

# Washington University Global Studies Law Review

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Volume 2 | Issue 2

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January 2003

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### Recommended Citation

Kenneth C. Wu, *The Protruding Nail Gets Hammered Down: Discrimination of Foreign Workers in Japan*, 2 WASH. U. GLOBAL STUD. L. REV. 469 (2003), [https://openscholarship.wustl.edu/law\\_globalstudies/vol2/iss2/8](https://openscholarship.wustl.edu/law_globalstudies/vol2/iss2/8)

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# THE PROTRUDING NAIL GETS HAMMERED DOWN: DISCRIMINATION OF FOREIGN WORKERS IN JAPAN

I understand discrimination is wrong in practice, but when shaking hands with black people, I get the feeling that my hands are turning black.

—Masao Kokubo, assemblyman in Hyogo prefecture<sup>1</sup>

## I. INTRODUCTION

At a time when American sports fans are proving to be more cosmopolitan than ever, new seeds of doubt concerning the spirit of openness to outsiders and fair play have arisen in Japanese baseball. While Japanese baseball fans celebrated the record breaking<sup>2</sup> and award winning<sup>3</sup> performance of home-grown star Ichiro Suzuki in the United States, teams in the Japanese Pacific League went out of their way to sabotage American Tuffy Rhodes's attempt to break the Japanese single season home run record set by the legendary Sadaharu Oh.<sup>4</sup> Stuck at fifty-five home runs for the remaining two weeks of the season as pitchers deliberately walked him time and again, Rhodes could only tie Oh's thirty-seven year old record. For many observers of Japanese culture, Rhodes's aborted quest was as indicative of the provincialism of Japanese baseball as it was about the insularity of Japanese society.<sup>5</sup> Although Japanese fans revere Japanese stars as heroes,

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1. Sam Jameson, *Embarrassed Japanese Hurry to Reject Latest Racial Remark*, L.A. TIMES, Mar. 20, 1993, at A10. Jameson characterized suppressing racial slurs by the Japanese government "like the game the Japanese call *mogura-tataki* or beating mole holes. Hit one mole and another pops up somewhere else." *Id.* See also Fred Hiatt, *Japanese Police Apologize for Slur on Pakistanis*, WASH. POST, Dec. 2, 1989, at A20 (revealing a police instruction manual that cited Pakistanis as having "a unique body stink" and doing "nothing but lie in the name of Allah"); Michiyo Nakamoto, *Tokyo Governor Rebuked for Attack on Immigrants*, FIN. TIMES (LONDON), Apr. 12, 2000, at 14 (reporting the refusal of Tokyo governor Shinataro Ishihara to apologize for declaring that *sangokujin*, highly charged term used to describe immigrant Koreans and Chinese, are responsible for atrocious crimes and may riot in the event of a major disaster).

2. Most hits by a Major League rookie. See *Ichiro*, SEATTLE TIMES, June 30, 2002, at D7.

3. American League Most Valuable Player 2001. See Buster Olney, *In Any Language, Suzuki is the League's Best*, N.Y. TIMES, Nov. 21, 2001, at S1.

4. See Howard W. French, *As Rhodes Misses Record, Japan's Fans Lose Out, Too*, N.Y. TIMES, Oct. 6, 2001, at D7.

5. This type of protectionism is not unprecedented. See Clyde Haberman, *Japanese Protect Oh's Record*, N.Y. TIMES, Oct. 26, 1985, § 1, at 49. In 1985, "interloping foreigner" Randy Bass ended the season one home run short of breaking Sadaharu Oh's record. *Id.* Despite many opportunities to break "mighty Oh's" record, Bass correctly predicted that the Japanese would manufacture tactics (deliberately throwing Bass unhittable pitches) to stop him from breaking the

exceptional foreign athletes like Tuffy Rhodes are treated as *tasuketo-man*, relegated to the status of helper.<sup>6</sup> Unfortunately, the bias experienced by foreign athletes is consonant with the kind of treatment other émigrés receive on a daily basis in Japan.

Within the context of Japan's ostensibly xenophobic culture, the consequences of Japanese alienation of non-Japanese residents has implications beyond the mere loss of an ephemeral sports record.<sup>7</sup> Because of Japan's decreasing birthrate<sup>8</sup> and increasing elderly population,<sup>9</sup> its domestic

home-run record. *Id.* Although the Japanese press ostensibly decried such actions, some Japanese fans believed that the tactics "violated basic sportsmanship." *Id.*

6. See Michael Shapiro, *A Place in the Sun on Japanese Terms*, N.Y. TIMES, June 15, 1986, at D28 (chronicling the struggles of Leon and Leron Lee, Americans playing baseball in Japan and trying to adjust to Japanese sport culture).

7. Obviously, Japan is not the only nation that has struggled with growing xenophobia and scapegoating of immigrants. See Alan Cowell, *Europe "Is Rubbing Its Eyes" at the Ascent of the Right*, N.Y. TIMES, May 18, 2002, at A3. European nations have begun to experience some of the effects of a globalized economy and regional political integration. *Id.* Like Japan, economic conditions in Europe are sluggish, with high unemployment rates. *Id.* Beginning with Jorg Haider's right-wing coalition victory in Austria, the European anti-immigrant movement has spread across the continent. *Id.* Right-wing and conservative leaders and their respective political parties in Germany (Edmond Stoiber), Netherlands (the late Pim Fortuyn), France (Jean-Marie Le Pen), Italy (Prime Minister Silvio Berlusconi), Denmark, Portugal, Spain, and Switzerland have fueled anti-immigrant anxiety and "encroached on mainstream politics." *Id.* Residents of Lucerne, Switzerland voted to reject citizenship applications of otherwise qualified Turkish or Yugoslavian immigrants. See Elizabeth Olson, *Swiss Refusal of Citizenship to Immigrants Raises Debate*, N.Y. TIMES, May 21, 2000, § 1, at 9. In a wholly subjective enterprise, local officials have the freedom to enter an applicant's home to inspect "how the [immigrant] family lives, the level of cleanliness and neatness, and . . . what they eat." *Id.* A Swiss court denounced a citizenship vote as a violation of the Constitution because residents had accepted Italian or Spanish applicants, but rejected applicants from Turkey. *Id.*

8. See William Hall, *Birthrate Blues*, JAPAN INC., Feb. 2000, available at [http://www.japaninc.net/mag/comp/2000/02/feb00\\_reports\\_js.pdf](http://www.japaninc.net/mag/comp/2000/02/feb00_reports_js.pdf).

In Japan, the average number of children born to each woman of child-bearing age has been steadily falling over the past three decades and reached a low of 1.38 in 1998. Since a birthrate of 2.08 children is considered to be the minimum required to simply maintain a level population, demographers are set to predict when the sun will set on the last surviving Japanese inhabitant of the land of the rising sun.

*Id.* According to the Japanese government's projections if nothing is done, there will be 100 million people in 2050 and only 67 million at century's end. *Id.* Total fertility rate reflects "the number of children a Japanese woman bears during her lifetime as calculated per 1,000 Japanese females between the ages of fifteen and forty-nine." *Id.*; accord *Births (1983-2001)* at n.1 (provided by the Statistics and Information Department, Minister's Secretariat, Ministry of Health, Labor, and Welfare), at <http://www.jin-japan.org/stat/stats/02VIT11.html>. Exemplifying Japan's desperate pursuit to increase the birthrate, the Bandai Corporation announced that employees would receive a one million yen (approximately \$1,000) bonus for every baby they have after their second child. Calvin Sims, *Japan's Employers are Giving Bonuses for Having Babies*, N.Y. TIMES, May 30, 2000, at A1. However, because Bandai makes toys, it is using the bonuses as a way to "expand the company's shrinking customer base-children." *Id.* Similarly, the Japanese government has doubled the number of parents receiving child subsidies as an incentive to procreate. *Id.*

9. The life expectancy for Japanese men in 2000 was 77.72 and 84.60 for Japanese women. *Life Expectancy at Birth (1983-2001)* (provided by the Statistics and Information Department, Minister's

working population is set to shrink further and faster than that of any other economically advanced country over the next fifty years.<sup>10</sup> In order to solve the current severe labor and fiscal crises, the government has realized that Japan must attract foreigners in dramatically increased numbers.<sup>11</sup>

Like the middle class of most industrialized countries, affluent Japanese have an aversion to a certain subset of jobs in the service industry. The Japanese call these jobs “3-K” because they involve work that is *kitanai* (dirty), *kitsui* (difficult), and *kiken* (dangerous).<sup>12</sup> Employers in this unskilled sector of the workforce have been especially affected by the reluctance of young Japanese recruits to engage in these stigmatized jobs.<sup>13</sup> In order to revitalize Japan’s economy, employers need to fill vacancies in service industries, the foundation of economic infrastructure, with willing and able foreign workers.<sup>14</sup> Takashi Oka cites a survey that identifies the construction

Secretariat, Ministry of Health, Labor, and Welfare), at <http://www.jinJapan.org/stat/stats/02VIT24.html> (last visited Mar. 11, 2003).

10. The combination of an aging population and a low fertility rate compounds Japan’s labor shortage. Sharon Moshavi, *Japan’s Foreigners Distrusted, Needed*, BOSTON GLOBE, Nov. 19, 2000. According to U.N. projections, “Japan will need to import 600,000 workers annually until 2050 just to keep its workforce stable. *Id.* Writing for the *Japan Labor Bulletin*, Professor Junichi Goto has compiled and analyzed Japan’s birthrate statistics. Junichi Goto, *Aging Society and the Labor Market in Japan: Should the Fertility Rate be Raised Now?—No!*, JAPAN LABOR BULL., Sept. 1, 2001, at <http://www.jil.go.jp/bulletin/year/2001/vol40-09/05.htm>. Professor Goto asserts that merely increasing Japan’s fertility rate is not an effective strategy for combating demographic imbalance. *Id.* Because newborns would not enter the workforce for another two decades, increasing the birthrate in 2000 would not solve problems in the short-term. *Id.* Professor Goto advocates increasing labor productivity and encouraging women to join the workforce. *Id.*

11. See generally DEMETRIOS G. PAPADEMETRIOU & KIMBERLY A. HAMILTON, *REINVENTING JAPAN: IMMIGRATION’S ROLE IN SHAPING JAPAN’S FUTURE* (2000); TAKASHI OKA, *PRYING OPEN THE DOOR: FOREIGN WORKERS IN JAPAN* 23-61 (1994). In February 2001, the government released findings of its *Opinion Survey Concerning Foreign Workers in Japan*. See *Opinion Polls Concerning Foreign Workers in Japan*, *supra* note 1. The results of the survey showed that:

- 21.2% believed that the government should not allow foreign nationals to engage in unskilled work.
- 51.4% supported allowing foreign nationals to engage in unskilled work with certain conditions and restrictions.
- 16.3% believed in granting unconditional, equal employment opportunities for foreign nationals.

*Id.*

12. See PAPADEMETRIOU & HAMILTON, *supra* note 11, at 11; OKA *supra* note 11, at 1.

13. See PAPADEMETRIOU & HAMILTON, *supra* note 11, at 11-12 (citing shortages in the “construction sector, certain segments of low-technology manufacturing, and low value-added service industries . . .”).

14. In June 1999, the Japanese Public Employment Security Offices surveyed employers about hiring non-Japanese workers. See *Non-Japanese Employees in Japan: Report of the Ministry of Labor*, JAPAN LABOR BULL., Mar. 1, 2001, at <http://www.jil.go.jp/bulletin/year/2001/vol40-03/03.htm>. By industry, foreign workers were employed in:

- Manufacturing: 52.2%
- Service sector: 24.3%

industry as “suffering from acute labor shortages.”<sup>15</sup> According to Oka, approximately 120,000 foreigners work in construction.<sup>16</sup> Other shunned sectors include jobs in hospitality, entertainment, and building maintenance; work that “Japanese no longer do.”<sup>17</sup>

As of 2000, only 1.5 million foreigners, including students, dependents, and undocumented workers lived in Japan.<sup>18</sup> In contrast to demographics in the United States<sup>19</sup> and the European Union,<sup>20</sup> foreign residents in Japan only account for one-tenth of one-percent of the registered workforce.<sup>21</sup> In 2000, Japan’s Ministry of Justice suggested that it would consider easing immigration rules for foreign workers with experience in high-tech<sup>22</sup> and nursing industries.<sup>23</sup> However, even as Japan tries to welcome foreign workers with one hand, it still keeps turning them away with the other.

Although the Japanese government has taken a prudent step in reconsidering its restrictive and outdated immigration policies, no specific legal framework exists to protect foreign workers from employment discrimination on the basis of their national origin. This Note explores the plight of foreign workers in Japan and the prospects of a broad equal employment opportunity regime to provide a more hospitable working environment for the impending influx of foreign workers. Part II of this Note provides examples of indignities, including employment discrimination, foreigners face within Japanese society. Part III evaluates the adequacy of present constitutional and statutory protections pertaining to employment rights provide adequate bases from which to build reliable equal employment

- Wholesaling, retailing, food, and drink establishments: 12.7%

*Id.* This is not the only time in Japan’s history when it depended on immigration to offset labor shortages. *See* OKA, *supra* note 11, at 9-10. During Japan’s militaristic era in the 1930s, most Japanese men were involved in the armed forces, so men from Korea and China were forced to “immigrate” to Japan and “work in factories, coal mines, and on construction projects, often under appalling conditions.” *Id.* at 9.

15. *See* OKA, *supra* note 11, at 25.

16. *Id.* Oka estimates that there are 5.5 million workers in the construction industry. *Id.*

17. *Id.* at 28.

18. *See* Moshavi, *supra* note 10.

19. Ten percent of the U.S. workforce. *Id.*

20. Five percent of the E.U. workforce. *Id.*

21. *Id.*

22. *The Door Opens a Crack*, *ECONOMIST*, Sept. 2, 2000, available at 2000 WL 8143419. Then Prime Minister Yoshiro Mori’s visit to India’s high-tech capital, Bangalore prompted the Ministry of Justice to issue a relaxation of immigration policy. *Id.* *See also* *Clash Course*, JAPAN INC., at www.japaninc.net/article.php?articleID=172 (Jan. 2001) (reporting a recruitment plan that would “bring 10,000 Indian I.T. workers into Japan—roughly equal to the size of the nation’s current overall Indian community—and . . . ‘rent’ them out to Japanese companies.”).

23. *See The Door Opens a Crack*, *supra* note 22. Japan is more tolerant of “skilled” workers with training in fields such as computer science. *Id.* However, easing immigration restrictions for “low-skilled” workers in the nursing industry has proven more controversial. *Id.*

law. Finally, Part IV proposes policies that the Japanese government can champion in order to prepare the country for the influx of much-needed foreign workers. A gradual and selective introduction of new immigrants in to the country will appease public and governmental fears that foreigners will undermine Japan's unstable labor market and social cohesion.<sup>24</sup> However, as these new immigrants arrive, the Japanese government must ensure that foreign-born individuals and their families are allowed to participate equally in the workforce with Japanese citizens. A framework founded upon the 1947 Constitution, international pressure, and effective enforcement by the Ministry of Labor will result in a more cooperative endeavor that both native Japanese and foreign workers can undertake in order for Japan to return to long-term economic stability.

## II. CIVIL RIGHTS OF MINORITIES IN JAPAN

The Japanese people generally believe that they are racially and culturally "pure" and take pride in their supposed monoethnicity.<sup>25</sup> Although there have been divergences in the representation of "self," all have been grounded in notions of an essentialized identity that distinguishes the Japanese from other populations. The Japanese further believe that their monoethnicity and purity result in the dominance of Japan over others in the international community.<sup>26</sup> Indeed, high ranking government officials have not been shy about voicing this concept of superiority.<sup>27</sup> To distinguish themselves from "other," the majority ethnic Japanese population refer to themselves as *wajin*.<sup>28</sup> In resorting to this self-identifying term, the Japanese have admitted

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24. In October 2001, Japan's unemployment rate set another postwar record, rising to 5.4 percent. Ken Belson, *Joblessness in Japan Rises to a Record*, N.Y. TIMES, Dec. 1, 2001 at C3. In January 2003, the unemployment rate increased to 5.5 percent. Ken Belson, *Japan: Record Unemployment*, N.Y. TIMES, Mar. 1, 2003, at C3.

25. William Wetherall & George A. DeVos, *Ethnic Minorities in Japan*, 2 CASE STUDIES ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: A WORLD SURVEY 333, 336-37 (1975).

26. Paul Lansing & Tamra Domeyer, *Japan's Attempt at Internationalization and Its Lack of Sensitivity to Minority Issues*, 22 CAL. W. INT'L L.J. 135, 136 (1991/1992). Critics decry Japan's assertion of homogeneity by revealing that "Japan has a substantial population of hidden minorities and attempts to maintain a façade of monoethnicity, by ignoring these minorities and openly excluding foreigners." *Id.*

27. See, e.g., Michael H. Cottman, *Business of Race: Dinkins Targets Japan Stereotypes*, NEWSDAY, Feb. 23, 1993, at 8. In 1986, "Prime Minister Yasuhiro Nakasone brag[ged] that Japan has a more intelligent society than the United States since there are black people, Puerto Ricans, and Mexicans in the United States, its intelligence on the average is far lower than the high level in Japan." *Id.*

28. Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. INT'L L. & POL. 419, 421 n.8 (2001). Professor Levin distinguishes the use of *wajin* with

inadvertently that ethnic homogeneity is but an unattainable aspiration.<sup>29</sup> The fact is that “others” do exist, and Japan is home to diverse populations.<sup>30</sup>

The fact that most established minorities are physically indistinguishable from the majority perpetuates the myth of homogeneity.<sup>31</sup> However, the Japanese have devised insidious methods of identifying these invisible minorities in order to preserve their privileged status. Traditionally oppressed minority groups targeted by such schemes include Koreans, *Burakumin*, and *Ainu*.

#### A. *Ethnic Koreans*

Japan’s harsh treatment of its Korean population originated in 1910, when Japan annexed Korea and placed the country under oppressive colonial control.<sup>32</sup> As a result of Japanese land management policies in Korea, thousands of Koreans migrated to Japan to earn a living, performing manual and menial labor for low pay.<sup>33</sup> In 1998, Koreans represented 42.2 percent of permanent foreign residents in Japan, numbering 638,828.<sup>34</sup> Although a large majority of these ethnic Koreans are not first generation residents of Japan,<sup>35</sup> the Korean community “still faces large-scale prejudice and discrimination.”<sup>36</sup> Until 1992, the Japanese government treated legal Korean residents like criminals by subjecting them to demeaning fingerprinting procedures.<sup>37</sup> Even now, Koreans who wish to be citizens are forced to adopt

“Japanese.” *Id.* Professor Levin reserves use of *wajin* to majority ethnic Japanese, whereas “Japanese” only refers to nationality. *Id.*

29. “Statistics reveal that more than ninety-nine percent of the population of Japan is of Japanese origin.” Lansing & Domeyer, *supra* note 26, at 141. As part of this ninety-nine percent, the so-called ethnic Japanese deem themselves as “one people, one nation.” *Id.* Based on this skewed notion, membership in the exclusive society of “Japanese” promotes a false sense of solidarity. *Id.* Even if a person has established ancestral roots in Japan, they may be perceived as alien—a disruptive force in Japanese society. *Id.* This discrimination provides the rationale for intolerance of others. *Id.*

30. Michael Weiner, *The Invention of Identity: “Self” and “Other” in Pre War Japan*, in JAPAN’S MINORITIES: THE ILLUSION OF HOMOGENEITY 1, 4-6 (Michael Weiner ed., 1997).

31. See OKA, *supra* note 11, at 31. Examples of the invisible minority include immigrants from Thailand, the Philippines, Korea, Taiwan, and Myanmar (Burma). HERBERT, *supra* note 1, at 42, tbl.5.1; PAPADEMETRIOU & HAMILTON, *supra* note 11, at 38, tbl.4.

32. See PAPADEMETRIOU & HAMILTON, *supra* note 11, at 45; see also OKA, *supra* note 11, at 11. The Korean presence in Japan represents a remnant of pre-World War II imperialism. *Id.*

33. See OKA, *supra* note 11, at 12 (listing launderers, junk men, charcoal makers, garbage collectors, miners, and construction workers).

34. See PAPADEMETRIOU & HAMILTON, *supra* note 11, at 44.

35. Daniel Snider, *Korean Minority’s Status Improves in Modern Japan*, L.A. DAILY J., Feb. 9, 1987, at S10.

36. See PAPADEMETRIOU & HAMILTON, *supra* note 11, at 44-45.

37. *Id.* at 45. Unfortunately, the Japanese government still fingerprints many registered foreigners. *Id.* at 45 n.49. For example, 600,000 of the 1.5 million registered foreigners were fingerprinted. *Id.* Even if the Japanese Cabinet relaxes the fingerprinting requirement, foreigners who

a Japanese surname as a practical necessity and deny their heritage.<sup>38</sup> Although “passing” as Japanese would appear to ameliorate the societal stigma of being an immigrant, these tactics take an obvious toll on the psyche of Koreans.<sup>39</sup> Unfortunately, attempts at “passing” have inspired Japanese employers to hire private detectives to confirm the “true” identity of prospective employees.<sup>40</sup>

In the realm of employment law, formal restrictions on employment discrimination do exist. For example, private employers are restricted from discriminating against Koreans through the Labor Standards Law,<sup>41</sup> the Employment Security Law,<sup>42</sup> and the Civil Code.<sup>43</sup> Nevertheless, Japanese courts have been reluctant to base employment discrimination rulings on civil rights grounds and instead, have relied on contract law to protect right to employment of foreign workers.<sup>44</sup>

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are at least sixteen years old and live in Japan for more than one year must still register with a signature. *Id.* The experience of American missionary, Ron Fujiyoshi, illustrates the situation for foreigners under Japan’s Alien Registration Law. See Deborah Sklar, *Testing Japan’s Anti-Korean Laws*, NATION, June 25, 1990, at 886.

38. See OKA, *supra* note 11, at 14. As recently as November 2000, the Osaka prefecture government published a booklet that had a benign purpose, but in fact offended Korean residents. The booklet contained a cartoon that depicted a Korean mother telling her son that he should use his Japanese name on job applications. *Osaka Scraps Booklet Project on Rights Koreans Say is Biased*, JAPAN ECON. NEWSWIRE, Nov. 16, 2000, Westlaw, JAPANECOM database. Ironically, the officials in Osaka published the cartoon booklet in order to educate students about Japan’s 1995 ratification of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. *Id.*

39. Earlier incarnations of the surname decrees often prompted many Koreans to commit suicide rather than renounce their familial identity. OKA, *supra* note 11, at 12. An innovative study by Professor Kenji Yoshino that examined the United States Armed Forces “Don’t Ask Don’t Tell” policy emphasized that so called “invisible groups” such as homosexuals are “disadvantaged relative to visible groups because their evasive action generated a series of harms, including: (1) alienation; (2) the sheer work of passing; (3) moral stigma; and (4) identity erasure.” Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 544 (1998).

40. See Braven Smillie, *Japan’s Top Private Eye Preaches Gentility*, L.A. TIMES, Oct. 2, 1994, at A4. These investigations have routinely been used to check potential marriage partners who may have “undesirable” traits such as Korean ancestry or a family history of disease. *Id.*

41. Labor Standards Law, Law No. 49 of 1947, art. 3.

42. Employment Security Law of 1947, Law No. 141 of 1947, art. 3, *trans. available at* <http://www.jcl.gov.jp/laborinfor-e/library/lawlos.html>.

43. Civil Code of 1896, Law No. 89 of 1896, art. 90, *translated in* J.E. DEBECKER, ANNOTATED CIVIL CODE OF JAPAN 88 (1st ed. 1909).

44. Japanese apprehension towards enforcement of existing civil rights laws that govern private relations is akin to the view of the United States judiciary during the Reconstruction Era. Despite ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments in 1865, 1868 and 1870, respectively. The United States Supreme Court decision in *Plessy v. Ferguson* did not accept the proposition that “social prejudices may be overcome by legislation.” 163 U.S. 537, 551 (1896). Instead, the Court relied on the theory that “if the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals.” *Id.*

The infamous *Park v. Hitachi, Ltd.*<sup>45</sup> case, which led to a landmark judicial decision in 1974, illustrates the methods employers use to investigate the ethnic backgrounds of applicants and a Japanese court's deference to contract law in civil rights matters. In 1970, Park Chong Sok, a nineteen year-old Korean who was born and raised in Japan applied for a job at Hitachi using his Japanese name, Shoji Arai.<sup>46</sup> Mr. Park passed a challenging entrance exam and was hired, only to be rejected when a check of his family registry revealed that he was Korean.<sup>47</sup> Mr. Park successfully sued Hitachi on a breach of contract claim<sup>48</sup> and was allowed to use his Korean name.<sup>49</sup> This case should have empowered more Koreans to follow Mr. Park's example. However, estimates show that ninety percent of Koreans in Japan continue to use their Japanese names.<sup>50</sup>

### B. *The Burakumin and the Use of Extrajudicial Tactics to Combat Discrimination*

The *wajin* consider the *Burakumin* to be descendants of Tokugawa Period (1600-1867) outcastes.<sup>51</sup> Like outcastes found in other countries, the *Burakumin* are forbidden to marry *wajin*, live in designated ghettos, and generally, are not allowed to associate or identify with majority society.<sup>52</sup> However, *Burakumin* have no distinct physiognomy and follow the same traditions as the *wajin* majority.<sup>53</sup> Even so, the *wajin* have attempted to propagate various myths to justify discrimination of *Burakumin* on the basis

45. 744 HANJI 29 (Yokohama Dist. Ct., June 19, 1974), *discussed in* 4 KODANSHA ENCYCLOPEDIA OF JAPAN 291-92 (1983).

46. *See* OKA, *supra* note 11, at 14.

47. *Id.*

48. *See* OKA, *supra* note 11, at 15. Although the Court acknowledged the inequity of Hitachi's action and the plight of Koreans in Japan, it did not officially find for Park based on a violation of civil rights. James M. Kearney, Comment, *Local Public Employment Discrimination Against Korean Permanent Residents in Japan A U.S. Perspective*, 7 PAC. RIM L. & POL'Y J. 197, 208 (1998). The Court narrowly construed the terms of the contract between Mr. Park and Hitachi and decided that because both parties had already acquiesced to the terms of the contract, Hitachi's revocation of the offer constituted "an arbitrary breach of the labor contract . . ." 744 HANJI 29 (Yokohama Dist. Ct., June 19, 1974) *discussed in* KODANSHA ENCYCLOPEDIA OF JAPAN, *supra* note 45, at 292.

49. *See* OKA, *supra* note 11, at 15. Hitachi did not appeal. *Id.*

50. *Id.* In 1985, a revision to the nationality law allowed "all naturalized citizens the option of retaining their foreign names." *Id.* Unfortunately, if foreigners wish for acceptance in Japanese society, they must "adopt Japanese names as a practical necessity . . ." *Id.*

51. *See* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 79 (1987)

52. *Id.* Some of the more bizarre rules included prohibitions on eating, sitting, smoking with *wajin* or "crossing a [*wajin*'s] threshold." *Id.* *Burakumin* could be identified according to outward appearance because they could not "dress their hair in the conventional manner [or] wear *geta* (wooden sandals) . . ." *Id.*

53. *Id.*

of race.<sup>54</sup> In reality, *Burakumin* outcaste status is founded upon historical occupational duties rather than ethnic or cultural differences. The *Burakumin* undertook roles the majority believed the unclean due to Shinto and Buddhist concepts of cleanliness and the stigma attached to the killing of animals.<sup>55</sup> Although centuries have passed since Japan's socially stratified feudal culture was in place, discrimination against *Burakumin* continues today.<sup>56</sup> Because of the traditional prohibition on association, *wajin* have refused to work with *Burakumin*.<sup>57</sup>

While other minorities have used conventional grievance proceedings to pursue justice, the *Burakumin* have resorted to more unorthodox self-help tactics. In the 1920s, *Buraku* organizations devised a strategy called the denunciation struggle (*kyūdan tōsō*).<sup>58</sup> These denunciation sessions subjected individuals to forceful verbal interrogations sometimes by large groups of *Burakumin*.<sup>59</sup> A 1975 opinion by the Osaka District Court gave a vivid account of the 1969 *Yata Denunciation* involving three middle school teachers accused of supporting a teachers' union candidate who issued a discriminatory election pamphlet.<sup>60</sup> During that denunciation proceeding, *Burakumin* leaders, and eventually a group of more than 250 people, subjected the teachers to an interrogation lasting nearly seventeen hours.<sup>61</sup> The instigators of the denunciation were tried for unlawful imprisonment.<sup>62</sup> Perhaps realizing that denunciations were the only means available for *Burakumin* to expose discrimination, the District Court capitulated and concluded that, though the conduct was somewhat "excessive," the defendants deserved to be acquitted.<sup>63</sup> On appeal, the Japanese High Court

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54. *Id.*

55. Other "degrading" roles imposed upon the *Burakumin* included those related to acting, begging and occupations dealing with death, such as butchers, tanners, and executioners. *Id.*

56. Emily A. Su-lan Reber, *Buraku Mondai in Japan: Historical and Modern Perspectives and Directions for the Future*, 12 HARV. HUM. RTS. J. 297 (1999).

57. See UPHAM, *supra* note 51, at 79-81. Similar to their treatment of Koreans, the *Wajin* used the registration system to identify *Burakumin* who attempted to work within the privileged milieu. *Id.* at 80. It was relatively easy for employers to identify *Burakumin* in their midst. *Id.*

58. *Id.* at 78. The most visible *Buraku* advocacy organization is the *Buraku* Liberation League (BLL). *Id.* at 78.

59. *Id.* at 82. Denunciations could range from "two or three *Burakumin* explaining the BLL's wishes to a local bureaucrat . . . [to] threatened use of limited physical force by large groups of *Burakumin*." *Id.* at 78.

60. *Id.* at 87.

61. *Id.* at 87-91.

62. *Id.* at 87.

63. *Id.* at 100. The subsequent High Court opinion agreed with the District Court and noted that denunciations should never exceed "the socially reasonable bounds as set by the legal order." *Id.* (quoting 9961 HANREI JIHŌ 34, 37). Nonetheless, the Court decided that "a certain level of severity is to be approved." *Id.*

reversed, but gave the defendants a suspended sentence and excused them from payment of court costs.<sup>64</sup>

In a more formal attempt to end *Buraku* discrimination, the government passed the Special Measures Law for Assimilation Projects (SMLAP) in 1969.<sup>65</sup> Unfortunately, the Japanese viewed this law as more of a political statement and turned to more devious methods to identify *Burakumin*.<sup>66</sup> Because the *Burakumin* had long been relegated to distinct ghettos, industrious private detectives published a commercial book listing the locations and addresses of *Buraku* neighborhoods.<sup>67</sup> Early in the application process, employers would simply cross-reference the address on the application with the addresses on the *Burakumin* list.<sup>68</sup> The government quickly suppressed the lists, but by 1979, no less than eight lists continued to exist.<sup>69</sup> Not surprisingly, companies, individuals, and universities had already purchased the lists.<sup>70</sup>

Today, employer screening of *Burakumin* occurs at an early stage in the hiring process.<sup>71</sup> Because of familiarity with lists in the past, Japanese human resource departments know where *Buraku* neighborhoods are making the *Buraku* book unnecessary.<sup>72</sup> When *Burakumin* are allowed to work, they are relegated to low-paying jobs with little to no job security.<sup>73</sup> Thus the *Burakumin* liberation movement has evolved from grassroots pressure upon bigoted individuals to an official governmental pronouncement recognizing

64. *Id.* at 101.

65. *Id.* at 86 (citing *Dōwa taisaku jigyō tokubetsu sochi hō* [Special Measures Law for Assimilation Projects], Law No. 60 of 1969).

66. *Id.* Indeed, Upham states that the BLL “movement remained unaffected by the SML’s passage.” *Id.*

67. *Id.* at 114.

68. These address books were also used to screen potential marriage partners. *Id.*

69. *Id.* at 115.

70. *Id.*

71. See Emily A. Su-lan Reber, *supra* note 56, at 324. Most employers in Japan begin recruiting potential employees in high schools. *Id.* at 324. Governmental regulations prohibit employers from inquiring about an applicant’s family background and place of residence. *Id.* Still, employers often include “optional” questions about an applicant’s “permanent domicile, family origin, or personal data about family members.” *Id.* Because many *Burakumin* work as day laborers, peddlers, street-cleaners, and junkmen, any evidence that an applicant’s family members participate in these traditionally *Burakumin* occupations alerts employers that the applicant is *Burakumin*. *Id.* When high school administrators complain about these violations of governmental regulations employers retaliate against these schools by not returning in following years for interviews. *Id.*

72. Allen D. Madison, *The Context of Employment Discrimination in Japan*, 74 U. DET. MERCY L. REV. 187, 193 (1997).

73. See UPHAM, *supra* note 51, at 115. Examples of these jobs include labor intensive manufacturing jobs that produce bamboo goods, knitwear, leather shoes, and sandals. Unfortunately, Japan has lost its comparative advantage in these low-tech industries, therefore, employment opportunities for *Burakumin* have gradually eroded. *Id.*

the problem of discrimination. However, because there are no legal rights or duties imposed upon employers, it remains to be seen whether *Burakumin* will ever receive full equality.

### C. *The Ainu*

The *wajin* also discriminate against the indigenous *Ainu* who inhabited Japan before the modern Japanese.<sup>74</sup> The *Ainu* are more physically distinct from *wajin* than Koreans or the *Burakumin* and have their own cultural traditions.<sup>75</sup> Moreover, the *Ainu* have been segregated to a different part of the country on the island of Hokkaido.<sup>76</sup> Because Japanese job applications usually require a photo and address, the *Ainu* are screened out early in the hiring process.<sup>77</sup> Therefore, it is difficult to accumulate direct evidence of intentional discrimination.

### D. *Foreigners*

#### 1. *Profile*

As of 2000, less than 100,000 of the 1.68 million foreigners living in Japan are considered permanent residents, accounting for less than six percent of the total foreign population.<sup>78</sup> The only explicit criteria for permanent residency are the inchoate standards of “good conduct,” possessing “sufficient assets to live independently,” and having interests that coincide with Japan.<sup>79</sup> Japan does not recognize the existence of permanent immigrants.<sup>80</sup> Instead, if foreigners in Japan wish to work in Japan without restrictions, they must classify themselves as “long-term residents.”<sup>81</sup> Immigrants of Japanese decent, spouses and children of Japanese nationals, and foreigners with children born of Japanese nationals all fall under this category.<sup>82</sup> Recently, Japanese expatriates from Brazil have returned with

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74. See Levin, *supra* note 28, at 420.

75. William H. Lash III, *Unwelcome Imports: Racism, Sexism, and Foreign Investment*, 13 MICH. J. INT'L L. 1, 4-9 (1991).

76. *Id.* at 4.

77. *Id.*

78. See Japanese Ministry of Justice, *Alien Registration*, at <http://www.moj.go.jp/ENGLISH/IB/ib-14.html> (last visited Mar. 10, 2003). The Ministry of Justice has identified the country of origin for aliens from Korea, China, Brazil, the Philippines, Peru, the United States, and other countries. *Id.*

79. See PAPADEMETRIOU & HAMILTON, *supra* note 11, at 25.

80. *Id.*

81. *Id.*

82. *Id.*

their families to fill vacancies in Japan's unmanned assembly lines.<sup>83</sup>

If foreigners have no direct familial connections with a Japanese citizen, they may only enter Japan as long-term residents.<sup>84</sup> Other legal immigrants can enter Japan under a temporary status if they are "skilled"<sup>85</sup> or if they enter under the auspices of a program that gives unskilled workers the opportunity to receive job training.<sup>86</sup> For example, in August of 2000, the Ministry of Justice contemplated easing restrictions for two disparate categories of workers.<sup>87</sup> First, to buttress Japan's information technology industry, the Immigration Bureau may ease rules for Chinese and Indian computer programmers.<sup>88</sup> Currently the rules only allow entry for those with a university degree or ten years' relevant experience.<sup>89</sup> The more controversial proposition involved the Ministry's suggestion that Japan should open its shores to low-paid, low-skilled nursing assistants who could help care for the growing elderly population.<sup>90</sup>

83. See James Brooke, *Sons and Daughters of Japan, Back From Brazil*, N.Y. TIMES, Nov. 27, 2001, at A4. Japan's Brazilian population has stabilized at 254,000. *Id.* Because of U.S. Asian exclusion legislation in the 1920s, the influx of Japanese émigrés to Brazil increased. *Id.* Even though reverse migration has occurred due to liberalization of immigration laws, Brazil is still home to 1.3 million people of Japanese ancestry, "the largest such population outside Japan." *Id.* In 1998, immigrants from Brazil constituted fifteen percent of Japan's foreign population. PAPADEMETRIOU & HAMILTON, *supra* note 11, at 28, fig.6. During the 2002 World Cup Football matches held in Japan and Korea, many Brazilian immigrants in Japan attended games and made the visiting team from Brazil feel quite at home. See Howard W. French, *The Talent Of Brazil Eventually Wins Out*, N.Y. TIMES, June 18, 2002, at D3.

84. PAPADEMETRIOU & HAMILTON, *supra* note 11, at 25.

85. *Id.* at 15, 27. See also *The Door Opens a Crack*, *supra* note 22.

86. See Yasushi Iguchi, *Challenges for Foreign Traineeship Programs in Japan*, JAPAN LABOR BULL., Oct. 1, 1998, at <http://www.jil.go.jp/bulletin/year/1998/vol37-10/04.htm>. In 1993, foreign trainees first entered via the Technical Intern Traineeship Program (TITP). *Id.* Japan usually accepts 40,000 foreign trainees per year. *Id.* Of the 40,000, 10,000 are funded by the government (Japan International Cooperation Association, the Association for Overseas Technical Scholarship, the I.L.O. Association, and the Japan Vocational Ability Development Association) and 30,000 are funded by private organizations (Japanese multinationals and small and medium enterprises). *Id.* Similar programs exist in Germany (20,000), England (4,000), and the United States (3,000 granted "industrial trainee" visas), and France (2,000 trainees participate in exchange programs with countries under bilateral agreements). *Id.* After trainees pass the skills test for their respective vocation, they can then be employed "to improve their skills for a total of up to two years (or three years in the case of some occupations)." *Id.* One explicit rationale for establishing these training programs is to "compensate for the lack of basic education and the generally low level of skills among local employees." *Id.* (emphasis added). Foreign trainees are found most commonly in "occupations like dressmaking, form work construction, tailoring, welding, concrete placer operation, machining, plumbing, and metal pressing." *Id.*

87. See *The Door Opens a Crack*, *supra* note 22.

88. *Id.*

89. *Id.*

90. *Id.* In particular, the aging population requires the services of foreign home health-care aides. See generally Carmel A. Morgan, *Demographic Crisis in Japan: Why Japan Might Open Its Doors to Foreign Home Health-Care Aides*, 10 PAC. RIM L. & POL'Y J. 749 (2001).

The last category of workers are illegal, undocumented immigrants who are tolerated because they are prepared to do so-called “3-K” jobs.<sup>91</sup> Most of the immigrants were women who worked in Japan’s entertainment industry, primarily as bar hostesses, prostitutes, or dancers.<sup>92</sup> Needless to say, Japan has hardly welcomed foreigners, instead preferring to keep them at arms length.

## 2. Perceptions

Despite relaxing immigration standards, the Japanese government remains apprehensive about the influx of foreigners.<sup>93</sup> Indeed, public perception of foreigners has progressed beyond apprehension to blatant hostility.<sup>94</sup> The reason behind the antipathy towards foreigners stems from the fact that ninety-five percent of Japanese have little or no contact with foreigners and thus rely upon negative depictions of foreigners in the news.<sup>95</sup> The likely implication from these perceptions is that the Immigration Bureau will feel as though it has the mandate to adopt a hard-line stance toward illegal workers. However, enmity towards foreigners already exists, particularly with regard to public accommodations, housing, and employment.<sup>96</sup> Nonetheless, despite legislative trepidation to codify anti-discrimination statutes, foreigners have begun to look to the judiciary for relief.

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91. See *The Door Opens a Crack*, *supra* note 22; PAPADEMETRIOU & HAMILTON, *supra* note 11, at 11.

92. See PAPADEMETRIOU & HAMILTON, *supra* note 11, at 27.

93. In a recent bulletin issued by the Japan Institute of Labor, the government admitted that it was “dealing cautiously with unskilled workers.” *Record Number of Foreigners Entering Japan Rekindles Debate Within Keidanren*, *supra* note 1. Some concerns related to the “substantial social costs involved in settling foreigners in Japan”, including welfare, medical services and education. *Id.* More disturbingly, the government expressed fear that foreigners would lead to an increase in crime and “thereby imperil law and order”. *Id.* But see generally HERBERT, *supra* note 1.

94. See *Opinion Polls Concerning Foreign Workers in Japan*, *supra* note 1. The high level of concern about law and order is a reflection of the rise in and wide media coverage of crimes committed by foreigners. See HERBERT, *supra* note 1, at 262-302. See also Moshavi, *supra* note 10 (noting “public announcements at sporting events that warn people to watch their belongings because foreigners are in the crowd”).

95. William Hall, *Workers From Abroad*, JAPAN INC., June 2001, at [http://www.japaninc.net/mag/comp/2001/06/jun01\\_reports\\_js.html](http://www.japaninc.net/mag/comp/2001/06/jun01_reports_js.html). Even in Tokyo, an urban center, nearly eighty percent of the Japanese population had almost no contact with foreigners. *Id.*

96. Foreigners also cite inequities in the Japanese disposal of criminal justice. See, e.g., Howard W. French, *Okinawa Justice is Tilted Against Them, Americans Say*, N.Y. TIMES, Oct. 3, 2001, at A3. In July 2001, an American husband of a Japanese restaurant owner in Okinawa, Japan died after a late-night altercation with a young Japanese man. *Id.* The incident received no coverage in the Japanese press and prosecutors quickly dropped the matter. *Id.* In contrast, there has been widespread coverage and criminal prosecution of an American serviceman who is accused of raping a Japanese woman. *Id.* Both incidents occurred within a week of each other. *Id.*

### 3. Other Examples of Discrimination

#### a. Public Accommodations

Certainly, Japan is not alone in confronting problems with racism and bias. However, for a country that prides itself upon harmony, the *wajin* have resurrected barriers against full participation by foreigners in mainstream Japanese society. Even in supposedly cosmopolitan areas such as Tokyo, owners of public accommodations engage in brazen demonstrations of discrimination. It is common for shop owners to post signs forbidding foreigners<sup>97</sup> and for banks to deny bank accounts to foreigners.<sup>98</sup> Again, the government implicitly sanctions these practices by publishing crime prevention brochures that encourage shopkeepers to note foreigners in cars, write down the license plate numbers, and phone the police.<sup>99</sup> Initially,

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97. Near Tokyo's busy Okubo Station, a coffee shop displayed a sticker proclaiming "We cannot accept foreigners." *Awareness of Discrimination Still Low, NGO Head Claims*, DAILY YOMIURI (TOKYO), May 27, 2001, at 3. The shop owner's reason for the sign was due to troubled exchanges with foreign customers who "exchanged thick bundles of banknotes and spoke loudly." *Id.* In a town on Japan's northernmost island, one frequented by Russian sailors, half the stores on the main street do not permit foreigners. Moshavi, *supra* note 10.

98. *See Non-Japanese Call Tokyo Safe, But Cite Discrimination*, DAILY YOMIURI, June 2, 1997. *The Daily Yomiuri* reported the following vignettes regarding foreigners and their experience in Tokyo:

- When attempting to obtain a loan, a Korean woman recounted, "A local financial institution recommended that I open a current account . . . . But when I started the procedures, they told me, 'Foreigners can't open an account.'"
- While walking down the street, a German man overheard, "AIDS is walking," directed to him.

*Id.*

99. Moshavi, *supra* note 10. Consequences of xenophobia extend to harsh criminal prosecution of foreigners. For a comprehensive study of Japan's treatment of foreign workers in the criminal justice system, see generally WOLFGANG HERBERT, FOREIGN WORKERS AND LAW ENFORCEMENT IN JAPAN (1996). Herbert attributes perceived foreigner "criminality" to distortions in media coverage. *Id.* at 300. Even though the Japanese media does not devote much time to stories dealing with criminal matters, various factors contribute to the public perception that foreigners are responsible for the majority of crimes in Japan. *Id.* Herbert notes that the Japanese media perpetuates the stereotype that foreigners have criminal inclinations by "concentrat[ing] on crimes of violence by foreigners . . . accentuat[ing] . . . their 'illegal' status, and the repeated 'warning' . . . of a link between immigration and crime . . . ." *Id.* Along with the "inclination among Japanese to inform the police about activities of foreigners," negative stereotypes of foreigners in the media generate a perfect storm of factors that heighten public scrutiny of foreigners. *Id.* Critics of an "open door" immigration policy, such as Nishio Kanji, have used these biased perceptions to rouse xenophobia and "induce a 'sense of crisis.'" *Id.* at 214-16. *See also* Richard H. Friman, *Informal Economies, Immigration Entrepreneurship and Drug Crime in Japan*, 27 J. ETHNIC & MIGRATION STUD. 313 (2001) (arguing that "despite increases in immigrant participation in illicit drug markets during the 1990s, the increase does not rise to the extent claimed in the public debate over immigrant criminality"). In 2000, the Japanese Cabinet Office published results of a survey entitled *Opinion Polls Concerning Foreign Workers in Japan*, JAPAN LABOR BULL., May 1, 2001, at <http://www.jil.go.jp/bulletin/year/2001/vol40-05/03.htm>. After

foreigners' rights activists tried to reason with the shop owners or influence Japanese lawmakers, but these tactics have proven to be futile.<sup>100</sup>

Activists now see another potential vehicle: lawsuits. In 1999, Brazilian journalist Ana Bortz prevailed in an action against a jewelry store that refused her service.<sup>101</sup> Although there are no laws that explicitly ban discrimination, Ms. Bortz took her case to court,<sup>102</sup> citing Japan's obligation to comply with the 1965 International Convention on the Elimination of All Forms of Racial Discrimination,<sup>103</sup> ratified by Japan in 1995. To the surprise of nearly everyone, including Ms. Bortz, a judge awarded her the full amount of damages sought, \$14,000.<sup>104</sup>

In reaction to Ms. Bortz success, Debito Arudo (David Aldwinckle), a naturalized Japanese citizen, filed a suit this year to combat the widespread practice of excluding "foreign looking" people from Japan's public bathhouses.<sup>105</sup> In addition to citing the 1965 treaty, Mr. Arudo's case also

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interviews with 2,070 individuals, 62.9% did not want unskilled workers in Japan due to security concerns; 59% feared that unskilled foreign workers might cause increased unemployment among Japanese citizens. *Id.* Fortunately, the Japanese government, in a report issued by the Institute of Labor acknowledged:

[T]here is . . . the opinion that while the number of [foreigner] arrests has substantially increased, the number of arrested people has not. This suggests that the increase in crime committed by foreigners is not due to the increase in ordinary immigration but to organized underground crime which has become more conspicuous.

*Record Number of Foreigners Entering Japan Rekindles Debate within Keidanren*, JAPAN LABOR BULL., Aug. 1, 2000, at <http://www.jil.go.jp/bulletin/year/2000/vol39-08/03.htm>.

100. Tony Laszlo, the head of a non-governmental organization advocating for/addressing foreigners' rights offered a bill to the Japanese Diet, urging them to make discrimination illegal. *Id.* The Diet evinced a less than enthusiastic response when only three members appeared to hear Mr. Laszlo's presentation. *Id.*

101. *Id.* The jewelry store owner said "he banned all foreigners because he was worried about Chinese thieves." *Id.* When reporting on the Bortz case, *National Public Radio* interviewed Ikira Iunada, a Japanese Foreign Ministry official, for his opinion on the plight of foreigners in Japan. Eric Weiner, *Morning Edition: Racism in Japan* (NPR radio broadcast, Sep. 4, 2001), at <http://discover.npr.org/features/feature.jhtml?wflD=1128433>, available at LEXIS, News & Business Library, Transcripts File. Oblivious to the extent of the problem, Iunada declared, "I have heard of some cases of discrimination against foreigners, but these are matters between private citizens. In these situations, we'd rather give people advice than charge them with a criminal offense." *Id.*

102. *Bortz v. Suzuki*, No. 332 Civ. (Shizuoka Dist. Ct., Oct. 12, 1999) (holding that private discrimination against a Brazilian resident in Japan was a cause of action for damages under Civil Code owing to Japan's obligations under the International Convention for the Elimination of All Forms of Racial Discrimination).

103. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 14, 1996). See also *Osaka Scraps Booklet Project on Rights Koreans Say is Biased*, *supra* note 38.

104. See Moshavi, *supra* note 10.

105. See Keiko Watanabe, *Otaru Still in Hot Water Over Discrimination*, DAILY YOMIURI (TOKYO), May 5, 2001, at 7. Non-Japanese have been barred from public swimming facilities after local families complained that their children had been "touched" by a foreigner at the pool. *Gumma Swimming Pool Bans Foreigners*, MAINICHI DAILY NEWS, Aug. 15, 1998, at 14. In the Gumma pool

claims that the bathhouse violated Article Fourteen of the Japanese Constitution, which guarantees equal rights to “all of the people.”<sup>106</sup> Thus, as foreigners begin to assert their legal rights in the area of public accommodations, foreign workers who experience employment discrimination may look to the strategy of Ms. Bortz and Mr. Arudo for guidance.

*b. Housing*

As an extension of discrimination in public accommodations, it is not surprising that foreigners experience discrimination in the real estate market. Foreigners fluent in Japanese, who are able to make successful preliminary inquiries by phone regularly complain that when they arrive at the rental office the apartment is suddenly no longer available.<sup>107</sup>

In the area of equal housing, there have been lawsuits filed by foreigners against those who engage in discriminatory rental practices.<sup>108</sup> Like Mr. Arudo’s case against the Otaru bathhouse, a Korean man filed a suit in the Osaka District Court in 1989, alleging discrimination in violation of the Japanese Constitution.<sup>109</sup> In June 1993, the court awarded Pe Cong II compensatory damages, but declined to rule on whether the discrimination violated the Constitution because the landlord’s motives were not clearly ascertainable.<sup>110</sup>

### III. EMPLOYMENT DISCRIMINATION

Although the Japanese have recognized the need to import more workers, the government has neglected to take prophylactic measures that ensure legal protection against discrimination. The Japanese government began the experiment by relaxing standards for hiring in the public sector.<sup>111</sup> The 1996

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case, village officials put up a sign in English and Japanese which read: “The pool will be closed to foreigners . . . Some children have been receiving rough behavior from foreigners in the pool lately.” *Id.* Local legal authorities then began to investigate the case as a possible infringement of human rights. *Id.*

106. See Watanabe, *supra* note 105; see also JAPAN CONST. art. 14, para. 1. (1947) (declaring that “[a]ll of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin”).

107. Jean Pearce, *Getting Things Done*, JAPAN TIMES, Feb. 28, 1999, LEXIS, News & Business Library, The Japan Times File.

108. See Kayo Sakaguchi, *House Hunting for Foreigners: Trying to Find the Trees in the Forest*, MAINICHI DAILY NEWS, June 10, 1998, at 11.

109. *Id.*

110. *Id.*

111. See *Minister Hints at Foreign Nationals in Public Service*, JAPAN ECON. NEWSWIRE, Nov. 8,

statement by Japan's Minister of Home Affairs easing hiring restrictions was derived from building pressures by local authorities.<sup>112</sup> However, few of the positions included provide any semblance of upward mobility.<sup>113</sup> Still, the struggle of Korean residents in Japan provides a guide to various legal theories that have been successful in establishing equal employment opportunities.<sup>114</sup>

#### A. Statutory Protections

All employees should be protected from discrimination through Article Three of the Labor Standards Law<sup>115</sup> and Article Three of the Employment Security Law.<sup>116</sup> As mentioned before in *Park v. Hitachi, Ltd.*,<sup>117</sup> the court based its holding on findings that the employer had breached the employment contract.<sup>118</sup> Although the court cited the Labor Standards Law,

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1996, LEXIS, News & Business Library, Japan Economic Newswire File. In 1996, Japan's Minister of Home Affairs, Katsuhiko Shirakawa announced that his agency would review longstanding restrictions on the ability of non-citizens in Japan to compete for jobs in Japan's public sector. *Id.* Previously, the government had declared that "public servants involved in wielding administrative authority or creating the will of the general public must be Japanese nationals." *Id.*

112. The city of Kawasaki eliminated the nationality requirement for all positions except for firefighters. *Id.* The Kochi prefectural government and the Osaka municipal government had also moved toward admitting foreigners as public servants, but their plans were put on hold in April 1996 due to opposition from the Ministry of Home Affairs. *Id.* Since the Minister of Home Affairs made his remarks, Yokohama's municipal government planned to abolish the nationality clause's application for up to seventy percent of municipal jobs. *Yokohama May Open Up Municipal Jobs to Foreigners*, JAPAN WKLY. MONITOR, Jan. 13, 1997, available at 1997 WL 8244516. Kanagawa and Kochi prefectures and the City of Kobe plan to accept foreigners for public clerical jobs. However, these employees are not eligible for promotions to positions that exercise administrative power or where decisions can affect public opinion. *Kanagawa, Kochi, Kobe to Hire Foreigners*, JIJI PRESS TICKER SERV., Jan. 6, 1997, LEXIS, News & Business Library, Jiji Press Ticker Service File. Finally, in 1999, Koreans in Tokyo called on Governor Shintaro Ishihara (the man responsible for racist statements concerning foreigners and rioting) to end the metropolitan government's practice of hiring only Japanese nationals as clerical employees. *Koreans in Japan Seek End of Tokyo Job Discrimination*, JAPAN ECON. NEWS SERV., June 8, 1999, LEXIS, News & Business Library, Japan Economic News Service File.

113. See *Koreans in Japan Seek End of Tokyo Job Discrimination*, *supra* note 112.

114. See generally Kearney, *supra* note 48. See also *Koreans in Japan Seek End of Tokyo Job Discrimination*, *supra* note 49.

115. Labor Standards Law, Law No. 49 of 1947, art. 3, translated in MINISTRY OF LABOR, 1 JAPAN LABOR CODE 128 (1953).

116. Employment Security Law, Law No. 141 of 1947, art. 3, MINISTRY OF LABOR, 2 JAPAN LABOR CODE 346 (1953).

117. KODANSHA ENCYCLOPEDIA OF JAPAN, *supra* note 45.

118. *Id.* at 291 (holding that "the issuance of the hiring notice specifying the amount of salary and the date to report for work constituted a consummation of a labor contract between the two parties . . . [the cancellation of which] . . . should be construed as an arbitrary breach of the labor contract, which was a violation of Article Three of the Labor Standards Law and Article Ninety of the Civil Code of Japan.").

employers appear to be free to discriminate against employees so long as they do so before signing a contract. Because employers often screen out employees prior to signing a contract,<sup>119</sup> employers obviously will confirm applicants' nationalities before making any offers, and thus may avoid liability for discriminatory hiring practices.

### *B. International Law*

The Constitution of Japan states that "treaties concluded by Japan and established laws of nations shall be faithfully observed."<sup>120</sup> The majority interpretation of this provision is that treaties are given the force of law in Japan.<sup>121</sup> Moreover, treaties are considered to be superior to all Japanese Law, except for the Constitution.<sup>122</sup>

Historically, Japan has been delinquent in ratifying international treaties and will do so only under intense social and international pressure.<sup>123</sup> In the employment context, the applicable treaty would be the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention), signed thirty years after adoption by the U.N. General Assembly.<sup>124</sup> Under the Race Convention, Japan is obligated to "pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all forms, and promoting understanding among all races" in both the public and private sectors.<sup>125</sup> Unfortunately, the Race Convention does not mention distinctions between residents and citizens.<sup>126</sup> Due to Japan's tight regulation of its amorphous citizenship requirements, nearly all foreign workers will not qualify for protection.

119. See Smillie, *supra* note 40.

120. JAPAN CONST. art. 98, para. 2.

121. Yuji Iwasawa, *Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law*, 8 HUM. RTS. Q. 131, 135 (1986).

122. Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127, 154 (1994).

123. For example, the United Nations declared that the "Decade for Women" would begin in 1976 with the U.N. Convention Concerning the Elimination of All Forms of Discrimination Against Women. M. Diana Helweg, Note, *Japan's Equal Employment Opportunity Act: A Five-Year Look at Its Effectiveness*, 9 B.U. INT'L L.J. 293, 299 (1991). Japan finally ratified the treaty in 1985. *Id.* at 300.

124. *Japan Notifies U.N. of Ratifying Anti-Discrimination Pact*, JIJI PRESS TICKER, Dec. 21, 1995, LEXIS, News & Business Library, Jiji Press Ticker File.

125. International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1).

126. *Id.* art. 2(1).

### C. Constitutional Protection

Due to the uncertain authority and questionable applicability of international human rights law, and the impotence of Japan labor statutes, the Japanese Constitution remains the most powerful tool for allaying employment discrimination. Though there has been some debate,<sup>127</sup> scholars and courts accept the proposition that foreigners are afforded equal protection under the Japanese Constitution.<sup>128</sup> Article Fourteen of the Japanese Constitution grants the broadest guarantee of equal rights.<sup>129</sup> In addition, Article Twenty-seven states that: “All people shall have the right and obligation to work . . . Standards for wages, hours, rest, and other working conditions shall be fixed by law . . .”<sup>130</sup> Although Article Twenty-seven does not have direct legal effect without statutory or administrative implementation,<sup>131</sup> Japanese courts have found social rights litigable and have extended social guarantees to alien residents.

### D. Judicial Treatment

Japanese courts have addressed occupational restrictions on permanent resident Koreans in only two cases. In the first case Kim Kyong-duk, an ethnic Korean applied for admittance into the Legal Research and Training Institute (LRTI).<sup>132</sup> The Institute would admit aliens only if they declared an intent to become Japanese citizens.<sup>133</sup> However, because Kim wished to use his legal skills to help advance the rights of Koreans in Japan, he could never gain his clients trust if he renounced his Korean identity.<sup>134</sup> On November 20, 1976 Kim petitioned the Supreme Court for admittance to the LRTI without forcing him to renounce his Korean heritage.<sup>135</sup> The Supreme Court returned a positive ruling for Mr. Kim, stating, “In the case of Mr. Kim, nationality would not be a factor to deny admission to the Judicial Research and Training Institute.”<sup>136</sup> This one-sentence response did not establish a precedent. Nevertheless, the statement indicated a willingness by the Court to

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127. Koseki Shoichi, *Japanizing the Constitution*, 35 JAPAN Q. 234, 236 (1988).

128. THE JAPANESE LEGAL SYSTEM, 721 (Hideo Tanaka ed., 1976).

129. JAPAN CONST. art. 14, para. 1.

130. *Id.* art. 27, para. 1.

131. *Supra* note 100, at 793.

132. CHANGSOO LEE & GEORGE DE VOS, KOREANS IN JAPAN: ETHNIC CONFLICT AND ACCOMMODATION 278.

133. Kearney, *supra* note 48, at 216.

134. *Id.*

135. *Id.*

136. *Id.* at 217.

limit its opinion strictly to the facts before it.<sup>137</sup>

The second case, *Chong Hyan Gyun v. Tokyo Municipal Government*,<sup>138</sup> also addressed the issue of foreign worker employment discrimination in the public sector.<sup>139</sup> Chong, a second-generation permanent Korean resident, was the first foreign public health nurse in Tokyo.<sup>140</sup> However, when she applied for a managerial position, the government denied Chong permission to sit for the exam because she was not a Japanese national.<sup>141</sup> She sued, alleging violations of Article twenty-two<sup>142</sup> and Article fourteen<sup>143</sup> of the Japanese Constitution, but lost.<sup>144</sup> The Tokyo District Court decided that government operations should only be carried out by citizens.<sup>145</sup> The Court declared that aliens are in principle unfit for any civil service position.

The *Chong* case appeared to be the perfect forum to resolve the controversy of whether the State's discriminatory preference to staff a particular position with a citizen overrides a foreign worker's constitutional rights under Article Twenty-two of the Japanese Constitution. However, the judiciary neglected to establish cogent guidelines and fill the void left by the executive and legislative branches. Out of spite, instead of allowing nurse Chong to contribute her medical expertise, the Japanese people decided to discriminate against her, thus depriving themselves of a much needed addition to the nursing field.

#### IV. PROPOSAL

One must always take into account Japan's gradualist notion of extending social, political, and legal rights. Despite the pervasive gradualist mindset, progressive ideas may flourish once the Japanese government resolves to end employment discrimination. First, the Japanese government must identify industries that require more workers. Presumably, these would be positions in the technology and nursing industries. The Japanese already recognize the

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137. In *In re Griffiths*, the United States Supreme Court held unconstitutional the denial of the right to practice law to resident aliens. 413 U.S. 717, 729 (1973). According to the Court, a lawyer was not "so close to the core of the political process as to make him a formulator of government policy." *Id.*

138. 1566 HANREI JIHŌ 23 (Tokyo Dist. Ct., May 16, 1996).

139. See Kearney, *supra* note 48, at 217-18.

140. *Id.* at 218.

141. *Id.*

142. JAPAN CONST., art. 22, para. 1.

143. JAPAN CONST., art. 14, para. 1.

144. See Kearney, *supra* note 48, at 218.

145. James M. Kearney has analyzed the Tokyo District Court opinion based on the "traditional theory" of national sovereignty. See Kearney, *supra* note 48.

deficiencies in these fields and would welcome some help.<sup>146</sup> Introducing positions in information technology would bring in skilled and educated workers who may more comfortably assimilate into Japan's formalistic society. Increasing foreign representation in the nursing industry would ameliorate the problem of elder care in Japan.<sup>147</sup> Japanese families generally do not have the means to care for the exploding population of the aged. Thus, foreign nurses would fill in those ranks and help take care of the aging boom.

Moreover, allowing existing foreign residents access to jobs in the public sector would gradually show Japanese policymakers that there are no inherent differences between people of disparate geographic origins. Because civil service employment restriction is a highly visible form of discrimination, opening up civil service jobs to foreign residents is an important symbol of increasing legal protection. The majority of foreign residents are sufficiently acquainted with Japanese culture and society to serve as public officials in most positions. The rationales for exclusion from public posts do not apply and will become legally untenable.

Once more immigrants arrive, the Japanese government must structure a legal system that will address potential incidences of discrimination. Since the Japanese seem more open to mediation than litigation, expanding the mediation branch of Japan's Institute of Labor appears to be a viable alternative.<sup>148</sup> However, outlets for litigation should remain open.

As mentioned, existing legal theories appear to be ineffective in combating employment discrimination. Extending greater citizenship rights, which ultimately translate into legal rights, could easily be attained by making the citizenship procedure more concrete. Even if the standards remain high, at least residents could structure their lives in order to satisfy requirements. Once foreigners are citizens, then the Constitution and international treaties will offer effective shields against employment discrimination. Fortunately, public interest organizations exist to help

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146. See Hall, *supra* note 95, tbl. 4. In the February 2001 Cabinet Office report full/equal even acceptance of foreigners in this critically understaffed industry remains somewhat tepid.

- Continue current no-entry policy: 21%
- Conditional/limited entry for unskilled labor: 51%
- Entry with no special conditions: 16%
- Don't know/other: 11%

*Id.*

147. Carmel A. Morgan predicts that because of the shortage of elder care facilities, Japan is likely to admit unskilled immigrants in order to fill labor shortages related to home health care. *Demographic Crisis in Japan: Why Japan Might Open Its Doors to Foreign Home Health-Care Aides*, 10 PAC. RIM L. & POL'Y J. 749 (2001).

148. See Hiroya Nakakubo, *Procedures for Resolving Individual Employment Disputes*, JAPAN LABOR BULL., June 1, 1996, at <http://www.jil.go.jp/bulletin/year/1996/vol35-06/05.htm>.

foreigners assimilate to Japanese life and become advocates for victims of discrimination.<sup>149</sup>

On March 24, 2000, the Ministry of Justice published the Second Basic Plan for Immigration Control.<sup>150</sup> The plan includes recommendations to expand categorization of jobs designated as eligible as part of the Technical Internship Program.<sup>151</sup> These changes reflect the increased demand for employees in industries previously ignored by the government.<sup>152</sup>

The Japanese legislature should also codify a disparate impact theory to more easily remedy less obvious modes of discrimination. With this in place, applicants would be able to challenge exclusionary hiring by firms that still utilize illegal screening procedures.

## V. CONCLUSION

The Japanese, like most societies, prefer gradualist ideals, especially when dealing with social change. One need only look to the United States to see that it is still struggling with its own issues concerning civil rights. However, Japanese history is replete with examples adapting and thriving after revolutionary changes in culture. Two examples of this are the western principles promoted during the Meiji Era and the ratification of the 1947 Constitution drafted during the Allied Occupation.

Two recent events involving the Japanese royal family may alter Japan's long held conceptions concerning tradition and heritage. First, on December 1, 2001, Crown Princess Masako gave birth to a baby girl, ending the long

149. Michael Busch, *JAPL Tries to Deal With Discriminatory Job Ads*, DAILY YOMIURI, Sept. 15, 1997. The Japan Association of Language Teaching is a 4,000 member organization that has been fighting to exclude ads that exclude applicants on the basis of gender, age, race, religion, or national origin. *Id.* The Kawasaki City Representative Assembly for Foreign Residents (KCRAFR) has also presented proposals to combat discrimination against foreigners. *Foreign Citizens Group Gets Results*, DAILY YOMIURI, Apr. 1, 1998, at 3. Some of the proposals include:

- Establishing a city ordinance that would ban discrimination against foreigners who need housing.
- Setting up offices that would allow foreigners to ask about adjusting to life in Japan.
- Promoting mutual understanding between children of foreign nationalities and Japanese youngsters.

*Id.* The efficacy of grass roots pressure on municipal governments is palpable. Four years after the the KCRAFR proposals, the "Kawasaki government has implemented a number of proposals made by the foreign residents assembly." Kakuya Ishida, *Giving Foreign Residents a Voice*, DAILY YOMIURI (TOKYO), Jan. 6, 2001, at 7.

150. *Entry for Foreigners Smoothed in Response to Globalization and Social Needs*, JAPAN LABOR BULL., May 5, 2000, at <http://www.jil.go.jp/bulletin/year/2000/vol139-05/04.htm>.

151. *Id.*

152. *Id.*

drought of births in the Japanese royal family.<sup>153</sup> However, since only males are allowed to ascend to the world's oldest imperial line, the Japanese are already contemplating a change in this most sacred of imperial laws.<sup>154</sup> Traditionalists are hostile to such an alteration of the succession laws. But, a homemaker in Tokyo offered another view by declaring, "It would be good to have a woman as the symbol of our state . . . [i]f we have a female symbol of state, the Japanese people's notions would change."<sup>155</sup> Second, and also in December, Emperor Akihito acknowledged that his family descended from the Korean Paekche Kingdom.<sup>156</sup> If sacrosanct ascension laws and imperial pedigree are mutable, certainly the Japanese can accommodate foreign workers equally to resolve their demographic and economic crises.

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153. Howard W. French, *Japan Royal Birth Stirs Talk of Return to Empress*, N.Y. TIMES, Dec. 2, 2001, at A3.

154. *Id.*

155. *Id.*

156. See Howard W. French, *Japan Rediscovered Its Korean Past*, N.Y. TIMES, Mar. 11, 2002, at A3. Emperor Akihito announced that the grandmother of his eight-century imperial ancestor, Kammu, was from a Korean kingdom. *Id.* In commenting on his Korean ancestry, Akihito declared, "I, on my part, feel a certain kinship with Korea." *Id.*

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