

JAPAN'S GAIBEN LAW: ECONOMIC PROTECTIONISM OR CULTURAL PERFECTIONISM?

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"The more laws and order are made prominent, the more thieves and robbers there will be."

Lao-Tzu

"Any government is free to the people under it where the laws rule and the people are a party to the laws."

William Penn

I. INTRODUCTION

If the dichotomy of legal perspectives between Japan and the United States is not apparent from the above quotes, the reader may need to study them again. The reader will need to recognize this dichotomy in order to fully understand the nature of the long debate between Japan and the United States regarding the admission and regulation of foreign attorneys (*Gaiben*) into Japan.

From 1955 to April 1, 1987, foreign legal services in Japan were prohibited.¹ After much debate and prodding by American lawyers, Japan enacted Law No. 66 (the *Gaiben* Law)² on March 16, 1986, and becoming effective on April 1, 1987, seemingly opening the door for foreign lawyers to practice in Japan.³ As of September 1993, seventy-six *Gaiben* had entered the Japa-

1. Some commentators feel Japan did not actually "prohibit" foreign legal services. In their view, the ambiguity of existing Japanese law allowed foreign lawyers, the *Gaiben*, to practice in Japan. See John O. Haley, *The New Regulatory Regime for Foreign Lawyers in Japan: An Escape from Freedom*, 5 UCLA PAC. BASIN L.J. 1, 14-15 (1986) (pointing out the difficulties of actual practice); Rexford L. Coleman, *Some of the Underlying Politics of the Dispute Involving Foreign Attorneys Under the Japanese Attorneys Law and a Plea for Future Accommodation*, 21 L. JAPAN 64, 66-67 (1988) (illustrating the problem as one of difficulty in obtaining visas). But see, e.g., Linda A. Cooper, *Is the Door Half Open or Half Shut? Japan's Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers*, 18 N. KY. L. REV. 417, 422-25 (1991) (recognizing that some foreign attorneys were allowed entrance but arguing that most were prohibited).

2. *Gaikoku Bengoshi niyoru Horitsujimu no Toriatsukai ni kansuru Tokubetsusochi Ho*, [Act Providing Special Measures for Handling Legal Business by Foreign Lawyers], Law No. 66 of 1986, reprinted in Stat. vol. 2 DOING BUSINESS IN JAPAN app. 6B (Zentaro Kitagawa ed., 1995).

3. Cooper, *supra* note 1, at 430.

nese legal market.⁴ Much to the dismay of these *Gaiben*, however, the door is barely ajar. The highly restrictive regulations imposed upon the *Gaiben* effectively destroy the perceived value of the *Gaiben* Law.⁵ Consequently, many American attorneys complain that the Japanese government is engaging in protectionism and have continued to demand further liberalization of the foreign practice laws.⁶ In support of their actions, the Japanese argue that they fear an influx of foreign lawyers will result in increased unethical practices by the legal profession⁷ and, more importantly, that Japanese society will become as litigious as other nations, particularly the United States.⁸ The Japanese do not view their actions as protectionism. They feel they are maintaining the cultural uniqueness that is important to their society, and that the differences between the Japanese and American legal systems are just too glaring.⁹ Therefore, to allow American legal thought and practice to intrude upon their traditional ideology is simply unacceptable.

Japan has maintained this paternalistic position in its most recent concession negotiations regarding the *Gaiben* Law.¹⁰

4. *Japan Said to Make Concessions on Practice by Foreign Lawyers*, 10 Int'l Trade Rep. (BNA) No. 48, at 2059 (Dec. 8, 1993) [hereinafter *Japan Said to Make Concessions*].

5. See Susan Sayuri Kigawa, *Gaikoku Bengoshi Ho, Foreign Lawyers in Japan: The Dynamics Behind Law No. 66*, 62 S. CAL. L. REV. 1489, 1503-06 (1989) (discussing how the law is structured to best suit the Japanese needs and not for the benefit of foreign attorney practice).

6. T.R. Reid, *Japan Fails to Yield in Talks over Limits on U.S. Lawyers; Americans Seek Expanded Practice Rights*, WASH. POST, Dec. 26, 1990, at F1.

7. See Sherill A. Leonard, *Attorney Ethics and the Size of the Japanese Bar*, 150 JAPAN Q. 86, 89-90 (1992) (explaining that this fear was spawned by the ethics crisis of the 1920s).

8. E.g., *Japan Said to Eye Easing Rules on Foreign Lawyers Practicing in Japan*, Int'l Trade Daily (BNA), at *2 (Mar. 23, 1994), available in LEXIS, WORLD Library, ALLNWS File; see also *World: Trade War Looms over International Legal Services—Section 301 to the Rescue?*, EUROMONEY FIN. L. REV., July 6, 1991, at *1, available in WESTLAW, INT-NEWS Database [hereinafter *Trade War Looms*].

9. E.g., David E. Sanger, *Japanese Say They Plan to Relax Restrictions on Foreign Lawyers*, N.Y. TIMES, Sept. 21, 1993, at A9.

10. See Cooper, *supra* note 1, at 426 (illustrating how the Japanese bar may

Although the Japanese Government passed new legislation, the Amendment of Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers¹¹ (the Amended Law), this concession does not grant satisfactory access for the *Gaiben*.¹² Many view Japan's actions as economically imperialistic and deceptive.¹³ There may, however, be some credibility to Japan's cultural justifications.

Part II of this comment explores these justifications with an emphasis on comparing and contrasting the role of culture, law, and lawyers in Japan and the United States. This comment is intended offer an understanding of Japan's defenses while not downplaying the role economics plays in the debate. Undoubtedly, protectionism plays a role in Japan's policies;¹⁴ however, when dealing with a country such as Japan, the role of culture cannot be ignored. In order to successfully negotiate the *Gaiben* issue, the United States should not close its eyes to the Japanese cultural perspective. To do so would surely result in deadlock and resentment on both sides.

Part III of this comment will analyze the interrelationship between the cultural factors and the *Gaiben* Law itself. This discussion will include a brief history of *Gaiben* regulation. It will also examine the most controversial aspects of the *Gaiben* Law, along with a look at American criticisms and proposals, current developments, and suggestions for possible strategies in future negotiations.

still deny foreign lawyers under the new Law No. 66 (*Gaiben* Law) because the applicant is likely to be "unsuitable" or if it is feared they may disturb or injure the reputation of the legal association).

11. Donald L. Morgan, *Regulation of Foreign Lawyers: Modest Changes to Be Made*, E. ASIAN EXECUTIVE REP., June 15, 1994, at 8. The new law's effective date is set for sometime in the fall of 1995. *Id.*

12. *Id.* See also *Japan Said to Make Concessions*, *supra* note 4, at 2059.

13. See generally Chalmers Johnson, *Artificial Cartels of the Mind Justify Distrust of Japan*, INT'L HERALD TRIB., June 16, 1993, available in LEXIS, WORLD Library, ALLNWS File (arguing that the Japanese legal system is really a cartel).

14. See, e.g., Sanger, *supra* note 9, at A9 (stating that "some Japanese lawyers concede that the real issue is one of competition").

II. CULTURE, LAW, AND LAWYERS

A. *Culture and History*

In order to fully understand Japan's actions, one must completely detach oneself from the roots and beliefs of one's own culture. Japanese culture exists at vast polar extremes from any other nation, especially that of the United States.¹⁵ Understanding a foreign culture such as Japan's is extremely difficult because it is human nature to project one's own thoughts and experiences on others, expecting that deep down everyone is fundamentally alike.¹⁶ For Japan, this perception is fatal. As a result, much negotiation with Japan is futile, leaving the non-Japanese participants frustrated and bewildered.¹⁷ Accordingly, the first step in attempting a successful negotiation with the Japanese is an understanding of their culture, which defines what is truly "Japanese."¹⁸

Unlike in the United States, culture is the true backbone of Japan.¹⁹ The heterogeneous nature of the United States ensures that no one culture is uniformly adopted.²⁰ As a result of this characteristic, America emphasizes individuality.²¹ In fact, much of the strife the United States faces today stems from the need to recognize and honor the many different cultures which make up the face of America.²² Because of the

15. See Richard B. Parker, *Law, Language, and the Individual in Japan and the United States*, 7 WIS. INT'L L.J. 179, 181 (1988) [hereinafter Parker, *Law*].

16. See *id.*; see also JAMES FALLOWS, MORE LIKE US 1 (1989) (stating that Americans semiconsciously assume that the American culture is universal and "peculiarities [between countries] cannot matter very much").

17. See Karel G. van Wolferen, *The Japan Problem*, 65 FOREIGN AFF. 288, 294-95 (1986-87) [hereinafter van Wolferen, *Problem*].

18. See Parker, *Law*, *supra* note 15, at 189 (discussing the understanding of the Japanese conception of the self).

19. See DENNIS LAURIE, YANKEE SAMURAI 270-71 (1992) (stating that, while Americans are "abysmally ignorant of their past," Japan "revels in its myths and legends").

20. See Parker, *Law*, *supra* note 15, at 182.

21. See *id.* at 183-93.

22. See generally Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN

very nature of being multicultural, the United States has come to rely on law as the mechanism for order and synthesis among its people.²³ This is not so in Japan. Because it is an island state, Japan has been geographically isolated. This has allowed it to remain homogeneous.²⁴ Consequently, Japan is imbued with a communitarian sense of self.²⁵ Individualism is neither accepted nor desired.²⁶ Rather, societal harmony or "*wa*" is given top priority, often resulting in the deprivation of individual rights.²⁷ These unique aspects of Japanese culture developed early in its history, originating through ritualism and tribal traditions.²⁸ Unlike many other nations, these early aspects of Japanese culture have survived centuries of industrialization and modernization and still transcend all aspects of Japanese society.²⁹

B. Law in Japan

1. Background

Japan's history does not contain the interwoven relationship of law and change as does the United States'.³⁰ Japan was not founded upon law as was the United States.³¹ Its founding

AFF., Summer 1993, at 22.

23. *Id.* at 182.

24. See MARTIN COLLCUTT ET AL., CULTURAL ATLAS OF JAPAN 12 (1988).

25. Joseph S. Nye, Jr., *Coping with Japan*, FOREIGN POL'Y, Winter 1992-93, at 96, 103. In fact, during World War II, the Japanese lived by the slogan "*ichi - oku isshin*" which means "one hundred million with one heart." FALLOWS, *supra* note 16, at 33.

26. See Parker, *Law*, *supra* note 15, at 187.

27. Elliott J. Hahn, *An Overview of the Japanese Legal System*, 5 NW J. INT'L L. & BUS. 517, 519-20 (1983).

28. See generally W. SCOTT MORTON, JAPAN: ITS HISTORY AND CULTURE (1984) (discussing the growth of Zen Buddhism, feudalism, and imperial dynasties in Japan from the 12th through 19th centuries).

29. Parker, *Law*, *supra* note 15, at 181.

30. See generally Richard B. Parker, *A Comparison of the Practice of Law in Japan and the United States* [hereinafter Parker, *Comparison*] (unpublished manuscript, on file with author). "Lawyers [in America] are on every side of every social change. They lead both conservative and liberal causes and lead the resistance to those causes." *Id.* at 2. "The contract between American lawyers and *bengoshi* is vivid. *Bengoshi* are a very small professional elite, distinct from politicians, law professors or businessmen." *Id.* at 3.

31. See generally *id.* (describing the development of American and Japanese law). "American Civilization is founded on law. Law defines its major institutions. Law permeates American life." *Id.* at 2. "Both law and formal politics are

fathers were not lawyers, nor was their nation built upon constitutional reverence.³² Instead, Japan is a country built upon tradition and imperial loyalty.³³

Law itself has played no major role in Japan's history.³⁴ It has provided no impetus for change as has law in America,³⁵ nor has it been a part of any historical Japanese developments or achievements.³⁶ Legal decisions in Japan do not hold the same precedential value as American legal decisions.³⁷

2. *Life Roles — Japanese Contextualism v. American Individualism*

Japan has traditionally been a nation guided by internal rather than external dictates.³⁸ Japan still has distinct social classes, and the Japanese firmly believe that each citizen has a life role³⁹ or "*bungen*"⁴⁰ determined by factors outside his or

peripheral to the real structure of Japanese society." *Id.* at 1.

32. See generally *id.* at 1 (stating that "[b]oth law and formal politics are peripheral to the real structure of Japanese society. Power is exercised by culturally significant people with seniority and good connections.").

33. COLLCUTT, *supra* note 24, at 189.

34. See generally YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 31-62 (1976) (focusing on Japanese history and Western influence upon its legal development).

35. See generally Parker, *Comparison*, *supra* note 30 (comparing the general role of law, politics, and lawyers in the United States and Japan).

36. See NODA, *supra* note 34, at 31-62.

37. Shotaro Hamura, *Liberalization of Grounds for Judicial Divorce in Japan: September 2, 1987 Decision*, 3 TRANSNAT'L LAW. 465, 486 n.6 (1990). But see Yoichiro Hamabe, *Changing Antimonopoly Policy in the Japanese Legal System—An International Perspective*, 28 INT'L LAW. 903, 904 (1994) (stating that although Japan has the civil law system, "in practice, Japanese judges follow court precedents in most cases").

38. See JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 4 (1991).

39. Parker, *Law*, *supra* note 15, at 184-86. A good example of the Japanese idea of a "life role" concerns a situation in which a Japanese mother committed suicide by drowning herself and her children. Japanese students felt that the woman's decision to kill herself was irresponsible, but they felt that the inclusion of the children was consistent with the woman's life role of mother; excluding them might have signalled nonattachment to her children. *Id.*

40. NODA, *supra* note 34, at 33-34 (describing *bungen* as a "line of demarca-

her control.⁴¹ As a result, the *wa* is preserved through internal societal obligations owed up and down the social ladder, not by an external legal system.⁴² Hence, relationships rather than legal controls are determinative.⁴³ The Japanese perceive these to be immutable, thereby prohibiting any legislation from altering, expanding, or destroying them.⁴⁴ They are what makes a person truly Japanese and are held inviolate.

Americans, on the other hand, consciously strive to detach themselves from their social roles, focusing instead on individuality and personal freedom.⁴⁵ In fact, the "defining characteristic of American freedom" is probably derived from this detachment.⁴⁶ Not surprisingly, the Japanese view the American way of slipping in and out of different life roles as appalling and almost incomprehensible.⁴⁷ This ideological dichotomy between Japan and the United States is key to understanding the differences between their legal systems. Japan's "contextual" view of self versus the United States' "individual" view perhaps explains why the Japanese are so indifferent to law, courts, and lawyers.⁴⁸ In the United States, by contrast, the fact that our

tion" within the hierarchical order of old Japan).

41. Parker, *Law, supra* note 15, at 184 (stating that "tribal standards of appropriate conduct and custom govern all important social relationships").

42. See FALLOWS, *supra* note 16, at 35. "Women defer to men, the young defer to the old, everyone fits in above and below someone on the national chain of command." *Id.* See also NODA, *supra* note 34, at 32-35 (explaining the origins of Japan's hierarchical system).

43. Coleman, *supra* note 1, at 69 (emphasizing the difference between America's "legally-controlled and money-determined structures" and Japan's focus on "warm close personal relationship[s]").

44. Parker, *Law, supra* note 15, at 184 (explaining that the Japanese feel these to be "natural" standards).

45. *Id.* at 186-88 (describing how Americans are constantly experimenting with different social roles and discarding them as they see fit).

46. *Id.* at 186-87.

47. Americans feel they do not have a set social role. Instead, they feel all people have only an abstract role which is flexible enough to allow individual changes as desired. *Id.* at 187.

48. *Id.* at 189-90 (explaining that a "contextual" society is naturally conducive to harmony, interdependency and trust, while an "individual" society views these as goals). A good recent example of this cultural difference is the "contextual" manner in which the Japanese dealt with the Kobe earthquake. Despite the chaotic destruction surrounding them, "[t]hey st[ood] in an orderly line for food and water, . . . [t]hey walk[ed] by easy pickings in shattered storefronts and homes . . . [and] [n]obody loot[ed], [and] [t]hey witness[ed] the painfully slow arrival of desperately needed medical aid and other relief [and] [n]obody

law is not "contextual" is precisely the reason we trust it.⁴⁹ Perhaps this attitude explains why Americans are awestruck that Japanese citizens allow their individual rights to be deprived for the collective good. Because Americans cannot extract themselves from their deeply held belief that individual rights are sacred, they cannot understand that most Japanese do not feel anger for their perceived oppression.⁵⁰ Japanese do not fear deprivation of individual rights because to them it is not really a loss.⁵¹ They instead fear exile from the group, which is equal to a loss of self.⁵² This attitude is reflected in the Japanese belief that suing is a disgrace.⁵³ To the Japanese, litigation does not advance the interests of the group, rather it creates conflict and disturbs the *wa*.⁵⁴

3. Recovery in Litigation

Another distinct difference between the American and the Japanese perspective on litigation is how each handles recovery. Americans have long been renowned and even criticized for what is called American "casino justice."⁵⁵ Large monetary awards are widely publicized in the United States and, more often than not, these large awards are the driving motivation in

whine[d]." *Japanese Calmly Endure in Face of Disaster*, HOUS. CHRON., Jan. 19, 1995, at 17A.

49. As Americans, we require impartiality in legal decisions. Such impartiality would be difficult, if not impossible, in a "contextual" setting. Parker, *Law*, *supra* note 15, at 200.

50. *See id.* at 192 (explaining that Japanese equate group conformity with reaffirmation of their "contextual" self).

51. *Id.*

52. *Id.*

53. *Id.* at 179. *See also* Patent Protection in Japan; Enforcing Patents in Japan Moves Toward International Patent Harmonization, E. ASIAN EXECUTIVE REP., Dec. 15, 1993, at *5, available in LEXIS, WORLD Library, ALLNWS File (stating that "[l]itigation of any sort is viewed in Japan as an extreme action").

54. Parker, *Law*, *supra* note 15, at 179-80.

55. HALEY, *supra* note 38, at 115. The American legal system, with its jury system and autonomous judges, lends itself to unpredictable litigation outcomes. America is famous for its windfall awards making litigation "a gambler's delight." *Id.*

bringing a lawsuit. In Japan, however, "casino justice" does not exist, mostly because there is no jury system in Japan and all litigation is before the bench.⁵⁶ Hence, there is more certainty of result and less chance of windfall recovery.⁵⁷ The Japanese generally do not seek large monetary awards in litigation.⁵⁸ When resolution and cooperative efforts fail, forcing litigation, the parties usually desire simple atonement in the form of a public apology and reasonable expenses.⁵⁹ Since litigation is a disgrace in Japan, the significance the Japanese place on atonement is emphasized by the very act of their bringing a lawsuit.⁶⁰

4. *The Role of Language in Law*

Clearly, language is an important aspect of any law. In the United States, language defines law. Written law dominates American courtrooms and law libraries. In contrast, the Japanese language is reflective of the Japanese "contextual" sense of self.⁶¹ Much of written Japanese simply cannot be translated into spoken words and vice versa.⁶² Spoken words are considered only one aspect of social behavior;⁶³ Japanese can and do say more through behavior than they could ever convey by mere spoken or written words.⁶⁴ Hence, Japanese do not place much stock in written laws.⁶⁵ Given this limitation of the Japanese

56. *Id.* (explaining that the Japanese have uniformity in litigation because their judges are career judges).

57. *Id.*

58. See generally FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 28-77 (1987) (explaining the "Big Four Pollution Cases" and the difficulty in the plaintiffs' decision to sue).

59. See, e.g., *id.*

60. See Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 L. & SOC'Y REV. 651, 653 (1990).

61. Parker, *Law*, *supra* note 15, at 193.

62. *Id.* at 196-97. Written Japanese is similar to painting pictures of the world rather than merely translating words into letters or symbols. There are three forms of written Japanese: *kanji*, *hiragana*, and *katakana*. *Id.* Furthermore, the Japanese view speaking and writing as vastly different activities, and therefore there is no logical translation between them. *Id.* at 196.

63. *Id.* at 194.

64. *Id.* at 199. Japanese feel they are "larger than their language." Therefore, words simply are not powerful enough to maintain their true expressions. *Id.*

65. Leonard, *supra* note 7, at 95 (stating that many *bengoshi* feel written rules are unnecessary as Japanese naturally behave in a manner consistent with

written language, a written set of rules and principles could not adequately govern responsibility or proper behavior in Japanese culture. Knowing one's "contextual" self guarantees that justice will be done, obviating a need for the written law.⁶⁶

5. *Makeup of the Japanese Legal System*

The legal system of Japan is not a product of the Japanese heritage.⁶⁷ Instead, it is a conglomerate of three major influences: German, French, and American.⁶⁸ In fact, Japan's present Constitution, implemented in 1947, is a result of the Allied Occupation of Japan.⁶⁹ General Douglas A. MacArthur, the Supreme Commander for the Allied Powers, imposed much of the American Constitution onto the Japanese.⁷⁰ Consequently, a definite gap exists as to what the Constitution and law presume Japanese society to be like and what society actually is like. One cannot turn an apple into an orange simply by placing the orange rind onto the apple.

Accordingly, the Japanese simply ignore much of their law and Constitution.⁷¹ Further, even when Japan does follow its

the rules).

66. See, e.g., Tanase, *supra* note 60, at 678 (describing how contextual relationships encourage the Japanese to attempt to personally resolve disputes between all parties without the necessity of litigation).

67. NODA, *supra* note 34, at 42.

68. Japan's first Penal Code and Criminal Procedure Code was modeled after the French Code. *Id.* at 43. Its Civil Code was modeled after the French and German Codes. *Id.* at 43, 51. The Japanese Constitution is modeled after the American Constitution. Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Despite Resolution in Japan*, 84 COLUM. L. REV. 923, 924 (1984).

69. COLLCUTT, *supra* note 24, at 207.

70. See David Ziskind, *Labor Provisions in Asian Constitutions*, 6 COMP. LAB. L. 117, 122 (1984) (stating that General MacArthur's staff drafted the constitution); Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127, 139-40 (1994) (stating that General MacArthur applied significant pressure on the Japanese to adopt the constitution).

71. See, e.g., KENPO [Constitution] art. IX (Japan) (renouncing the maintenance of any and all military forces). However, in 1990, Japan's defense budget exceeded \$2 billion. Dan Rosen, *The Koan of Law in Japan*, 18 N. KY. L. REV.

Constitution, it is unlike America's adherence. One example is seen in the context of judicial review: although their Constitution guarantees it, Japan's judiciary lacks the power of its American counterpart.⁷²

6. *Political Authority in Japan*

Lack of power is also distinctive in other areas of the Japanese government. There is no central Japanese political authority.⁷³ The true power of Japan lies with several semi-autonomous groups.⁷⁴ The most prevalent of these are the bureaucrats or ministries, "some political cliques, and clusters of industrialists."⁷⁵ The resulting structural phenomenon produces a true obstacle for countries attempting to implement effective foreign policy with Japan.⁷⁶ This is because there is no one person with the necessary broad authority to fully negotiate any concessions of foreign policies.⁷⁷ Many negotiators walk away confident that they have succeeded in their negotiations with the Japanese and are later dismayed to find that little or none of their agreement comes to fruition.⁷⁸

Due to the lack of centralization in Japanese politics, there are four principal authorities regarding the *Gaiben* law: the

367, 375 (1991). See also Kikuyo Matsumoto-Power, *Aliens, Resident Aliens, and U.S. Citizens in the Never-Never Land of Immigration and Nationality Act*, 15 HAW. L. REV. 61, 96-97 (1993) (stating that an alien is not deprived of constitutional protection if the Minister of Justice refuses to renew the alien's visa even though the alien has acted in accordance with Japanese laws and its constitution. The Minister can deny the extension if the alien's conduct is "undesirable for Japan from the perspective of propriety," or if the Minister can infer from the conduct that the alien will harm Japanese interests in the future).

72. Parker, *Law, supra* note 15, at 179.

73. van Wolferen, *Problem, supra* note 17, at 289.

74. *Id.* These groups are not the equivalent of America's special interest groups. Instead, the groups are arranged in a hierarchical fashion with no top layer. They are part of the very structure of Japanese government and are viewed as a political enigma. *Id.*

75. *Id.* Other groups include "agricultural cooperatives, the police, the press, and the gangsters." *Id.*

76. *Id.* at 291.

77. *Id.* at 295.

78. Several Japanese governmental ministers act as "buffers" when dealing with foreign trade negotiators. *Id.* These "buffers" appear to have negotiating authority but are actually only entrusted with the task of smoothing out foreign contacts. *Id.* at 294-95.

Japanese Government, the Foreign Ministry, the Ministry of Justice, and the Japanese Federation of Bar Associations (*Nichibenren*).⁷⁹ Not surprisingly, the *Nichibenren* holds the most power over decisions involving foreign attorneys.⁸⁰

C. Japanese Lawyers

Just as Japanese law is drastically different from American law, Japanese lawyers (*Bengoshi*)⁸¹ are far different from their American counterparts. Most of these differences lie in their history, numbers, and training.

1. History of *Bengoshi*

Much of American history was built by its lawyers.⁸² Hence, American lawyers have historically enjoyed a distinguished reputation. Today, however, there has been a stark turnabout with the legal profession bearing much criticism and being the brunt of many jokes. Ironically, Japanese lawyers appear to have undergone an exactly opposite transformation.⁸³ Their earliest precursors, the *kujishi*, or innkeepers, were regarded as disreputable and held in low esteem.⁸⁴ This inferiority ended with the 1893 Lawyers Law.⁸⁵ Since then, Japanese lawyers have been referred to as *Bengoshi* and held in

79. Leibert L. Greenberg, *American Legal Services in Japan*, N.Y. ST. B.J., Dec. 1986, at 28, 29.

80. See Coleman, *supra* note 1, at 66.

81. Greenberg, *supra* note 79, at 28.

82. See Parker, *Comparison*, *supra* note 30, at 2 (emphasizing how the unique construction of American civilization has enabled lawyers to dramatically shape its development).

83. See generally Richard W. Rabinowitz, *The Historical Development of the Japanese Bar*, 70 HARV. L. REV. 61 (1956) (providing a comprehensive detail of *Bengoshi* history).

84. Leonard, *supra* note 7, at 87.

85. *Id.* at 88. Although the 1893 law did regulate examinations, admissions, and permissible activities of the *Bengoshi*, there were enough loopholes in it to allow the implication that the *Bengoshi* really did not possess specialized knowledge. These loopholes allowed judges and prosecutors to serve as the *Bengoshi* at will without allowing the *Bengoshi* to become judges or prosecutors. *Id.*

higher esteem.⁸⁶ In the 1920s, however, the *Bengoshi* experienced an oversupply of attorneys, which resulted in a rash of unethical practices.⁸⁷ This led to the Lawyers Law of 1933,⁸⁸ which imposed some new restrictions.⁸⁹ After the American Occupation, *Bengoshi* were freed from governmental control and became largely self regulating via the Japanese national bar, the *Nichibenren*.⁹⁰ During the 1960s, *Bengoshi* once again behaved unethically.⁹¹ The *Nichibenren* issued a public apology in 1979 and, in 1990, enacted the first Code of Ethics since 1955.⁹² The *Bengoshi* reputation has since improved, and they are now viewed as elite professionals.⁹³

2. *Number of Japanese Lawyers v. American Lawyers*

As of 1993, there were slightly more than 14,000 *Bengoshi*.⁹⁴ In contrast, America had approximately 850,000 lawyers.⁹⁵ *Bengoshi* do not have a monopoly on what Americans would consider a traditional legal practice.⁹⁶ A substantial number of nonlawyers provide a variety of legal services, such as in-house corporate legal advisers who provide counsel on

86. *See id.*

87. *Id.* (explaining that most of these unethical practices were by desperate *Bengoshi* struggling to remain solvent).

88. BENGOSHI HO, Law No. 53 of 1933 [hereinafter 1933 Lawyer's Law].

89. Leonard, *supra* note 7, at 88. The 1933 law, however, was disappointing to the bar as it did not provide for sanctioning the unauthorized practice of law and maintained governmental control over the legal profession. *Id.*

90. *Id.* (describing the *Nichibenren*, or "Japan Federation of Bar Associations," as "a legally autonomous entity charged with overseeing the local bar associations").

91. *Id.* This behavior was spawned by the riots over the Japan-U.S. Mutual Security Treaty. *Id.* Defense attorneys for the protesters believed the judges to be biased for the prosecution. *Id.* at 88-89. As a result, they effectively denied their clients due process by "adopt[ing] delaying tactics, defly[ing] court instructions, and even resign[ing] from their cases in displays of utter contempt for the treatment of their clients." *Id.* at 89.

92. *Id.* at 89 (explaining that this law was only a technical fulfillment of the 1979 promise by redefining withdrawal procedures and making minor structural modifications).

93. *See Parker, Comparison, supra* note 30, at 3 (analogizing the *Bengoshi's* professional life to that of a British barrister).

94. Sanger, *supra* note 9, at A9.

95. *Id.*

96. Haley, *supra* note 1, at 3-4.

matters unrelated to litigation,⁹⁷ *Benrishi*,⁹⁸ and administrative scriveners.⁹⁹

Economic studies suggest that Japan's sparse lawyer population is related to its economic efficiency and historic economic growth.¹⁰⁰ These studies conclude that the growth of the legal profession is harmful to the growth of the economy.¹⁰¹ Notably, these studies have been criticized for being too simplistic and misleading.¹⁰² One commentator's main criticism is that lawyers should not only be measured by their economic but also by their social worth.¹⁰³ Critics contend that lawyers contribute immeasurably to the creation of nonmarketed social goods like the advocacy of individual and civil rights.¹⁰⁴ Though this approach may be an absolute truth for the United States, it is not for Japan. As discussed above, the Japanese do not emphasize individualism.¹⁰⁵ They focus instead on protecting the collective good.¹⁰⁶ Hence, large numbers of *Bengoshi* are not desired.¹⁰⁷ Regardless of the economic issue, the Japanese sin-

97. *Id.*

98. *Benrishi* "have the power to give legal advice and represent clients in court on patent and trademark work." Cooper, *supra* note 1, at 418.

99. *Id.*

100. See Frank B. Cross, *The First Thing We Do, Let's Kill all the Economists; An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645, 648 (1992). But see David Flint, *Australia: Lawyers Prove Competitive in International Markets*, AUSTL. FIN. REV., Feb. 3, 1994, at *2, available in LEXIS, WORLD Library, ALLNWS File (suggesting that this theory lacks an evidentiary basis).

101. See Cross, *supra* note 100, at 648-49 (describing three studies: (1) where economic growth of different countries was compared to the percentage of lawyers in those countries; (2) where law school enrollment was compared to economic growth; and (3) where an attempt to measure the United States' rent-seeking behavior using the number of lawyers as the "proxy" for rent seeking).

102. *Id.* at 649.

103. *Id.* at 658-61 (showing how nonmarketed social goods are part of human welfare and how these goods may be denied unless one has the assistance of an attorney).

104. *Id.* at 659.

105. See *supra* text accompanying notes 38-54.

106. *Id.*; see Upham, *supra* note 58, at 205-08.

107. See Upham, *supra* note 58, at 205-08.

cerely believe (and their history tends to confirm) that a large or surplus supply of lawyers leads to ethical corruption.¹⁰⁸

3. *Japanese Legal Training*

Japan's distrust of large numbers of attorneys is reflected in the highly selective process of admission into the Legal Training and Research Institute (Institute), the only true law school in Japan.¹⁰⁹ In order to become a *Bengoshi*, prosecutor, or judge, one must attend the Institute, which is very different from American law schools.¹¹⁰ The law students receive a salary from the Ministry of Justice, and only Japanese citizens may work for the Ministry.¹¹¹ Graduates of the law school automatically become *Bengoshi*, judges, or prosecutors.¹¹² There is no required bar examination to become licensed as a Japanese lawyer.¹¹³ The closest thing Japan has to the American bar exam is the extremely difficult entrance exam which students must pass in order to enter the Institute.¹¹⁴ As of 1992, this exam barely had a 2.7 % pass rate.¹¹⁵ The Japanese justify the difficulty of the exam as a control for the legal profession to uphold its ethics.¹¹⁶ They feel that passing exams acts as an ethical filter, equating competence with ethics.¹¹⁷ Furthermore, the Japanese hold close the assumption that a small number of attorneys would be easier to supervise.¹¹⁸

108. Leonard, *supra* note 7, at 89.

109. Hahn, *supra* note 27, at 522.

110. *Id.* The Legal Training and Research Institute (Institute) is located in Tokyo and requires a two-year curriculum consisting of mostly practical instruction. *Id.* at 525.

111. *Id.* at 524. The Japanese Supreme Court has allowed one non-Japanese admittance. *Id.* However, that case had unique circumstances wherein the student was a Korean whose family had resided in Japan for generations, and the student himself was born and raised in Japan. *Id.*

112. *Id.* at 525.

113. *See id.* at 524. This is probably due to the fact that there is only one law school in Japan. *Id.*

114. *Id.* In order to practice law in Japan, Article 4 of the Lawyers Law No. 205 requires graduation from the Institute. *Id.*

115. Leonard, *supra* note 7, at 90.

116. *Id.*

117. *Id.* By making the exam very difficult, those applicants who are intellectually weaker and uncommitted will be rejected. *Id.* The Japanese feel it is this group of "weaker" applicants that would subsequently engage in unethical practices. *Id.*

118. *Id.*

III. THE GAIBEN LAW

A. *Background*¹¹⁹

The 1933 Lawyers Law was replaced by the 1949 Lawyers Law.¹²⁰ This law governs the regulation of Japanese lawyers today.¹²¹ Two provisions of the 1949 Lawyers Law are of particular importance in outlining the scope of a *Bengoshi's* practice:

Article 3. A lawyer shall, upon the request of a party and other persons concerned, or a government or public office, perform acts and other general legal business *related to* lawsuits, noncontentious cases, appeals or dispositions by administrative offices such as requests for investigation, objections, petitions for review.¹²²

Article 72. No person other than a lawyer shall, with the aim of obtaining compensation, engage in the presentation of legal opinions, representation, mediation or conciliation and other legal business (*horitsu*) *in connection with* lawsuits or noncontentious cases, and such appeals filed with administrative offices as requests for investigation, objections, petitions for review and *other general legal cases*, or act as other agent therefore; provided that this shall not apply in such cases as otherwise provided for in this Law.¹²³

The most important information in these articles is that Japanese lawyers do not have a monopoly over all legal business. Instead, they retain exclusive rights to handle legal

119. *E.g.*, Rabinowitz, *supra* note 83, at 61-78. Much literature exists outlining the full details of the history of *Gaiben* regulation. *Id.*

120. BENGOSHI HO, Law No. 205 of 1949 [hereinafter 1949 Lawyer's Law]; Haley, *supra* note 1, at 3.

121. Haley, *supra* note 1, at 3.

122. *Id.* (emphasis in original) (citing the 1949 Lawyer's Law).

123. *Id.* (emphasis in original) (citing the 1949 Lawyer's Law).

business that is "related to" or "in connection with" lawsuits or administrative proceedings.¹²⁴ Accordingly,

Japanese courts have consistently held that legal advice, the drafting of contracts and other legal documents as well as other services involving legal matters unrelated to a legal dispute or formal proceedings as listed in articles 3 and 72 are not covered by either provision of the 1949 Lawyers Law.¹²⁵

Another important development for *Bengoshi* regulation occurred in 1949.¹²⁶ The Japanese Supreme Court gained the responsibility of setting the qualifications, training system, and admissions policy of the Japanese Bar.¹²⁷ Notably, the regulation of admission of foreign lawyers also belongs to the Japanese Supreme Court.¹²⁸ Regulation of the bar, however, was and is reserved for the *Nichibenren*.¹²⁹

Foreign lawyer practice was not always as restricted as it is today. Prior to 1955, the *Gaiben* were allowed comparatively liberal access to the Japanese legal system.¹³⁰ Even though no foreigners were allowed to attend the Institute,¹³¹ some foreigners became *Bengoshi* via Article 7(1) of the 1949 law¹³² which stated in relevant part:

A person who is qualified to become an attorney of a foreign country and who possesses an adequate knowledge of the laws of Japan may obtain the recognition of the Supreme Court and conduct the affairs pre-

124. *Id.* at 4.

125. *Id.*

126. *Id.* at 6.

127. *Id.* (explaining that Article 77 of the postwar Constitution grants rulemaking authority in determining "matters relating to attorneys" to the Supreme Court).

128. *Id.* (noting that this function was once exercised by the Ministry of Justice).

129. *Id.* (stating that *Nichibenren* gained this autonomy from the Ministry of Justice in 1949).

130. *Id.* (stating that "[u]ntil 1955, Japanese law had consistently permitted qualified foreign lawyers to be admitted to the bar with authority to represent at least alien clients in Japanese court proceedings").

131. See Kigawa, *supra* note 5, at 1493 n.22 (explaining that Japan refuses the admission of foreigners to the Institute because students at the Institute are public servants and therefore citizenship is a prerequisite).

132. Haley, *supra* note 1, at 6-7.

scribed in article 3¹³³

Furthermore, many foreign lawyers gained access to practice in Japan via Article 7(2) of the 1949 law:

A person who is qualified to become an attorney of a foreign country may obtain the recognition of the Supreme Court and conduct the affairs prescribed in article 3 in regard to aliens or foreign law. Provided, however, that this does not apply to the persons listed in the prior article.¹³⁴

Those attorneys gaining access via Article 7(2) have been allowed to continue their legal practice in Japan despite the 1955 amendment to the Lawyers Law which repealed Article 7 and closed the legal market to those already established in Japan.¹³⁵ They are known as *Junkaiin*.¹³⁶ Interestingly, these *Junkaiin* comprise part of the opposition to allowing *Gaiben* access to Japan.¹³⁷ It is, therefore, somewhat hypocritical for Americans to accuse the Japanese of being protectionistic on this issue when our own nationals contribute to the opposition. Following the 1955 amendment to the Lawyers Law, Americans have demanded specific licensing opportunities.¹³⁸

B. *The Current Gaiben Law*

1. *Victory or Defeat?*

While the *Gaiben* Law may appear to be a victory for American lawyers, some commentators feel the *Gaiben* Law is actually a setback.¹³⁹ They feel American lawyers erred in

133. *Id.* at 7.

134. *Id.*

135. Kigawa, *supra* note 5, at 1493.

136. "*Junkaiin*" means "quasi-member of the Association." Coleman, *supra* note 1, at 71 n.16.

137. *See id.* at 71-72. However, as of 1992, only 13 *Junkaiin* still remained in Japan. Nozomu Ohara, *Introduction to the Japanese Legal System* (June 1992) (unpublished manuscript, on file with author).

138. John O. Haley, *Redefining the Scope of Practice Under Japan's New Regime for Regulating Foreign Lawyers*, 21 L. JAPAN 18, 22-26 (1988).

139. *See* Haley, *supra* note 1, at 9-11 (stating that "[t]he new licensing stat-

seeking a clear definition of their status and licensing in Japan.¹⁴⁰ Additionally, the commentators argue that American lawyers should have remained content in being allowed to practice as nonlawyers, given the ambiguity in Articles 3 and 72 of the 1949 Lawyers Law working in their favor.¹⁴¹ One distinct advantage to limiting their role to one of in-house corporate advisers is that *Bengoshi* do not view the adviser practice as competition.¹⁴² Indeed, they find it encouraging because legal issues are pinpointed by the advisers, making their work easier.¹⁴³

Some argue that although Article 7 was repealed, *Gaiben* could have remained in practice in Japan and would not have been in violation of Article 72.¹⁴⁴ In order for the *Gaiben* to practice illegally, they must violate a statute.¹⁴⁵ Since Article 72 was the only statute relating to the scope of legal practice prior to the *Gaiben* law, they could never commit a statutory violation.¹⁴⁶ Even assuming that the *Gaiben* practice was a statutory violation, Article 72 was extremely difficult to enforce against *Gaiben* because it was a criminal statute.¹⁴⁷

The more difficult problem *Gaiben* faced was obtaining a visa from the Japanese government to enter the country.¹⁴⁸ The *Gaiben* could have pursued their visa-related concerns through Article 1 of the Japan-U.S. Treaty of Friendship, Commerce and Navigation.¹⁴⁹ By demanding clarification, however, some commentators feel that American lawyers effectively shut the door on the legal freedom they possessed in Japan and

ute is perhaps most notable for what it prohibits rather than what it allows").

140. *Id.* at 11. "The underlying premise that licensing is required under the 1949 Lawyers Law is based not only on ignorance of the history of the role of foreign lawyers in Japan but also on an erroneous interpretation of the 1949 Lawyers Law." *Id.*

141. *Id.*

142. Mihoko Iida, *Demand Soaring for Legal Experts; Corporations Bolster Legal Departments, but Lawyers Still Rare*, NIKKEI WKLY., July 19, 1993, at 1.

143. *Id.*

144. Coleman, *supra* note 1, at 68.

145. *Id.* at 67.

146. *Id.*

147. *Id.* at 67-68 (explaining that the Japanese government knew foreign attorneys were in the country and that intent to violate the article is required to prove a violation of Article 72).

148. *Id.* at 67.

149. Haley, *supra* note 1, at 12.

opened the door to heavier regulations through the *Gaiben* Law.¹⁵⁰ These commentators argue that had American lawyers attacked the issue by addressing the visa problem, they might have been more successful by directing the majority of their negotiations through the Ministry of Foreign Affairs, effectively bypassing the *Nichibenren*.¹⁵¹

2. *Recent Negotiations Concerning the Gaiben Law Resulting in the 1995 Amendments*

Since the U.S.-Japan Global Partnership Plan of Action was adopted on January 9, 1992 by former President George Bush and former Japanese Prime Minister Miyazawa, the Japanese government increased its efforts to resolve the *Gaiben* issue.¹⁵² The Ministry of Justice, in conjunction with the *Nichibenren*, formed a study group (the "Commission on the Issue of Foreign Lawyers") that met in September 1993 to discuss the *Gaiben* debate.¹⁵³ The Commission was composed of a variation of twenty Japanese *Bengoshi*, scholars, journalists, and businessmen.¹⁵⁴ On September 30, 1993, the Commission submitted its report and recommendations.¹⁵⁵

The recommendations provided the framework for the Japanese government to offer concessions at the Uruguay Round, which ultimately relaxed some of the restrictions.¹⁵⁶

150. *Id.* at 9-10. Haley, however, feels that the "visa approach" is still possible, although difficult. *Id.* at 15.

151. Coleman, *supra* note 1, at 66.

152. *U.S.-Japan Global Partnership Plan of Action (Parts I and II) Adopted by President Bush and Japanese Prime Minister Miyazawa, Jan. 9, 1992*, 9 Int'l Trade Rep. (BNA) no. 3, at 125 (Jan. 15, 1992).

153. *Japan Study Group Established to Focus on Problems of Foreign Lawyer Practice*, 9 Int'l Trade Rep. (BNA) no. 27, at 1130-31 (July 1, 1992).

154. *Id.*

155. Victoria Slind-Flor, *Foreign Law Community Chafing Under Limits*, NAT'L L.J., Dec. 6, 1993, at *2, available in LEXIS, GENFED Library, NTLAWJ File. Their recommendations consisted of the new provisions in the Amended Law, discussed in the text, including relaxing the five-year requirement, allowing home country firm names, and instituting the Joint Enterprise scheme. However, they also agreed to maintain the employment and partnership bans. *Id.*

156. Hiroshi Nakamae, *Industry Expects GATT Gains to Outweigh Losses* [sic]

The *Gaiben* felt that the offer was still inadequate.¹⁵⁷ They were so dissatisfied that the American Chamber of Commerce in Japan requested the United States Trade Representative Office (USTRO) to reject the proposal.¹⁵⁸ The USTRO initially rejected Japan's proposals; however, after much negotiation, Japan stood by its position, claiming that the *Nichibenren* would not concede any more than the original proposals.¹⁵⁹ These offers culminated in the Amended Law.¹⁶⁰ Under the Amended Law, there will be some relaxation of restrictions, while leaving the most disputed restrictions in the *Gaiben* Law intact.¹⁶¹

3. *Heated Issues of the Gaiben Law*

This part of the Comment emphasizes the issues within the *Gaiben* Law that have been and continue to be in the forefront of demands for liberalization.¹⁶² The *Gaiben* view some of the restrictions as only a nuisance, while others as a burden.¹⁶³

a. Five Year Eligibility Requirement

Article 10 of the *Gaiben* Law requires *Gaiben* seeking application to have practiced a minimum of five years "in the country where the qualification of a lawyer was given."¹⁶⁴

American lawyers have criticized the five-year requirement in several ways.¹⁶⁵ First, they feel it is a subtle form of protectionism in that only senior attorneys will be eligible for admission.¹⁶⁶ As a result, their fees will be high, placing them at a

Leaders Conclude Japan Would Benefit Despite Emotional Rice Issue, NIKKEI WKLY, Dec. 13, 1993, at 1.

157. Morgan, *supra* note 11, at 8.

158. *Japanese Said to Make Concessions*, *supra* note 4, at 2059.

159. Morgan, *supra* note 11, at 8.

160. *Id.*

161. *See infra* text accompanying notes 159-217.

162. Ohara, *supra* note 137, at 12-23 (outlining a comprehensive examination of the contents of the *Gaiben* Law).

163. *Japan: Lowering Japan's Legal Bar*, ECONOMIST, Aug. 7, 1993, at 60 (discussing how such things as the five-year requirement is bothersome, but how restrictions such as the ban on the employment of *Bengoshi* by *Gaiben* is onerous).

164. Ohara, *supra* note 137, at 15.

165. *U.S. Lawyers and Japanese Bar Members Hold Talks on Professional Restrictions*, 7 Int'l Trade Rep. (BNA), at 167 (Jan. 31, 1990), available in LEXIS, BNA Library, INTRAD File.

166. *Id.*

competitive disadvantage with *Bengoshi*.¹⁶⁷ Second, they feel the requirement deters young lawyers, who are usually most interested in seeking to practice in Japan.¹⁶⁸ Finally, Americans are dissatisfied that the Article requires the five years actually be gained in the lawyer's home country.¹⁶⁹ They feel any experience practicing American law should be included even if the applying attorney gained it while in another country.¹⁷⁰

The Japanese defense of the five-year requirement is compelling. They feel that the five-year requirement is necessary to ensure quality legal work.¹⁷¹ Since they cannot impose an examination to test American competence on American law, the Japanese feel that a certain amount of experience is required.¹⁷² The Japanese argue that this requirement is reasonable in light of the United States' more stringent experience requirements.¹⁷³

In the spirit of concession, the Amended Law has addressed some of the Americans' concerns by allowing "two years' experience practicing home country law in Japan under the auspices of a . . . *Bengoshi*) or a foreign law firm to be credited toward" the five year experience requirement.¹⁷⁴ Home country legal experience gained in countries other than the home country or Japan remains ineligible for credit toward the five year requirement.¹⁷⁵

167. *See id.*

168. *Japan: Lowering Japan's Legal Bar, supra* note 163, at 60.

169. Terence Murphy, *Japan: Foreign Lawyers Have Been Told They Will Be Allowed to Practice [sic] in Japan, but [sic] There Are Strong Restrictions*, *EUROMONEY FIN. L. REV.*, Mar. 17, 1987, at 10.

170. *See id.*

171. Ohara, *supra* note 137, at 20.

172. *Id.*

173. *Id.* The Japanese argue that the United States requires investigations checking for charges or complaints against applicants in their home jurisdiction. *Id.* They further argue that New York, Michigan, the District of Columbia, Hawaii, Texas, New Jersey, and Alaska laws require home country practice with New York requiring five years of home country practice within the seven years immediately before the application date. *Id.*

174. Morgan, *supra* note 11, at 8.

175. *Id.*

b. Firm Name Requirement - Gaikokuho Jimu Bengoshi imusho

Before the Amended Law, the *Gaiben* Law prohibited foreign law firms from using their home country name standing alone,¹⁷⁶ requiring instead that the firm be named after the partners who actually practiced in Japan.¹⁷⁷ *Gaiben* were forced to use the title "*Gaikokuho Jimu Bengoshi*."¹⁷⁸ The *Gaiben* law also demanded that *Gaiben* affix the title "*Gaikokuho Jimu Bengoshi Jimusho*" and the name of their home country to the title of their firm name.¹⁷⁹ The American lawyers argued against this restriction because they lost the valuable asset of name recognition and the advertising value of their trademark name by having to name their firm after resident partners.¹⁸⁰ Once any new partner joined the firm or any *Gaiben* partner moved, retired, or died, the firm incurred the expense of renaming the firm in accordance with the personnel change.¹⁸¹ This process, they argued, robbed the *Gaiben* firm of any name recognition accumulated in Japan from the inclusion of the departing partner's name.¹⁸²

The Japanese addressed this argument by stating that *Gaiben* status was only accorded to individuals, not firms.¹⁸³ This argument is questionable, however, as the effect of the requirement was discriminatory to Americans by allowing *Bengoshi* to name their firm in any manner they chose, without specifications.¹⁸⁴

176. *Id.* at 8. *Gaiben* could use the name of their home country firm in a parenthetical after the required Japanese name. *Id.* at 8 n.2.

177. Ohara, *supra* note 137, at 21.

178. *Id.* at 17. "*Gaikokuho Jimu Bengoshi*" means "Foreign Law Solicitor." *Id.*

179. *Id.* For example, the American law firm of Cleary, Gottlieb, Steen & Hamilton is Morgan Carroll Terai Gaikokuho Jimu Bengoshi Jimusho in Japan. Morgan, *supra* note 11, at 8 n.2.

180. Ohara, *supra* note 137, at 21.

181. *Id.* (explaining that the firm must change such things as "bank accounts, group life insurance, real estate contracts, stationery, etc.").

182. Reid, *supra* note 6, at F1.

183. Ohara, *supra* note 137, at 21.

184. *Id.*

Perhaps for this reason, the Amended Law succumbed to American pressure and now allows "licensed foreign lawyers to use the names of their home country firms."¹⁸⁵

c. *Denial of Representation in Judicial or Arbitral Proceedings*

The *Gaiben* law prohibits *Gaiben* representation before the Japanese judicial or arbitral system.¹⁸⁶ Ironically, *Gaiben* are allowed to act as arbitrators whether Japanese law governs the proceedings or not.¹⁸⁷

American attorneys have shown less interest in being allowed admittance to judicial proceedings.¹⁸⁸ Their real goal is to be allowed to represent clients in arbitral proceedings, even those governed by Japanese law,¹⁸⁹ because most disputes in Japan are settled in arbitration proceedings and are not litigated in courtrooms.¹⁹⁰ Commentators have also argued that the arbitration systems of most countries, including the United States, do not restrict foreign attorneys in their representation in arbitration.¹⁹¹ Representation is allowed notwithstanding the governing law.¹⁹²

Japan counterargues that the *Gaiben* law does allow *Gaiben* to represent clients in arbitrations in which their home country law governs.¹⁹³ In those proceedings where Japanese law governs, the Japanese adamantly stand by their position that advice concerning Japanese law should retain its "independence."¹⁹⁴ To allow *Gaiben* to represent clients on Japanese

185. Morgan, *supra* note 11, at 8.

186. Ohara, *supra* note 137, at 16.

187. See *Trade War Looms*, *supra* note 8, at *1.

188. See Cooper, *supra* note 1, at 424 (stating that *Gaiben* contend that they only want to provide nonlitigation services).

189. Ohara, *supra* note 137, at 21.

190. See generally Charles R. Ragan, *Arbitration in Japan: Using Alternative Methods of Resolving Disputes*, E. ASIAN EXECUTIVE REP., Oct. 15, 1992, at 8 (describing the popularity of arbitration in Japan).

191. Ohara, *supra* note 137, at 22.

192. *Id.*

193. *Id.*

194. Gregory H. Feldberg, *Japan: 'We Must Preserve Independence of Advice*

law would be to circumvent the arduous training their *Bengoshi* undergo at the Institute. This training is subsidized by the Japanese government, thereby allowing the government to retain its public-private relationship with the *Bengoshi*.¹⁹⁵ This relationship, states Akira Kawamura, Deputy Chairman of *Nichibenren's* committee on the *Gaiben*, "gives [the *Bengoshi*] a very strong sense of moral obligation to the public interest."¹⁹⁶ American attorneys have different cultural backgrounds and legal perspectives; to allow them to practice Japanese law would rob the Japanese legal system of its "independence."¹⁹⁷

d. Ban on the Employment of Bengoshi

Under Article 49 of the *Gaiben* Law, *Gaiben* are absolutely prohibited from employing *Bengoshi*.¹⁹⁸ This restriction is one of the most heated: not only are *Gaiben* prohibited from hiring a *Bengoshi*, but the prohibition also includes forbidding *Gaiben-Bengoshi* partnerships.¹⁹⁹

The *Gaiben* Law allows *Gaiben* to share office space with *Bengoshi* and to associate with them on particular case-by-case matters.²⁰⁰ However, prior to the Amended Law, the *Gaiben* were restricted from any profit sharing in their professional relationships with the *Bengoshi*.²⁰¹

American attorneys have argued that the partnership and employment prohibitions are too confining and thus harm the interests of their clients.²⁰² In the global arena, they argue, legal problems know no boundaries and legal issues overlap into several different legal systems.²⁰³ By allowing partnerships or

on *Japanese Law*', JAPAN ECON. J./NIKKEI WKLY., July 14, 1990, at *2, available in WESTLAW, INT-NEWS Database (quoting Akira Kawamura, Deputy Chairman of *Nichibenren's* Committee on Foreign Lawyers).

195. See Hahn, *supra* note 27, at 522.

196. Feldberg, *supra* note 194, at *1.

197. *Lawyers in Japan*, ECONOMIST, Aug. 7, 1993, at 60.

198. Ohara, *supra* note 137, at 17.

199. See *id.*

200. *Id.*

201. See *id.*

202. *Id.* at 18. See also Feldberg, *supra* note 194, at *1 (statement of Akira Kawamura) ("I often hear criticism by American lawyers that Japanese lawyers serve the national interest rather than the client's interest. That is not true. The client's interest may be best served by finding a compromise between the public interest and the individual client interest.")

203. Ohara, *supra* note 137, at 18.

employment, clients' needs are almost certainly better served.²⁰⁴ The restriction is particularly discriminatory, American lawyers argue, because *Bengoshi* may freely employ their American counterparts.²⁰⁵

Conversely, the Japanese have consistently asserted that the prohibition is necessary to maintain their "independence."²⁰⁶ Allowing *Gaiben* to hire or form partnerships with *Bengoshi* would enable the *Gaiben* to use the *Bengoshi* as a medium through which to practice Japanese law.²⁰⁷ The Japanese fear this practice would upset the entire *Bengoshi* system in several ways.²⁰⁸ It could infect the Japanese legal system with American legal perspectives and decrease the number of *Bengoshi* available for Japanese firms,²⁰⁹ causing problems in the judicial and prosecutorial divisions of Japan.²¹⁰ Furthermore, the Japanese note that American Ethical Rules prohibit American lawyers from practicing law with nonlawyers.²¹¹ As it relates to foreign lawyers, Article 49 of the *Gaiben* Law has substantially the same premise. Finally, the Japanese do not see any tangible need for eliminating the restriction.²¹² They argue that *Gaiben* are allowed to share office space, office machines, and administrative support with *Bengoshi*,²¹³ allowing the *Gaiben* to significantly decrease the costly overhead expenses that exist in Japan.²¹⁴ Furthermore, *Gaiben* may asso-

204. *Id.*

205. *Id.*

206. Feldberg, *supra* note 194, at *2.

207. Ohara, *supra* note 137, at 18. See also Feldberg, *supra* note 194, at *2 (statement of Akira Kawamura) ("An American lawyer may give advice to a foreign client sitting with a Japanese lawyer on an aspect of Japanese law, and say: 'This Japanese lawyer supports me, but I am sorry, he does not speak English.' That is the worst case.")

208. Ohara, *supra* note 137, at 19.

209. *Id.*

210. *Id.*

211. *Id.* The United Kingdom, France, Belgium, Australia, and Hong Kong also have similar restrictions. *Id.*

212. *Id.*

213. *Id.*

214. Reid, *supra* note 6, at F1 (quoting expense to set up an office in Tokyo

ciate with *Bengoshi* in substantially the same way different American law firms do with each other.²¹⁵

Although the Amended Law still specifically maintains the prohibitions against partnerships and *Bengoshi* employment, it now provides a limited exception for "Joint Enterprises."²¹⁶ In a Joint Enterprise, *Gaiben* may contract with *Bengoshi*²¹⁷ "to work in parallel for common clients and to share fees and profits."²¹⁸

Although the Joint Enterprise system appears to grant some relief to *Gaiben*, this exception is problematic for *Gaiben* practice. First, the scheme mandates that *Bengoshi* in Joint Enterprises be "autonomous regarding matters of Japanese law" but holds *Gaiben* responsible for the full range of Joint Enterprise activities.²¹⁹ Furthermore, *Bengoshi* themselves are restricted in their practice areas within a Joint Enterprise. They are "precluded from handling . . . [matters involving] litigation, proceedings similar to litigation, and all matters of Japanese law that do not involve a foreign part or a Japanese client at least [fifty] percent owned."²²⁰ Hence, despite the Amended Law, America remains unsuccessful in obtaining true access to the Japanese legal market.

IV. CONCLUSION

The future of the *Gaiben* issue remains uncertain; however, the Japanese will not grant concessions as long as the opposition is insensitive to the distinct cultural differences between Japan and the United States.

It may be true that fear of competition is the driving force behind Japan's refusal to further liberalize the *Gaiben*. Even if

at one million dollars).

215. See Ohara, *supra* note 137, at 19.

216. Morgan, *supra* note 11, at 8.

217. *Id.* These *Bengoshi* must have five years experience themselves in practicing Japanese law. *Id.*

218. *Id.* Sharing fees may prove problematic for *Gaiben* as doing so raises ethical problems under American law. *Id.*

219. *Id.* Such broad potential exposure may make obtaining malpractice insurance difficult for *Gaiben*. *Id.* Furthermore, *Gaiben* responsibility may be affected by the regulations and guidelines that the *Nichibenren* plans to enact governing Joint Enterprises. *Id.* *Nichibenren* has been silent regarding the contents of such mandates. *Id.*

220. *Id.*

true, however, such a motivation is not unique to Japan.²²¹ As of 1992, there were only eleven American states along with the District of Columbia that granted reciprocal allowance of foreign attorneys.²²² Only fifteen states currently allow joint partnerships between foreign and American attorneys.²²³ In fact, the Japanese do not view the *Gaiben* issue as a trade matter.²²⁴ In their perspective, it is the American lawyers who categorize the *Gaiben* problem as a trade problem.²²⁵ Japan views the legal profession as just that: a profession—not a trade.²²⁶ Americans view the *Gaiben* restrictions as a nontariff trade barrier making it an issue at the General Agreement on Tariffs and Trade (GATT).²²⁷ By classifying the *Gaiben* issue as protectionism, the United States may only be perpetuating Japan's fear of American imposition.

There is merit to Japan's cultural justifications in spite of any protectionist motive. The Japanese do not want their legal system expanded or modified to that of the United States because it would conflict profoundly with their culture. There are many other aspects of Japanese culture that Americans should recognize and respect. Americans must understand that the Japanese have a difficult time understanding American individualism. Additionally, the differences in the significance of language in Japanese and American law must be understood.²²⁸ For instance, while in contract situations American lawyers are accustomed to drafting lengthy documents and

221. Ohara, *supra* note 137, at 15.

222. *Id.*

223. *Japan Said to Make Concessions, supra* note 4, at 2059.

224. Kunio Hamada, *The Reaction of Japanese Lawyers to the New Law*, 21 LAW IN JAPAN 43, 43 (1988).

225. *Id.*

226. *Id.* (arguing that the Japanese view the legal profession as including more than just securing economic results for clients).

227. Karel van Wolferen, *The Japanese Problem Revisited*, 69 FOREIGN AFF., Fall 1990, at 42, 54 [hereinafter van Wolferen, *Problem Revisited*].

228. Hamada, *supra* note 224, at 45.

contracts,²²⁹ Japanese contracts that number even twenty pages in length are very rare.²³⁰

Regardless of whether Japan's motivation is guided more by protectionism or by cultural traditions, negotiations should not be addressed by debating right and wrong. The true purpose of the negotiations should be to succeed in further liberalizing the Japanese legal market. However, as long as Americans cling to their current perspective and continue to impose their viewpoints on the Japanese,²³¹ success will be difficult. A callous attitude will only increase resistance and resentment.²³² Exemplifying many *Bengoshi* attitudes, *Bengoshi* Takeshi Suzuki has stated, "America will not be satisfied until Japan overhauls its laws and regulations to guarantee American companies the same freedoms in Japan that they enjoy at home The U.S. stance on coordination of legal systems is quite simple: American concepts of justice should prevail in Japan."²³³ We should not give this impression to Japan. Americans must recognize that Japanese values and policies are not necessarily bad, just different.²³⁴ To succeed in dealing with Japan, a trusting relationship must be formed, and Americans should be more sensitive to Japanese traditions.²³⁵ Japan's pervasive sense of national insecurity motivates many of their actions, and the United States should address these fears.²³⁶ Perhaps if Japan is assured that the goal of the American attorneys is not to "conquer" the Japanese legal system or to interfere in Japan's

229. Iida, *supra* note 142, at 1.

230. *Id.*

231. Stephen W. Bosworth, *The United States and Asia*, FOREIGN AFF., America and the World 1991/92, at 113, 125.

232. *Id.*

233. *U.S. Lawyers and Japanese Bar Members Hold Talks on Professional Restrictions*, *supra* note 165, at *2-*3.

234. van Wolferen, *Problem Revisited*, *supra* note 227, at 54.

235. Nye, *supra* note 25, at 115.

236. van Wolferen, *Problem Revisited*, *supra* note 227, at 54.

national interests,²³⁷ their fears of losing their independence will diminish.

As the world becomes more globalized, Japan will naturally be pressured to be more open to negotiations.²³⁸ Since Japan will not be able to rely on their cultural norms to establish order and trust, laws in the international society will become more important to Japan.²³⁹ Thus, America should concentrate on encouraging a more global role for Japan by accentuating long-term mutual gains.²⁴⁰ Japan will also need to compromise and become more understanding of America, recognizing that true access to markets is necessary in a global atmosphere.²⁴¹

In sum, there must be compromises on both sides. The United States should concentrate on developing an environment conducive to such compromise. Should the United States and other countries be able to establish a more trusting environment for the Japanese, future negotiations may well result in satisfaction for all parties — a true “win-win” situation.

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237. Japanese seem to feel that the prohibition on *Gaiben* is well deserved because the Japanese government is so involved in *Bengoshi* qualifications whereas it is not in *Gaiben* qualifications. One bureaucrat was noted as saying,

We in the Japanese government believe that *bengoshi* are fundamentally public servants — servants of the state — since we test them, certify them, and then educate them for two years in the National Legal Training and Research Institute before they become *bengoshi*. Thus, to have foreign lawyers supervising *bengoshi* would, by definition, be contrary to the Japanese national interest.

Glen S. Fukushima, *The “Consciousness Gap,”* TOKYO BUS. TODAY, Aug. 1994, at 48.

238. Feldberg, *supra* note 194, at *1.

239. See Iida, *supra* note 142, at 1.

240. Nye, *supra* note 25, at 107.

241. Richard Holbrooke, *Japan and the U.S.: The Unequal Partnership*, FOREIGN AFF., Winter 1991-92, at 41, 57.

