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Doing Business in Japan: The Importance of the Unwritten Law

I. Introduction

Negotiating with the Japanese has not been easy for Americans, partly because we do not fully understand the language, culture, and society of the Japanese people and how they relate to the formation of the Japanese legal consciousness. Therefore, this article will focus not merely on the written Japanese law, but rather on the forces and traditions that have helped shape their legal heritage. Having established these cultural forces, we will examine the problem of administrative guidance and how it is implemented in Japan. Since we will be able to negotiate successful contracts with the Japanese only when we are aware of the differences between our cultures and their legal attitudes, it is important that we have an understanding of the development of the Japanese legal consciousness.

II. History of Japanese Legal Development

The development of Japanese law can basically be divided into three stages. The first occurred in the 7th century, when the Japanese adopted the Chinese legal system. This was done basically to minimize the power of the aristocracy in Japan through the use of a merit system, where all positions were based on examinations, not heredity. But more importantly, the Taika land reforms nationalized the land, removing it from private ownership. This was Japan's first attempt to centralize authority; it also marks the beginning of a pattern in Japan's social evolution whereby a foreign legal and social system was adopted to solve political and economic problems. This pattern was repeated in 1868 during the Meiji Restoration when Euro-

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pean civil law was introduced, and once again following World War II during the American occupation of Japan.

The emperor gradually lost control and there followed a period of civil war known as the "Warring States" period in which individual *daimyo* (lords) warred for control of the country.[1] It was during this time that feudalism began to develop. Eventually, Tokugawa Ieyasu emerged as *Shogun* (Supreme lord), beginning a four hundred year period marked by peace and feudal custom.[2] During this period, Japan was virtually cut off from the rest of the world. Indeed, even within Japan travel was restricted. In order to leave your fief, special permission from your daimyo was needed. This period of isolation was an enormously important era in the formation of Japan's legal consciousness.

A. *The Tokugawa Period*

The legal and psychological basis of society in Japan became the group, not the individual during this feudal period. This concept is based on the Confucian ideal of the importance of the family within society. Taken a step further, the daimyo is like a father to his *samurai* (warriors) and they are like his sons. The samurai, in turn, protect the commoners, who respect and pay allegiance to him. As the father is responsible for his family, the village head is responsible for the well being of his people etc. The individual per se is unimportant; it is the group to which he belongs and his position in the hierarchy that must be recognized. Thus, the law focused on the maintenance and preservation of the group, not on the establishment of individual rights.[3]

This need for group harmony was not just based on the Confucian ideal of the family and the father/son model of relationships as the basis of social order, but on a yet more fundamental need. Unlike western farming, wet rice cultivation requires cooperation and group effort to plant and harvest. Therefore, group maintenance was not merely an abstract social or ethical ideal; it was an economic necessity since rice was the monetary unit of the times. Maintaining order was the duty of the village head; failure to do so resulted in strict punishment, for failure to keep order meant a loss of revenue for his lord.

In order to preserve social order, the individual had to recognize and accept his place within society. According to Neo-Confucian theory, society could be divided into four classes: the samurai, the *hyakuhsho* (farmers), the *shokunin* (the merchanges and artisans), and the *eta* (outcasts, usually animal tanners or undertakers). These classes were hereditary and clearly delineated. Interestingly, the farmers ranked before the merchants because tradition maintained that farmers contributed something to society

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[1]This civil war took place between the twelth and sixteenth centuries in Japan.
[2]This period began in the sixteenth century.
[3]Henderson, *Some Aspects of Tokugawa Law*, 27 WASH. L. REV. 105 (1952).

while merchants were essentially parasites who contributed little but gained a lot. This class stratification had to be legally maintained since it was the underlying structure that held Japanese society together. The legal ramifications of this view that men were essentially unequal are clear enough: the law can be applied unequally to different classes. For example, only the *samurai* were allowed to bear arms.

Most striking in such a system is the individual's lack of recourse to the law. In feudal Japan there was no mechanism for appeal if you disagreed with a superior's decision. The individual as such had no legal existence; he was only part of a group, family, *kumi* (village group) or class.[4] Connected with this lack of individual rights, perhaps paradoxically, is the Confucian sense of duty and loyalty to one's superiors. To question their decisions is to question the entire social order. Therefore conciliation was preferred to litigation, and disagreements were settled by superiors, preferably in a manner that would maintain group harmony. Maintenance of the class structure, not the delineation of individual rights was of value; duty, not vindication was expected.[5] Since the moral force of filial loyalty inhibited the development of litigation, "dispensing justice was regarded as a matter of grace from the lord to the commoners and a good commoner was expected not to disturb the lord or use his time litigating. Thus a case must have real merit before a commoner would have the courage to impose upon his governer for justice."[6]

Because of the pervasive Confucian code, ethics and law were synonymous. "One of the most noticeable aspects of Tokugawa legislation is that it usually takes the form of guides to moral administration rather than precise unbending rules purporting to be exact measures of specific behavior. If action is ethical and moral, it is legal; the law is ipso facto ethical and moral."[7] Thus the law was not generalized principles of behavior but moral precepts which might alter given differing circumstances. The law is not an objective measurement of society's values, but a subjective morality applied by one's lord. Law was a matter of right relations based on the moral tenets of Confucian thought; it did not develop as a separate institution.

Not only did law and ethics merge, but private and public law combined through personal obligations. The contractual relationship between the shogun and his vassals, the daimyo and his samurai were based on personal obligations of the lord to his samurai in exchange for their loyalty. This essential private contract was the basis of all public functions and behavior.[8] It was maintained through custom for generation to generation. Contractual relationships were not just legal responsibilities, but moral claims to one's family and descendants.

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[4] *Id.* at 105.
[5] Van Mehren, *The Legal Order in Japan's Changing Society*, 76 HARV. L. REV. 1174 (1963).
[6] Henderson, *supra* note 3 at 99.
[7] *Id.* at 103.
[8] *Id.* at 107.

B. *Nineteenth Century European Intervention*

However, with the arrival of Commodore Perry in 1868, Japan's period of isolation was ended, and with it the Tokugawa period. Faced with the realities of modern western society and witnessing the fate of China, Japan's leader decided to modernize and once again adopt a foreign legal and political system. The problem was to decide which system to adopt: the French, English or German. Due to the vestiges of Tokugawa thought, the Japanese were temperamentally unsuited to adopt the English system of common law, so instead the German model of civil law was chosen. Common law, with its development of individual rights and adversarial relationships, was simply too radical an idea for the Japanese at that time. In addition, because the German law was codified, it was easier to adopt than a common law system which depended upon case precedent.

Although anxious to abandon feudal traditions, Confucian ideas remained an influence on their behavior. The law—and government itself—was seen as paternalistic; a supra authority that maintained peace and harmony among the people much the way the *shogun* had previously dispensed the law. This is not to imply that the adoption of the German codes was not a radical departure for the Japanese, but rather that it was adopted because it fit already existing modes of behavior and thought. Since both Germany and Japan were based upon a paternalistic society, the adoption of the German law fit easily into the societal structure in existence in Japan. The Meiji Resortation was accomplished by the malcontent *samurai* class which, while seeking a new model for authority, maintained many of its old beliefs and prejudices. "Both in content and in method of enactment it (the constitution of 1869) has been a thoroughly undemocratic document. It was conferred on the Japanese people as the gift of the Emperor Meiji and instead of recognizing individual rights, it has seemed rather to restate in modern form the powers of the emperor.[9]

However, the adoption of the German Civil Code in 1896 remains important because it signifies the first recognition by society of the importance of the merchant class and it still forms the basis of Japanese commercial law today. This acknowledgement of the commercial classes marks a radical departure from the Tokugawa world that (ostensibly) abhorred the merchant's preoccupation with money. Now commercial activity was to be encouraged. "The Meiji government created monopolies for itself but found it needed the merchants' expertise in its development of the country. Consequently, by the end of the 19th century, the merchants had, with the encouragement and assistance of the government, reasserted themselves in the community."[10] It was during this period that the great trading houses

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[9]Blakemore, *Post War Developments in Japanese Law*, WIS. L. REV. 638 (1947).

[10]Angelo, *Big Business and the Law in Japan*, UNIV. OF WELLINGTON L. REV. 119 (1976).

developed called *zaibatsu*, the most important of which were (and still are) Mitsui, Mitsubishi, Sumitomo, and Yasuda.[11]

C. *Post World War II*

Because of the basically autocratic nature of the Japanese constitution, a new constitution was adopted following World War II in order to protect civil liberties and promote democracy in Japan.[12] "The purpose of the American occupation was to create a new democratic Japan through laws philosophically based on American concepts of democracy and economic regulation. In the process of the democratization of Japan, western legal concepts such as individual rights and due process were introduced."[13] In addition to promulgating a more democratic constitution, the occupation forces also dismembered the *zaibatsu* because of their close connection with the previous military government.

However, the zaibatsu were not destroyed, merely transfigured; today they continue to play an active role in Japan's economy. "There is now no large holding company nor perhaps personal family control of a large sector of the Japanese economy, but there are large families of companies which cooperate and coordinate their activities vis a vis competitors outside their group. Whether *kuhatsu* (modern trading companies) are the lineal descendants of zaibatsu is a moot point, but it seems reasonable to think they are."[14] In addition to dismantling the zaibatsu, Japan's commercial code was reformed, as was the securities exchange law, the income tax code, and other regulations.[15] Once more, the Japanese adopted a foreign system (American) to revise her political, economic, and legal system.

Thus the development of the Japanese legal consciousness can be characterized as a series of extensive borrowing from foreign models, followed by a period of adaptation to the Japanese milieu. Superficially, it may appear that each time such borrowing occurred, Japan embarked on a radical reshaping, yet the undercurrent of attitudes and beliefs remained the same. Despite the changing rules and precedents, Japanese attitudes still remain rooted in tradition. The problem for westerners is that we tend to see the similarities between Japanese legal concepts and our own, and tend to ignore the differences in application; yet these differences are the very source of our problems in contract negotiations with the Japanese.

III. The Role of Lawyers and Litigation in Japan Today

Having explored Japan's past, we now turn to contemporary Japan to observe the impact of foreign concepts on traditional attitudes. A good

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[11] *Id.*

[12] This new emphasis on civil liberty was an American influence brought upon the Japanese.

[13] Johnson, *The Japanese Legal Milieu and its Relationship to Business*, 13 AM. BUS. L. J., 340 (1976).

[14] Angelo, *supra* note 10 at 121.

[15] Stevens, *Modern Japanese Law as an Instrument of Compromise*, 19 AM. J. OF COMP. L. 666 (1971).

starting point is the Japanese attitude toward litigation and the role of lawyers in Japan. Given the fact that the law has been imported and has not been the product of a gradual, evolutionary process, the role of lawyers is unique among industrialized nations. The difficulty remains one of sorting cause and effect: is the lack of litigation due to the scarcity of practicing lawyers or is the lack of lawyers due to the Japanese dislike of lawsuits. Untangling this issue is no small task. Part of the problem certainly stems from the Japanese system of legal education. It is based on the European model: instruction consists of exposition, and learning involves rote memorization without evaluation or criticism of the material.[16] (It should be noted that this type of education is not limited to the law, but permeates all disciplines.) However, it is not the type of system that develops a tradition of adversarial relationships, the ability to debate or defend your point of view or prepare a defense for your client. "Legal education is essentially static, concerned with a description of existing rules and institutions rather than with imparting an understanding of the progress of development or the direction of change."[17]

Another problem of Japanese legal education is that all future lawyers, prosecutors, or judges must be admitted to, and graduate from, the Legal Research and Training Institute, which maintains a virtual monopoly on the training of lawyers. "This institute is run under the supervision of the Supreme Court of Japan, and it gives a two year course, including an apprenticeship in the practice of law as a judge, attorney, and prosecutor. The problem is that it is virtually impossible for a bright young law department undergraduate to plan his future career around the necessity of being admitted to the institute. This difficulty of admission is occasioned by the very few openings for each year's class."[18] Admission is based solely on an extremely competitive examination system, not on your previous academic record.

It is no suprise that many would-be lawyers prefer a career with the government or a company rather than the uncertainty of admission to the institute. "Thus, in 1970, there were 23,040 law department undergraduates who graduated from all Japanese universities. In the same year, only 405 lawyers graduated from the Legal Research and Training Institute."[19] Even as Japanese society becomes more highly industralized and impersonal, and the traditional methods of settling disputes more inoperative, the dearth of lawyers discourages the use of the Japanese legal system. Added to this is the high court cost borne by the loser, which further discourages litigation. Thus, the lawyer in Japan stands between tradition and westernization, neither fully assimilated into Japanese society nor totally accepted

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[16]Van Mehren, *supra* note 5 at 1182.

[17]*Id.*

[18]Stevens, *Japanese Law and the Japanese Legal System, Perspectives for the American Business Lawyer*, 27 THE BUS. LAW. 1270 (1972).

[19]Stevens, *supra* note 15 at 680.

as a necessary evil. Rather, the lawyer in Japan occupies a unique position as a highly trained specialist that the general populace never consults.

If there is a tendency not to use the court system nor seek the counsel of a lawyer in settling a dispute, how then do the Japanese resolve conflicts? As we have seen, the Japanese long-standing dislike of litigation remains; only when persons have stepped outside of the community of thought can disputes arise. In such a case, all parties are, to some extent, culpable, and harmony is to be restored only by reconciling the parties, not by determining which party was right and which was wrong.[20] Given this attitude, it is obvious why the Japanese continue to shun litigation, which divides parties into definite winners and losers, ignoring social relationships in favor of analytic decisions based on precedents.

Therefore, submitting a dispute to court is viewed as a last resort. "Indeed, the Japanese do not like the clear-cut solutions but rather prefer social settlements such as compromise (*wakai*) or conciliation (*chotai*) in the majority of civil suits today."[21] To bring a case to court emphasizes a failure of society and individuals to resolve suits through traditional means. Any hope of restoring harmony is thus destroyed. We, who are comfortable with our tradition of common law, may have trouble comprehending the Japanese preference for compromise; but for them, social order still remains a higher ideal than individual rights. "The Japanese aversion to law is really an aversion to the use of law in the legal process, to the shame of the courtroom, to the judgment that blames."[22] Shame here implies the immense social pressure brought to bear on the individuals to resolve their conflicts without disturbing the social order. Japan remains a homogeneous society with a high degree of social stratification; ignoring your position in this hierarchial society is to risk ostracism. Troublemakers are not to be tolerated, but repressed.

We may then wonder how disputes have traditionally been settled. In response, let us examine one example involving a taxi accident that caused personal injury. Normally, a representative of the company visits the victim or his family and apologizes. Some compensation is paid, but the amount is less than would be required to cover hospitalization and loss of income. The respective rights of the parties as they would be vindicated through litigation play little, if any, role in the settlement. The basic explanation is that the taxi company, ordinarily the economic and social superior, can take advantage of "anachronistic" social attitudes.[23] The injured party does not want his associates to think him odd and troublesome. "To the extent that the cohesive family unit still provides a substitute for com-

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[20]Kim and Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 THE INT'L & COMP. L. Q., 511 (1979).

[21]Douglas, *Legal Aspects of Doing Business in Japan*, 6 AM. BUS. L. J. 680 (1968).

[22]Kim and Lawson, *supra* note 20 at 505.

[23]Von Mehren, *supra* note 5 at 1175.

pensation or social security, the injured party is effectively cared for."[24] It is perhaps hard for Americans to accept such a solution, but the Japanese generally consider this method superior to litigation. Individual satisfaction is considered less significant than social harmony, and conciliation effects the desired end. Whether the individual is pleased with the settlement is not of overriding importance.

IV. Contract Negotiation With the Japanese

Given these attitudes, how do the Japanese approach contract negotiations? Obviously, the differences between our attitudes towards the law are reflected in our expectations of what a contract should be and how negotiations ought to proceed. As might be expected, the Japanese view of a contract is quite different from our own. For the Japanese businessman, a business relationship implies more than a legally binding document, for the contract constitutes only part of a relationship in which personal and social factors may play a major role. "He further expects that the relationship will be adjusted and accommodated in a spirit of mutual reasonableness and compromise as it continues over time."[25] For the Japanese, a contract is the end result of having established a relationship of trust and friendship. This relationship of mutual trust is more important that the obligations embodied in the contract, for it indicates that both parties possess an understanding that can be employed if and when future problems arise. When you negotiate a contract with a Japanese, you are negotiating an entire social and moral relationship that is assumed to transcend the bounds of the contract.

This view is different from that of an American who sees a contract as a legal document. When we negotiate a contract, our goal is to get the best possible terms; for the Japanese, it is to establish the trustworthiness of the other party. "What to an American would be regarded as a forthright position might well impress a Japanese as showing a lack of appreciation for the necessity of compromise and flexibility, lead them into a reticence to enter into a long range working relationship with such people."[26]

With these different views in mind, our objectives seem to be contradictory. We want our contracts to contain the greatest possible detail; the Japanese prefer more open-ended agreements that can be modified as circumstaces change. If you have negotiated a good working relationship, the contract is just an affirmation of your understanding. We, however, view a contract as a legal document which stipulates the rights and obligations of each party, enforceable by law.

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[24] *Id.* at 1176.

[25] Narcessi, *Advising Japanese Corporations on Doing Business with Americans*, 29 THE BUS. LAW. 837 (1974).

[26] *Id.* at 842.

While Americans observe regulations and contractual agreements to the letter of the law, the Japanese generally regard the circumstances of the contract and the relationship that has been established between the parties as being of paramount importance. Although Americans observe contractual obligations more closely than the Japanese, they will not accept responsibility for contingencies not covered in the contract. Japanese, on the other hand, will frequently do so, believing that the good will and friendship embodied in the contract is more significant than its exact terms. Therefore, American businessmen tend to view contracts and social or personal obligations separately, unlike the Japanese who often spend more time developing the proper relationship or atmosphere than they do creating a thorough agreement.[27]

Thus, Japanese contract negotiation involves reaching an understanding of the interests and goals of the other party. If a good relationship has been established, the contract need not be explicit. Indeed, a more ambiguous contract allows for flexibility and adaptation. However, most Americans would feel uncomfortable with such a contract. Our tradition uses the law to enforce our rights, and we expect these rights to be clearly represented at all times. In contrast, the Japanese still prefer using compromise and carefully established social relationships to resolve disputes.

It is therefore not unusual to see clauses such as the following in a Japanese contract:

"If in the future disputes arise between parties with regard to the rights and duties provided in this contract the parties will *confer in good faith* (*sei o motte kyōgisuru*)." This "good faith clause" is similar to another "harmonious settlement" clause that is also commonly employed, which states, "they will settle the dispute harmoniously by consultation" (*kyogi ni yori emmon ni kaiketsu suru*).[28] We may contrast this with our own use of arbitration clauses and litigation where the parties are under an obligation to bargain in good faith, especially in labor arbitration cases.

Just as it would trouble a Japanese to include an arbitration clause which guarantees the resolution of a dispute by law, an American would be troubled by a "confer in good faith clause." We prefer knowing in advance that there is a definite procedure by which disputes may be settled. However, for the Japanese, harmonious relations are important. Once an understanding has been reached, problems can be resolved through conciliation and compromise. This notion recalls the traditional idea that both parties are to blame when a conflict arises (*kenka ryōseibai*).[29] It is therefore in the mutual interests of both parties to settle the problem privately. The occurrence of litigation for enforcement of contracts is still rare in Japan today, and for Americans doing business in Japan, it may be advantageous to pro-

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[27]Kawashima, *The Legal Consciousness of Contract in Japan*, (trans. Charles R. Stevens,) LAW IN JAPAN 6-7 (1974), quotes Professor Hattori in ASAHI SHINBUN 12/20/52.

[28]*Id.* at 16-17.

[29]Kim and Lawson, *supra* note 20.

vide for flexible remedies if nonfulfillment should occur.[30] If the contract has been negotiated under Japanese law, an American is better off accepting the Japanese way of doing things than trying to impose his will and culture on others.

In addition, the complexities of negotiating a contract are enhanced by linguistic problems. Every effort should be made to guarantee that both parties understand the terms and conditions of the contract. "There should be explicit agreement between the parties on all terms and possible interpretations appertaining to the contract itself."[31] Therefore, Americans should make sure the Japanese understand fully the implications of a detailed American contract, just as an American should take care to understand the nuances of a Japanese one. Only then will a mutually beneficial relationship occur.

Once an acceptable contract has been drawn, both parties must sign it. This decision is made on one side by an American executive who has been given the authority to represent his company in the negotiation, and who is naturally responsible for the final outcome. The Japanese decisionmaking process is not as straightforward; concensus is required throughout the organization. This decisionmaking process, *ringisho* or *nemawashi* is very time-consuming; however, once a decision has been reached, it will be supported by the entire organization and its implementation will proceed smoothly.

The advantages of such a system are that by consulting with many executives at different levels of the organization, the chances of serious errors are reduced. Furthermore, because of the extensive consultations, the people and departments directly involved in the implementation of the contract understand the requirements. Finally, because members of the organization had a chance to express their views, they are less likely to oppose the decision, even if they do not agree with it entirely.[32]

However, Americans often feel frustrated by this process because it is so different from the way we do business here. But given that the Japanese regard a contract as much more than a legally binding agreement, it is no wonder that much time and care is given to its approval. Ringisho maintains group harmony by insuring that the entire corporation, not just a few executives, play a role in the decisionmaking process. If the decision is poor, no one person is blamed, but the entire company is responsible. Thus, the individual is protected against the shame of failure. "This process, called *ringi*, is a good example of the Japanese preference for acting in a group, so as to avoid the possibility of individual embarrassment for mistakes."[33]

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[30]Douglas, *supra* note 21 at 682.

[31]*Id.*

[32]Narcessi, *supra* note 25 at 840.

[33]*Id.*

V. Administrative Guidance in Japan

In addition to the problems directly related to negotiating contracts with the Japanese, there still remains one serious obstacle to be considered. In Japan, business and government cooperate with each other unofficially under the auspices of "administrative guidance" (*gyoseishido*). "This term eludes precise definition, but generally embraces all the different means whereby the ministries and agencies of the Japanese government exert formal and informal regulating authority over business in Japan."[34] For Americans who believe in laissez-faire and resent government intervention, the Japanese system of unofficial cooperation is difficult to accept.

However, for the Japanese, this system is a natural outgrowth of their feudal tradition. "The bureaucrats of the Japanese government still display characteristics of paternalism, autonomy, and an inclination to settle disputes informally. The modern bureaucrats are not unlike the ancient daimyo (lords) of 200 years ago in Tokugawa Japan. It is because of these bureaucrats who regulate business that great attention must be paid to administrative policy and guidance rather than strictly to formal law and legal considerations."[35] Government bureaucrats, the modern descendents of feudal lords, are respected authorities, and their opinions are adhered to.

Although administrative guidance is strictly unofficial, and as such, up to the discretion of the business, the bureaucracy can exert subtle forms of pressure. "This type of governmental influence assumes business cooperation on a voluntary basis, but its ultimate sanction is a use of governmental power, often in a totally unrelated field, to punish noncompliance with regulatory requests."[36] Thus administrative guidance has the interesting quality of being officially voluntary but unofficially binding.

Given the seemingly contradictory nature of administrative guidance, which is at once based on cooperation and coercion, its mechanisms and its implications for an American doing business in Japan are important. "Administrative guidance may be understood as the actions of administrative organs, in respect to matters in either a certain administrative field, in executing statues by applying them, and in ordering strong measures against and otherwise compelling, specific individuals, juristic persons (*hōjin* includes various types of corporations) and associations; where there is voluntary compliance and a statuary basis of action in guiding, suggesting and advising; and where there is voluntary compliance but no statutory basis of action, in influencing the parties' voluntary cooperation and concensual performance by expressing, as an administrative organ, the expectation and wish that something should exist or be done in a certain way."[37]

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[34]Stevens, *supra* note 18 at 1264.
[35]Johnson, *supra* note 13 at 341.
[36]Stevens, *supra* note 18 at 1264.
[37]Narita, *Administrative Guidance*, (trans. James L. Anderson) LAW IN JAPAN 46 (1968).

Administrative guidance can take the form of directives (*shiji*), requests (*yōbō*), warnings (*keokoku*), suggestions (*konkoku*), and encouragements (*kansho*), which are usually released through circulars to the businessmen concerned.[38] Furthermore, administrative guidance can be classified according to whether it has a statutory basis or not. First there is administrative guidance which is conducted on the authority of statutes and such suggestions, guidance, and encouragement is formal. In addition, there is administrative guidance for which there is sometimes no direct statutory authority enabling administrative agencies to give advice; but there are also statutes to cover these situations, authorizing such measures as orders, permission, approval licensing or revocation and suspension of licenses in appropriate cases. This form of administrative guidance substitutes noncoercive, voluntary measures for the strong measures authorized by statute, but it results in strong psychological pressures on the parties, for if they should not comply with these noncoercive, voluntary measures, administrative disposition exercising the public authority will be effected.[39]

Finally, administrative guidance may be conducted on the basis of "general authority" when there is no particular statute regulating the matter at hand or where the statute is deemed inadequate in a given situation.[40]

Administrative guidance may further be classified by its functions. Administrative guidance may regulate or suppress activities that are not considered in the public interest.[41] Since this guidance is based on official authority and undertaken in the public interest, a fairly wide range of restrictions and encouragements, both formal and informal, are employed. Formal restrictions can include any measures legally permitted in cases of noncompliance; informal measures can include the yet wider range of measures an agency may employ to bring disadvantage to a company through its authority in other areas.[42]

Restrictive measures may include punishment or compulsory performance and, if employed, administrative guidance then becomes an order or a prohibition. Informal restrictive measures may involve suspension or revocation of a business as well as public persuasion. Encouraging measures are measures whereby specific benefit is given to a party who follows guidance and is not given to a party who does not. There are two types of encouraging measures, formal and informal. An administrative agency can issue licenses only to companies that cooperate either because a law may prescribe this (formal encouragement) or by discretion of the agency (informal).[43]

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[38] *Id.* at 46.

[39] *Id.* at 57.

[40] *Id.*

[41] *Id.* at 59.

[42] Yamanouchi, *Administrative Guidance and the Rule of Law*, (trans. Peter Figdor) LAW IN JAPAN 14-15 (1974), at 14-15.

[43] *Id.* at 26.

The second type of administrative guidance is termed "harmonizing administrative guidance." "Harmonizing administrative guidance" occurs when government intervenes in order to end conflicts between various organizations and industries in order to accomplish a desired end. Compliance is assured by the means described above.[44]

The third type of administrative guidance is promotional and auxiliary. It is usually requested by the recipient for his personal benefit, so compliance is left to his discretion.[45]

Given the complexity and wide-ranging powers of such a system, why maintain it? The Japanese debate this issue, too. Basically, the advantage of administrative guidance is its flexibility and speed. Because action can occur without the benefit of a statute, issues can be resolved quickly and unofficially. Thus an administrative agency can effectively seek its objectives through an informal process of voluntary cooperation rather than the time-consuming processes needed for legislation and prosecution of offenders.

In addition, it provides a flexible response to the changing circumstances of Japanese society.[46] "Administrative guidance appears as a means of bridging the gap between (a) the principle of administration according to the law, and, (b) the positive duty of public administration to form the social order in response to the demands of the people, even if this means exceeding the law on occasion."[47] However, the basic problems with administrative guidance cannot be ignored: there are no legal checks to control the power of agencies employing administrative guidance and no formal legal recourses for its abuse. After all, administrative guidance clearly puts government in the dominant position. If administrative authority is viewed either as the servant of monopolistic capital or a remnant of the imperial bureaucracy, administrative guidance is undemocratic, even dangerous.[48]

Whatever our attitude toward administrative guidance, we will probably be confronted with unofficial government advice when doing business in Japan. Whether we approve or disapprove of such advice, it certainly cannot be ignored. Thus we are best off cooperating with the government in the hopes that some compromise can be reached.

VI. Conclusions

As one author succinctly stated, "This lack of flexible communication between the government and foreign business in Japan makes it easier for a Japanese industry which feels itself threatened by foreign competition to use its better rapport with the officials to enlist their support to prevent

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[44]Narita, *supra* note 37 at 59.
[45]Yamanouchi, *supra* note 42 and 23.
[46]Johnson, *supra* note 13 at 346.
[47]Narita, *supra* note 37 at 51.
[48]*Id.*

foreign encroachment in the Japanese market."[49] The solution to this problem is either to use a Japanese law firm to assist you with government regulations, or let the Japanese company with which you have negotiated the contract handle government agencies. You might also acquire the necessary cultural and linguistic skills yourself to develop good relations with the government.

The objective of this paper was not to convince one of the impossibilities of doing business in Japan. Rather, it was to show some of the important influences and ideas that must be understood before doing business in Japan. Too much has been misunderstood for too long. This article has attempted to show that by careful study of the traditions and history of the Japanese, their system of business makes sense within their own cultural setting.

If we are to successfully compete with the Japanese, particularly in their own country, we must understand them as well as they understand us. Whether we like or dislike their way of doing business is, of course, irrelevant; we must learn to accept them on their own terms, and by doing so, learn to negotiate our own terms with them.

[49]Stevens, *supra* note 18 at 1268.