\hline
Year & Number of Applicants & Those who Passed the Multiple-Choice Type Test & Those who Passed the Final Exam. & Percentage of Success \\
\hline
1949 & 2,514 & — & 265 & 10.5\% \\
50 & 2,755 & — & 269 & 9.8 \\
51 & 3,648 & — & 272 & 7.5 \\
52 & 4,765 & — & 253 & 5.3 \\
53 & 5,141 & — & 224 & 4.4 \\
54 & 5,172 & — & 250 & 4.8 \\
55 & 6,306 & — & 264 & 4.2 \\
56 & 6,714 & — & 297 & 4.4 \\
57 & 6,920 & — & 286 & 4.1 \\
58 & 7,074 & — & 346 & 4.9 \\
59 & 7,819 & — & 319 & 4.1 \\
60 & 8,302 & — & 345 & 4.2 \\
61 & 10,921 & 2,092 & 380 & 3.5 \\
62 & 10,802 & 1,931 & 459 & 4.2 \\
63 & 11,725 & 2,030 & 456 & 3.9 \\
64 & 12,728 & 2,017 & 508 & 4.0 \\
65 & 13,681 & 2,258 & 528 & 3.9 \\
66 & 14,867 & 2,225 & 554 & 3.7 \\
67 & 16,460 & 2,244 & 537 & 3.3 \\
68 & 17,727 & 2,322 & 525 & 3.0 \\
69 & 18,453 & 2,326 & 501 & 2.7 \\
70 & 20,160 & 2,157 & 507 & 2.5 \\
71 & 22,336 & 2,821 & 533 & 2.4 \\
72 & 23,425 & 2,407 & 537 & 2.3 \\
73 & 25,259 & 2,484 & 537 & 2.1 \\
74 & 26,708 & 2,419 & 491 & 1.8 \\
75 & 27,791 & 2,343 & 472 & 1.7 \\
\hline
\end{tabular}
\end{center}

Tanaka, \textit{supra} note 11, at 577.

\textsuperscript{30} There are in Japan a substantial number of individuals who spend many years studying for the entrance examination to the Legal Training and Research Institute before they pass it; many others spend many years studying for and taking the exam, but never do pass. In understated humor typical of the Japanese, these people are called \textit{ronin}, the Japanese word for the samurai of the Tokugawa era who, because they did not have a master to serve, roamed Japan searching for one. Some observers of the Japanese have argued that today these people represent a very inefficient use of labor. See, e.g., Abe, \textit{Education of the Legal Profession in Japan}, in \textit{Law in Japan—The Legal Order in a Changing Society} 153, 162 n.17 (A. von Mehren ed. 1963).

\textsuperscript{31} Brown, \textit{supra} note 6, at 227.
completed the course of study at the Legal Training and Research Institute shall be competent to practice as a lawyer." At first glance, this law seems to allow non-Japanese to be admitted to practice law in Japan—as long as they graduate from the Legal Training and Research Institute. In 1955, however, the Japanese Supreme Court restricted admission to the school to Japanese only. The Court declared that because those who attend the school receive a salary from the government, they are also employees of the Ministry of Justice; only Japanese citizens may be so employed. In only one case since then has the Supreme Court allowed a non-Japanese to attend the school. That case, however, was unique because it involved a Korean, Kyeong Deuk Kim, who had been born and raised in Japan and whose family had lived in Japan for several generations, but who the Japanese still considered a Korean. In light of strong pressure from the bar, because Kyeong Deuk Kim had been born, raised and educated in Japan, and because he was then living in Japan, the Supreme Court in 1977 permitted him to enter the Institute. In 1979, the Supreme Court amended the admission requirements of the Institute to provide that foreigners may be admitted in "appropriate" cases. Apparently, however, no other such appropriate cases have yet been found. To the author's knowledge, no foreigner has been admitted to the Legal Training and Research Institute since that date; certainly no American has.

Because of the Institute's role as the sole source of lawyers in Japan, Japan's closest analogue to the American bar examination is the test to enter the Institute. Article 4 of the Japanese statute governing the practice of law states that only graduates from the Institute may be admitted to the practice of law. A major difference between the two legal systems, therefore, is that each jurisdiction in the United States gives a bar examination to those who have graduated from law school and wish to practice law there. In contrast, the Japanese give the bar...
examination before entry to law school. In this way, Japan severely limits the number of attorneys admitted to practice each year.

The Legal Training and Research Institute has a two-year curriculum. As indicated below in Figure 1,39 the Institute’s curriculum heavily stresses practical instruction. Two-thirds of the time spent there is devoted to “field training,” a term given to the four four-month periods students spend in the field as clerks to practicing attorneys, “procurators” (i.e., prosecutors), and civil and criminal judges. In addition, the Institute faculty’s teaching is geared to practical instruction, the faculty itself being composed of practicing attorneys, judges, and procurators temporarily appointed by the Japanese Supreme Court. Through this kind of curriculum, students can quickly assimilate the practical skills they need for day-to-day professional activities after graduation.

Based on the example of the civil law system of continental Europe, Institute graduates immediately become judges, procurators or attorneys. Of the Institute’s annual 500 graduates approximately seventy to eighty become judges, forty to fifty become procurators, and the rest become attorneys.40 For those accustomed to the yearly entry of thousands of law school graduates into the ranks of attorneys in the United States, it is staggering to consider Japan’s figure of only 370.

39 See infra at 526.
40 Interview with Shigeo Kifuji, Counselor at the Japanese Ministry of Justice (June 29, 1982).
1. Major Functions
   (1) Training for Legal Apprentices
   (2) Continuing Legal Education for Judges
2. Training for Legal Apprentices

   National Law Examination
   
   Initial Training Term | Field Training Term | Final Training Term
   April                 | July                  | November
   4 months             | 16 months             | 4 months
   Final Examination

3. Continuing Legal Education for Judges
   (1) Training of Assistant Judges and Judges of Summary Courts
   (2) Judicial Research
The comparatively few attorneys in Japan and the relatively high fees they charge\(^{41}\) prevent most Japanese from consulting an attorney if...

\(^{41}\) One publication recently described Japanese attorneys' fees as follows:

Those law firms in Japan which are dubbed or self-acclaimed as international offices generally charge for their services (litigation or otherwise) on a time charge basis. The rate, whether quoted in dollars or yen, is roughly in the range of $50.00 to $200.00 per hour. The $50.00 figure clearly ought to be considered on the low side and would perhaps be applicable to the work of a new associate. . . .

For non-contentious matters, e.g., contract drafting, opinion letter, services are generally charged on a lump sum basis. The actual amount is in fact determined by the attorney after the service has been substantially completed. The amount is rather roughly calculated on the basis of the time spent for the service and the value of the service to the client.

Contentious matters, normally requiring negotiations and/or litigation, are generally handled by both plaintiff and defense attorneys on the basis of an initial non-returnable lump sum fee calculated as a percentage of the amount claimed or in dispute, and a success fee. The success fee for the plaintiff attorney would be earned only if there is success and would be calculated as a percentage of what the plaintiff received in judgment or settlement. The success fee for the defense attorney would be calculated on the amount the claim was reduced, whether in judgment or settlement. In all cases, court costs and out-of-pocket expenses are to be for the client's account.

The actual calculation of fees is guided by the fee rules of the Japan Federation of Bar Associations. The guidelines are just that—guidelines. They are not mandatory, but it is said that they are for the public benefit, in that the clients will have an idea whether the fee is excessive or not.

The guidelines provide a sliding percentage scale depending upon the yen amount. For example, 15% of the first ¥500,000, 12% of the next ¥500,000, and 10% of the next ¥2 million. Since the initial fee is based on the amount claimed, it is easy for the attorney to set the initial fee with the client. However, because the success fee is based on the "amount" of success, one could not say beforehand what percentage would apply.

Attorneys often solve the problem by proposing the success fee percentage indicated in the guidelines which corresponds with the attorney's estimate of the actual outcome. The fee guidelines indicate that the initial fee and success fee may each be set within a range of 30% below and 30% above the amount calculated in accordance with the guidelines, all depending upon the complexity and difficulty of the case.

Shown below are the sample initial fee percentages, for both plaintiff and the defense attorneys, resulting from guideline calculations and the suggested range. The success fee percentage would be the same as that for the initial fee, assuming either full recovery by the plaintiff or complete victory to defendant.

(For comparisons, compute approximately 250 yen to the US dollar.)

<table>
<thead>
<tr>
<th>Amount Claimed</th>
<th>Initial Fee</th>
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<tbody>
<tr>
<td>¥10 million</td>
<td>8.45%</td>
</tr>
<tr>
<td>¥591,500-¥1,098,500</td>
<td></td>
</tr>
<tr>
<td>¥20 million</td>
<td>6.7%</td>
</tr>
<tr>
<td>¥941,500-¥1,748,500</td>
<td></td>
</tr>
<tr>
<td>¥50 million</td>
<td>3.7%</td>
</tr>
<tr>
<td>¥1,291,500-¥2,398,500</td>
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</tr>
<tr>
<td>¥100 million</td>
<td>4.8%</td>
</tr>
<tr>
<td>¥3,391,500-¥6,298,500</td>
<td></td>
</tr>
<tr>
<td>¥500 million</td>
<td>3.4%</td>
</tr>
<tr>
<td>¥11,791,500-¥21,893,500</td>
<td></td>
</tr>
</tbody>
</table>

The guidelines do not distinguish between negotiations and litigation fees, but attorneys generally make a lower fee quotation for negotiations. It appears that Japanese attorneys often decide that the fee provided by the guidelines is, from the practical point of view, simply too high to propose to the client. Also as one might expect, there is a tendency for the plaintiff attorney to quote on the low side for the initial fee but on the high side for the success fee. The tendency for the defense attorney is generally the opposite. Specific fee proposals are, of course, negotiable. However, Japanese attorneys are
they have a dispute with someone. In this way, the Japanese system has been able to maintain the key Tokugawa/Confucian value of non-litigiousness. And consequently, the traditional Japanese norm of resolving problems without resort to litigation persists. In 1979, for example, 387,000 law suits were filed in Japan.\(^{42}\) In contrast, there were approximately 2,000,000 in West Germany in 1974 and 1,990,000 in England in 1979.\(^{43}\) Taking into account the populations of these countries, litigation in West Germany and England is nine times more frequent than in Japan. This figure does not by any means suggest that the Japanese have fewer disputes and arguments than the Germans or the English. What it does show, however, is that the Japanese are still far less prone to use the courts to settle their quarrels.\(^{44}\) Furthermore, by spending a relatively small amount of money, time or energy on litigation as compared with the West, the Japanese system can devote more resources to benefitting society in more tangible ways, e.g., to the production of goods and the enhancement of the gross national product.\(^{45}\)

\(^{42}\) See infra note 46 and accompanying chart.

\(^{43}\) Id.

\(^{44}\) Professor Haley of the University of Washington School of Law has argued that the Japanese are not especially reluctant litigators. Rather, he asserts, there is present in Japan the distaste for litigation and the preference for informal dispute resolutions that is found in most societies. What the Japanese have done is simply to use institutional arrangements to protect this preference from societal erosion. Haley, *The Myth of the Reluctant Litigant*, 4 THE J. JAPANESE STUD. 359 (1978).

\(^{45}\) It should be noted, however, that the amount of money spent by a nation on legal activities is counted in the computation of the gross national product.
### Figure 2: Civil Litigation Cases of First Instance\(^{46}\)

<table>
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<th></th>
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<tr>
<td><strong>Summary Court:</strong></td>
<td><strong>Summary Court:</strong></td>
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<td>Ordinary Civil</td>
<td>Include</td>
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<tr>
<td>134,243</td>
<td>Ordinary civil</td>
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<tr>
<td>67,910</td>
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</tr>
<tr>
<td>Bill/check</td>
<td>Interdiction*</td>
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<tr>
<td>2,494</td>
<td>Public summons*</td>
</tr>
<tr>
<td>Civil mediation applied</td>
<td>District Court:</td>
</tr>
<tr>
<td>58,336</td>
<td>166,113</td>
</tr>
<tr>
<td>Provisional seizure/disposition</td>
<td>Ordinary civil</td>
</tr>
<tr>
<td>5,503</td>
<td>Documents, Bills, Checks</td>
</tr>
<tr>
<td><strong>District Court:</strong></td>
<td><strong>District Court:</strong></td>
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<td>Ordinary civil</td>
<td>93,732</td>
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<td>Promissory note/check</td>
<td>Administrative</td>
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<td>21,364</td>
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<tr>
<td>Administrative</td>
<td>Civil mediation applied</td>
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<td>776</td>
<td>776</td>
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<td>Insolvency</td>
<td>Provisional seizure/disposition</td>
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<tr>
<td>2,783</td>
<td>46,697</td>
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<tr>
<td><strong>Family Court:</strong></td>
<td><strong>Other Courts:</strong></td>
</tr>
<tr>
<td>Adjudication (B)</td>
<td>Labour Court</td>
</tr>
<tr>
<td>85,955</td>
<td>531,032</td>
</tr>
<tr>
<td>Mediation</td>
<td>Finance Court</td>
</tr>
<tr>
<td>5,396</td>
<td>297,162</td>
</tr>
<tr>
<td>High Court:</td>
<td>Social Court</td>
</tr>
<tr>
<td>252</td>
<td>154,218</td>
</tr>
<tr>
<td>Administrative</td>
<td>Administrative Court</td>
</tr>
<tr>
<td></td>
<td>252</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>Total</strong></td>
</tr>
<tr>
<td>386,563</td>
<td>2,001,664</td>
</tr>
</tbody>
</table>

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**Great Britain (1979)**

| County Court: | 1,659,064 |
| High Court: | 330,603 |
| Chancery Division | 13,848 |
| Queen's Bench | 149,244 |
| Family Division | 167,511 |

**Total** | 1,989,667

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* Interdiction and Public Summons amounts, not given separately, total approximately 18,000 (1967)

Sources:

- Japan: *Shihō tōkei nenpō* (for 1979)
- Great Britain: *Judicial Statistics*, 1979
- West Germany: *Anwaltsblatt*, 1976, pp. 81, 328-9
It is misleading to compare the raw number of attorneys practicing in Japan with the number in the United States. Although it is true that the United States has twenty-five times as many attorneys per capita as Japan,\textsuperscript{47} the Japanese permit many people who are not attorneys, but quasi-lawyers, to perform tasks associated with attorneys in the United States.\textsuperscript{48} One type of quasi-lawyer in Japan is the judicial scrivener, who may draft court documents, transfer title to land and give legal advice in these matters.\textsuperscript{49} Another type of quasi-lawyer is the administrative scrivener, who drafts the legal documents individuals submit to government offices.\textsuperscript{50} Two more groups of quasi-lawyers in Japan are the \textit{benrishi} and \textit{zeirishi}. \textit{Benrishi} have the power to give legal advice on patent and trademark matters, and even may represent clients in court.\textsuperscript{51} \textit{Zeirishi} have the power to give legal advice in tax matters and to represent their clients before the Tax Office.\textsuperscript{52} Attorneys and public accountants qualify ipso facto as \textit{zeirishi}. Others must pass an exam to be accredited either as \textit{zeirishi} or as \textit{benrishi}.\textsuperscript{53}

One additional class of quasi-lawyers in Japan, as shall be discussed below, is composed of university graduates who specialize in law at the university level and then work in corporate or governmental legal departments. In the Japanese university system, unlike that of most American universities and colleges, students can "specialize" in law. Courses in law are taught by professors of law. Virtually all of these individuals, without exception, do not graduate from the Legal Training and Research Institute and therefore are not empowered to practice law.

Because nearly all Japanese universities have a department of law, it is not uncommon for Japanese to tell Americans when they first meet that they specialized in law. The American should remember that the only way to become an attorney in Japan is to graduate from the Legal Training and Research Institute.\textsuperscript{54} Specializing in law in Japan simply compares with majoring in law at an American university, if such a major existed.

Thus, those who major in law at Japanese universities do not have the type of legal knowledge that United States or Japanese lawyers pos-

\textsuperscript{47} See supra notes 23-26 and accompanying text.
\textsuperscript{48} See supra note 32.
\textsuperscript{49} See Brown, supra note 6, at 353.
\textsuperscript{50} \textit{Id.} at 378.
\textsuperscript{51} \textit{Id.} at 400.
\textsuperscript{52} \textit{Id.} at 424.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} See supra notes 27-40 and accompanying text.
sess. At the university level professors teach by lecturing about the general content and interpretation of the more important Japanese code provisions. Systematic development of theory is common, but classes rarely discuss individual fact situations and cases.

IV. CORPORATE LEGAL DEPARTMENTS

Because so few applicants are admitted each year to the Legal Training and Research Institute, most Japanese university graduates who specialize in law go to work for corporations or governmental agencies. Although most Japanese corporations have corporate law departments, they rarely employ lawyers. Thus, most members of Japanese corporate law departments are university graduates who specialized in law.

Consequently, an American who negotiates a contract with a Japanese company must expect in the usual case not to deal with an attorney, but rather with a member of the company's legal department. The American should assess the Japanese counterpart's experience. Clearly, Japanese counterparts will not have the legal education background of American attorneys. Those Japanese who have been in the corporate law department for some time, however, will have used their experiences to develop practical legal skills tailored to the particular needs of their companies.

For the most part, parties do not seek the services of an attorney in Japan until they decide there is no viable alternative other than litigation. Japanese corporations rarely use attorneys for their normal work. The American negotiating a contract in Japan will be struck by the absence of attorneys representing the Japanese company in the drafting stage. A lawyer, if at all involved by the company, will usually act behind the scene as an "advising attorney" to double-check the con-

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55 Because Japan's legal system is a progeny of the civil law system, the study of law in Japan is centered around the six most important codes of Japan (the Roppo): the Constitution, the Codes of Civil and Criminal Procedure, and the Civil, Penal, and Commercial Codes.

56 Only 0.3% of all law department graduates will ever pass the exam to enter the Legal Training and Research Institute. Brown, supra note 6, at 237.

57 These corporate law departments are a relatively new phenomena in Japan, since most were formed in the 1970s. See Concerning the Roles of the Legal Departments of Typical Japanese Enterprises, COMMERCIAL LAW CENTER, INC. 1 (1979).

58 As of June 1982, there were less than ten attorneys directly employed by corporations in Japan. See Brown, supra note 6, at 349. The statute regulating the practice of law in Japan provides that attorneys cannot work directly for companies without the permission of their bar association. BENGOSHI HO, [LAWYERS' LAW] art. 30(3), LAW NO. 205 of 1949.

59 Note, however, that many members of Japanese corporate law departments, especially the younger ones, have studied in a LL.M. or M.C.L. program at an American law school.
tract after it has already been drafted. Unlike in the United States, companies seldom involve attorneys in their decisionmaking process. Thus, the Japanese business law system is somewhat akin to that of England. The members of the corporate law departments of Japan are comparable to the solicitors of England; both handle the day-to-day contract negotiation and drafting. Japan's attorneys, on the other hand, play a role similar to that of the barristers of England; the work of both usually relates to litigation.

Thus, the role of attorneys in the contract negotiation process in Japan differs greatly from their role in the United States. In the United States, attorneys play an integral role in the process. Clients rely not only upon their attorneys' skills as contract drafters, but also upon their advice about negotiations and upon their business judgments. Moreover, much of the American business lawyer's work involves finding creative solutions to a client's problems. In Japan, however, the business client consults an attorney only after having completed negotiation of the contract. The attorney rarely participates in the initial business negotiations—often the most crucial part of the contract negotiation process—but simply rewrites the contract language and ties up the loose ends. Some Japanese attorneys have told this author that even their power to redraft the contract language may be limited if it has already been approved by the department's section chief, the bucho, who is a person of substantial responsibility and importance in the company. Frequently, in fact, the business client may ask the Japanese lawyer to examine not the entire contract draft, but only a small part—as small as one paragraph!

To sum up, attorneys in the United States and Japan play far different roles. In the United States, attorneys not only handle lawsuits, but frequently use their verbal and analytical training to give counsel about business negotiations and decisions. As we have seen, however, Japanese attorneys do not receive such training; theirs is far more oriented to practical litigation skills and the drafting of contracts. Naturally enough, this training reflects their type of practice. In a recent survey, for example, attorneys in Tokyo stated that of civil matters, litigation comprises seventy-two percent of their work; attorneys in the countryside estimated the amount to be eighty-four percent.\(^\text{60}\) Not surprisingly, since so much of their work centers around litigation, most attorneys in Japan have their offices in large cities with district courts.

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\(^{60}\) Kahei, supra note 46, at 7.
Tokyo and Osaka have by far the most attorneys' offices.61

V. THE JAPANESE JUDICIAL SYSTEM

The Japanese judicial system resembles the state court systems in the United States. There are trial courts, an intermediate court of appeals, and a supreme court. Japan is divided into forty-nine judicial districts. The usual court of original jurisdiction is the District Court,62 where most cases are heard by a single judge.63 The largest and the most important District Court is Tokyo District Court. Although District Courts are the usual courts of original jurisdiction, the Summary Courts handle lesser civil and criminal matters.64 Currently, the jurisdiction of the Summary Courts in civil matters is limited to claims not exceeding 900,000 yen (approximately $2,250).65 In addition, the Family Courts have plenary jurisdiction for family and juvenile matters.

Litigants may appeal Summary Court civil decisions to the District Courts and criminal decisions directly to the High Courts, the general courts of appeal in Japan.66 Appeals from the District Courts and from quasi-judicial governmental bodies go to one of the eight High Courts of Japan.67 The High Courts are located in different areas of the country. Just as the Tokyo District Court is the most important of the forty-nine District Courts, so the Tokyo High Court is the most important of the High Courts. Although the High Courts are normally courts of appeal, in one significant situation a High Court sits as a court of original jurisdiction. Pursuant to the law creating the Japan Fair Trade Commission (JFTC) cases filed by the JFTC must be adjudicated by the High Court of Tokyo sitting as a court of original jurisdiction.68 Each case before the High Court is heard by a panel of three judges.69

Japanese law provides two opportunities to appeal a lower court's decision in commercial cases. The first appeal is called koso and the second jokoku. The party who loses at trial can file a koso appeal for

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61 Id. at 8. Most law offices in Japan, however, are very small by American standards. The largest office in Tokyo, for example, has about 25 attorneys while most have one or two.
62 See Tanaka, supra note 11, at 50.
63 There are no juries in Japan today. See K. Saito, (Bashin) (jury) in KEHen Hogaku JITEN (DICTIONARY ON CRIMInAL LAW) 62 (Takigawa ed. 1957).
64 See Jurisdiction of Summary Courts To Be Expanded, JAPANESE TRADE LAW BULL. 8 (Feb. 1982).
65 COURT ACT, arts. 33-35, LAW No. 82 OF 1982.
66 COURT ACT, arts. 16, 24.
67 Id.
68 Id.
69 Id., art. 18.
an alleged error in fact-finding as well as in law. In civil cases, there are two grounds for jokoku appeal: (1) an error in the interpretation of the Japanese Constitution and (2) an error in law clearly affecting the litigation’s outcome.

**Figure 3:** The Japanese Court System

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When the Summary Court is the court of first instance.

When the District Court is the Court of first instance.

When the Family Court is the court of first instance.

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70 MINJI SOSHÔ HÔ (CODE OF CIVIL PROCEDURE), art. 360, LAW NO. 29 OF 1890.

71 Id., art. 394. Article 395 lists grounds where an error in procedure shall *ipsa facta* be so grave as to be a ground for appeal.
The Supreme Court of Japan, which sits in Tokyo, is composed of fifteen justices. The Court conducts hearings and renders decisions as either a petty bench court of five justices or as a grand, i.e. full, bench. The grand bench must hear:

(1) cases in which a determination is made of the constitutionality of a law, ordinance, regulation, or disposition as a result of a litigant's contention (excluding those cases in which the opinion is the same as that of a previous grand bench decision holding such a law, ordinance, regulation, or disposition to be constitutional);

(2) cases other than those previously mentioned in the preceding item when the law, ordinance, regulation, or disposition in question is held to be unconstitutional;

(3) cases in which an opinion regarding the interpretation and application of the Constitution or of any other law or ordinance is contrary to that of a previous Supreme Court decision.\(^{72}\)

With regard to Supreme Court appointments, only ten of the fifteen justices must be attorneys, procurators, judges or law professors. The only requirements for the remaining five are that they have "broad vision and legal knowledge" and that they be not less than forty years old.\(^{73}\) The rationale for placing people without legal training on the Supreme Court is that they broaden the collective outlook of the Court, an especially important consideration in light of the significant policy issues they must decide.\(^{74}\) Inevitably, however, the Supreme Court appointments follow the so-called 5-5-5 rule. This unwritten quota rule provides that five of the justices be chosen from the judiciary, five from the ranks of procurators and law professors, and five from among practicing attorneys.\(^{75}\) The Chief Justice of the Japanese Supreme Court is appointed by the Emperor on the basis of the Cabinet's designations,\(^{76}\) and the other justices are appointed by the Cabinet.\(^{77}\)

The background of judges is one of the most significant differences between the legal systems of the United States and Japan. In the United States, judges usually take office by appointment, often after distinguished careers as attorneys. In Japan, where the civil law system governs, judges begin careers on the bench after graduation from the

\(^{72}\) \textit{Saiban Shoho, Court Organization Law}, art. 10, Law No. 59 of 1947.

\(^{73}\) \textit{Court Law}, art. 41(1). This statute also provides that 10 of the 15 justices must have been either (1) District or High Court judges with at least 10 years of experience, or (2) Summary Court judges, prosecutors, lawyers or law professors with at least 20 years experience. \textit{Id}.


\(^{75}\) Tanaka, \textit{The Appointment of Supreme Court Justices and the Popular Review of Appointments}, 11 Law in Japan: An Annual 25, 27-28 (1978). Since 1947, only five justices have been appointed who were not formerly attorneys, judges, procurators or law professors. Brown, \textit{supra} note 11, at 289.

\(^{76}\) \textit{Const.}, art. 6(2).

\(^{77}\) \textit{Const.}, art. 79(1).
Legal Training and Research Institute and are often as young as twenty-six years old. Judges usually spend ten years as assistant judges, rotate regularly to various courts, and then become full judges.

Neither Japanese attorneys nor judges enjoy the prestige enjoyed by their counterparts in the United States. One reason may again relate to the traditional Japanese aversion to litigation; dislike for the process may spill over to those involved in it. Another reason may stem from the greater public awareness of American attorneys and judges. Because of the great frequency of litigation in the United States, newspapers report more cases and give publicity to those involved. Moreover, judges in Japan rarely, if ever, issue sweeping decisions like those of American courts which can ultimately transform society. Such differences in prestige may, however, stem from the very natures of the two judicial systems. Under the civil law traditions of Japan, a judge simply calls attention to the specific statute invoked as authority. In contrast, under a common law system, the judge enjoys more free-wheeling powers. Japanese judges rarely write philosophical decisions which the populace may discuss at length. American judges, however, often write such opinions in the hope of thereby changing future votes of other judges—as in dissents, for example. Often, American judges issue opinions that change the law because they see the court as the vehicle to do so; rarely, if ever, would a Japanese judge agree with this view. In fact, an analysis of Japanese opinions suggests that many Japanese judges see themselves as conservators of the values that have guided Japan for hundreds of years.78

VI. AMERICAN LAWYERS IN JAPAN

As American lawyers deal increasingly with businesses and lawyers from Japan, they develop increased interest in establishing offices in Japan. In the past years, American attorneys have literally besieged the Japanese government with requests to open in Japan branches of their law offices.79 For the most part, however, the Japanese have adamantly refused to change their restrictive policies on visas for American attorneys. In addition, stringent Japanese bar rules stand as further impediments to the quest of American attorneys to open offices in Ja-

The Americans argue that Japanese refusals to permit Americans to practice law in Japan, while the Americans permit Japanese to practice in the United States, has reached the status of a formal trade barrier.81

In 1977, the New York City law firm of Milbank, Tweed, Hadley & McCloy opened an office in Tokyo to advise the Japan branch of the Chase Manhattan Bank on United States law.82 Many Japanese attorneys filed protests against the opening of the office and pointed out that no member of the firm was admitted to practice in Japan. The firm countered by stating that its members were not advising on Japanese law, but rather were advising on foreign law, that of the United States, in Japan. The firm argued that the attorney-enabling statute in Japan does not prohibit people lacking permission to practice law in Japan from giving advice on foreign law.83 This interpretation, although unsupported by any statute or court holding, is buttressed by the fact that Japanese attorneys receive no training in, nor are ever examined on, foreign law. At any rate, despite the protests, the Milbank firm still operates in Japan today. Apparently, however, Milbank has acceded in some degree to the Japanese protests. Its office door first lists the names of the resident partners in Tokyo, and then notes the firm name below. In addition, the firm has reportedly consented to limit its practice in Japan to a few of its major American clients doing business there.84

A few other United States firms, such as Baker & McKenzie and Coudert Brothers, now have opened offices in Tokyo by affiliating with Tokyo law firms. Most of their clients in Tokyo offices are Japanese.85 In the usual case, however, the Japanese have used the visa weapon to frustrate the efforts of American attorneys to operate there.86 At the time this article was written, American attorneys hoped that these bar-

80 JAPANESE PRACTICING ATTORNEYS ACT, LAW NO. 205 of 1949.
81 Abrahams, Japan's Bar to U.S. Lawyers, The Nat'l L.J., June 28, 1983, at 34, col. 1. A Japanese attorney may practice law in any state in which he passes its bar examination. The Japanese state in response that recent Japanese Supreme Court actions have opened the door for Americans to apply for admission to the Legal Training and Research Institute. Most Americans who are familiar with this issue declare that this is of little value. They assert that the nature of the examination requires a knowledge of the Japanese language beyond that possessed by most Americans.
82 Fukuda, Japan, in TRANSNATIONAL LEGAL PRACTICE 201, 213 (D. Campbell ed. 1982).
83 BENKOSHI HO [LAWYERS' LAW], art. 72.
84 Brown, supra note 11, at 458.
85 Id. at 463.
86 One American had her visa application blocked because she refused to promise not to complain about the issue. See Tell, U.S. Lawyers Want Japan to Open Door to Practice, The Nat'l L. J., May 3, 1982, at 2, col. 3.
riers could be dissolved within the context of the trade liberalization talks being held between officials of the United States and Japanese governments.

Despite these restrictive policies, some particular classes of Americans may practice law in Japan. Many American lawyers went to Japan after World War II to handle the legal matters of SCAP, the Supreme Command Allied Powers, and to assist in the international military affairs trials. Others went to handle legal matters other than those related to the occupation. In 1949, the Supreme Court of Japan enacted regulations to permit those lawyers to practice law in Japan.\footnote{SUPREME COURT REGULATION No. 22 of 1949.} Although a 1955 amendment to the Japanese statute governing the practice of law repealed this regulation, foreigners already practicing law in Japan were covered by a “grandfather clause” and may continue practicing in Japan as long as they live there.\footnote{LAW No. 155 of 1955.} In addition, an increasing number of American attorneys, many directly out of law school, go each year to Japan to work for Japanese law firms as “trainees” or “advisors,” usually for a period of two years. Although they cannot practice law in Japan on their own, these Americans can work under the supervision of a Japanese lawyer. Nevertheless, many Americans find this experience surprisingly frustrating. First, those with competence in Japanese are frustrated by the realization that their positions cannot become permanent. Secondly, because their work consists mostly of drafting documents in English and assisting in international trade matters, those who wish particularly to learn about domestic Japanese law find it difficult to do so.

VII. CONCLUSION

The Japanese legal system is truly unique: it is a mixture of civil and common law systems that has been grafted onto a system based on customs and values which have held paramount importance in Japan for centuries and remain vibrant today. As is true in so many other facets of their system, the Japanese have been incredibly successful in absorbing features of foreign legal systems without sacrificing their own indigenous values.

The Japanese legal system differs significantly from that of the United States. Consequently, Americans should study it carefully, if for no other reason than to ensure the success of their transactions with the Japanese. In addition, as Japan’s economic prowess and impor-
tance in the world grow, so must the world's understanding of her peo-
ple, system and ethos. A far more important reason for American
understanding, however, is to improve the United States' legal system.
Japan's economic success story since World War II has demonstrated
that the United States has no monopoly on economic wisdom. Simi-
larly, the United States' legal system is far from perfect. Of late, such
distinguished observers as Derek Bok have asserted that the legal sys-

tem is in chaos. Japan's surely is not. Clearly, the strikingly dissimilar
values of the two nations mean that some aspects of Japan's legal sys-

tem will not suit the United States' system. Parts of Japan's system,
though, could be emulated in the United States with success. Perhaps
the most important lesson Americans can learn from the Japanese legal
system is that it is possible to adopt features of other legal systems and
yet, by taking care, not sacrifice important American values.