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**JAPANESE ONLY: XENOPHOBIC EXCLUSION IN JAPAN'S PRIVATE
SPHERE**

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Introduction

On Sunday, September 19, 1999, a diverse group of families entered the popular giant onsen (privately run communal bathhouse resort) Yunohana in Hokkaido, the cold northernmost island of Japan.¹ A sign at the front door clearly read "Japanese Only" in English, Japanese, and Cyrillic.² Inside, the ticketing attendant immediately refused entry to the adults with Western features.³ A Chinese woman in the group, previously admitted due to her Asian features, was subsequently asked to leave when her nation of origin was discovered.⁴ Furthermore, upon questioning, Yunohana's manager indicated that while the child of a Japanese and an American with Asian features could enter, their other child with Western features could not.⁵

The fact that this blatant racial discrimination happened in a nation as modern as Japan may surprise many, but what is truly surprising is that such discrimination was not per se illegal. In fact, "there is at present no provision in national [Japanese] legislation that outlaws racial discrimination" in the private sphere.⁶ Although the Constitution of Japan does prohibit discrimination,⁷ it does so only with regards to state action;⁸ "the Supreme Court and the executive remain fiercely opposed to recognition of legal rights other than those provided under the Constitution as it has been narrowly construed by Japanese courts."⁹ As a result, when the above-mentioned exclusionary incident led to a well-publicized lawsuit, known as the Otaru Onsen case,¹⁰ the plaintiffs were forced to sue under domestic tort and international anti-discrimination laws. The resultant outcome from this and similar cases presents a troublesome judicial standard that outlaws unreasonable discrimination only among private parties, requiring judicial analysis of social customs and factual circumstances even when the facts of a case reveal racial discrimination on its face.

Despite Japan's public message of internationalization, lingering perceptions of Japan as a monoethnic nation serve to fortify barriers between native Japanese and outsiders. Incompatibly, however, Japan's decreasing population has required a recent and continuing surge in foreign migration, if only to maintain an adequate working population. This demographic shift has necessarily increased friction with Japanese culture and has led a number of private businesses to exclude foreigners in an attempt to maintain a traditional sense of Japanese self-identity.¹¹ With population statistics predicting an ever-increasing amount of foreign migration¹² and mounting pressure from internal¹³ and external human rights organizations,¹⁴ it is likely that the Japanese government will ultimately have to re-examine its policy of providing a discrimination control mechanism exclusively through current judicial channels.

Part I of this article will address the traditional image of a homogenous Japan, examine the statistics behind Japan's changing population demographics, and investigate historical groups of outsiders within Japan. Part II will view the Japanese government approach to increasing foreigner populations and how this has affected the exclusionary tactics of some private businesses. Part III will address three legal cases brought by victims of exclusionary practices and the interplay between factual circumstances and various avenues for legal remedy. Finally, Part IV will examine Japan's obligations under international human rights treaties and the viability of anti-discrimination legislation in a nation that prefers to resolve interpersonal disputes exclusively privately through traditional self-regulation.

Part I—Challenging Japan's Image of Homogeneity

Japan has many reasons to be proud. "[A] strong work ethic, mastery of high technology, and a comparatively small defense allocation (1% of GDP) [has] helped Japan advance with extraordinary rapidity to the rank of second most technologically powerful economy in the world after the [United States] and the third-largest economy in the world after the [United States] and China, measured on a purchasing power parity (PPP) basis."¹⁵ "Among all industrialized democracies, [Japan has] the narrowest gap between the richest [ten] percent and the poorest [ten] percent of citizens[.]"¹⁶ Perhaps most impressively, "[i]n the course of half a century, Japan has moved from recipient of World Bank funds to second largest shareholder."¹⁷

The Japanese and even outsiders often attribute Japan's remarkable post-war success, at least in part, to unique attributes of Japan's incredibly homogenous population.¹⁸ After all, out of a population of approximately 127.5 million,¹⁹ there are only "1.97 million legal foreign residents."²⁰ In fact, the Japanese government does not

even deem it necessary to track ethnicities in official population surveys.²¹ Notably, the "[f]amous remarks by Prime Ministers Miki in November 1975 and Nakasone in September 1986 echoed official statements by the Japanese government to international bodies denying the existence of ethnic minorities in Japan."²²

The notion of Japan as a nation peopled entirely with the homogenous Wajin²³ ethnicity chiefly arose out of Japan's self-imposed isolation of nearly four hundred years,²⁴ which only ended in 1853 when Commodore Perry of the United States Navy appeared in the Tokyo harbor to open Japan to the outside world.²⁵ Often believing that this nearly vacuum-like isolation has created a unique people, "group distinction on a national level comes quite naturally to most Japanese when dealing with non-Japanese people, and indeed one commentator has called the Japanese a 'single great tribe,' noting that their society is essentially exclusionary in nature."²⁶ However, "[d]espite master narratives of racial and cultural homogeneity, which precludes the existence of minorities, Japan is [nevertheless] home to diverse populations."²⁷

a. Historical Outsiders

Behind Japan's rice-paper facade of monoethnicity, groups of outsiders have always existed within Japanese society. While the populations of these traditional outsiders may seem small, or even insignificant, in order to contextualize the "defensive ethnic separatism" of some Japanese regarding outsiders, it is important to understand the ways in which outsiders from within "have suffered legal and social discrimination" historically.²⁸

i. Ainu

"The Ainu people have inhabited the northern areas of Japan from before recorded time."²⁹ While there are many theories about the origins of the Ainu, their ancestral source is ultimately unknown.³⁰ Some commentators have referred to the Ainu as "aboriginal[.]"³¹ while the UN has referred to them as an "indigenous population."³² The Japanese government, on the other hand, is unwilling to recognize the Ainu as indigenous.³³ Rather, the government has "recognized the Ainu as an ethnic minority" without the determination that they "deserve[] special rights as a distinct ethnic group[.]"³⁴

Throughout recorded Japanese history, accounts refer to a back-and-forth between peaceful trading and warring relationships amongst the Ainu and Wajin peoples.³⁵ Despite the fact that relations may have at times been relatively positive, the

fact remains that the Wajin did not generally hold the Ainu in high esteem.³⁶ An early written account "describe[d] an incestuous people, living in holes and nests, who 'drink blood,' have supernatural animal-like physical powers, and rob agricultural harvests [.]"³⁷ By the sixteenth century, during the period of international isolation, the Wajin had established a permanent foothold in the Ainu home territory of Hokkaido.³⁸

The period in the mid-nineteenth century after Japan was re-opened to the world is known as the Meiji Restoration, during which time forces supporting the Japanese emperor wrested power from the Tokogawa shogunate warlord and saw Japan presenting itself on the world stage, rapidly becoming a modern regional power.³⁹ One of the many national reforms included expansion of national borders; Hokkaido was relatively easy to colonize.⁴⁰ During this period, the policy of the Japanese government toward the Ainu was one of forced assimilation.⁴¹ "The policy was designed to eradicate the Ainu's cultural identity, practices, and traditions."⁴² On a day-to-day level, this policy took the form of bans on "traditional earrings and tattoos and abrogation of Ainu tribal dispute resolution processes in favor of Japanese national and Hokkaido colonial judicial authority."⁴³ Furthermore, an 1899 law refused Ainu "the right to own land unless the government specifically granted permission."⁴⁴

While a 1997 "law for the promotion of the Ainu culture was enacted,"⁴⁵ which finally voided the old discriminatory laws, today the Ainu still control only "approximately 0.15 percent of their original land holdings [.]"⁴⁶ Prior to the 1997 law, there were many instances in which the government of Japan referred to the Ainu as a "dying race."⁴⁷ Even recently there are many reports of social discrimination against the Ainu.⁴⁸ As a result, many Ainu choose to conceal their ethnic identity and represent themselves as Wajin Japanese.⁴⁹ While the government puts the population of Ainu at close to 24,000,⁵⁰ there is speculation that this number is under-representative due to extensive concealment of identity.⁵¹

While the Ainu have arguably not received the full recognition that they would prefer from the Japanese government, the Ainu have made some recent strides in the judicial arena. During the 1970s, plans were drawn up for a dam to be built in the Nibutani river valley, which happened to be one of the few remaining ancestral Ainu cultural centers.⁵² In fact, Nibutani was "known as 'the birthplace of Ainu scholarship,'" and even featured an Ainu cultural museum.⁵³ After plans for the museum became known, the owner of the Ainu museum made many appeals to the Minister of Construction, although all were ultimately rejected.⁵⁴ Eventually a suit was brought, and the decision came down in the Sapporo District Court in 1997 in a case known as the Nibutani Dam Decision.⁵⁵

Although the decision was ultimately a victory for the plaintiffs, it in fact "failed to provide ... a remedy."⁵⁶ Nevertheless, the decision is valuable for the language used in the court's rationale. To begin with, the court recognized the Ainu as a minority group protected under the International Covenant on Civil and Political Rights (ICCPR) Article 27,⁵⁷ which states that "such minorities shall not be denied the right ... to enjoy their own culture[.]"⁵⁸ Furthermore, "the court found itself to be bound by duties arising under Article 13 of the Constitution of Japan[.]"⁵⁹ which declares that "[a]ll of the people shall be respected as individuals."⁶⁰ Particularly upon analysis of Article 13, the court found that in order for the government to respect the Ainu as individuals, it must respect the "distinct ethnic culture of the Ainu people" which is an "essential commodity" of their individual identity.⁶¹ With this in mind, following a lengthy discussion of the history of "social and economic devastation the Wajin majority has inflicted on the Ainu," the court found that the government had "failed to satisfy its burden ... to show that [it] had adequately considered the Nibutani Dam's impact on Ainu culture during the project's authorization process."⁶² Nevertheless, the court ultimately treated the issue as moot considering that the damage in question had already been done by the dam's construction.⁶³

ii. Ryukyans

Although the people of Okinawa are not recognized specifically as an indigenous people or even an official minority group by either the Japanese government or the United Nations, it has been suggested nevertheless that they meet the characteristics for such recognition under ICCPR.⁶⁴ "The 'Ryukyu Kingdom,' maintained by the Okinawa people from the fourteenth century, was conquered by the Government of Japan and annexed in 1879."⁶⁵ After that point, Japan instituted assimilation policies against the Ryukyans similar to those applied to the Ainu, such as the prohibition of "Ryukyu dialects, traditional customs, religious faith[,] and lifestyle."⁶⁶ Since that time, Okinawa's distance from Japan, both physically and culturally, has led to a "quasi-foreign" distinction and subsequent "exploit[ation]."⁶⁷ The main complaint of discrimination from Ryukyans comes from the perceived "inequality of treatment under the law represented by the presence of [75] percent ... of [United States] military bases in Japan on Okinawa's 0.6 percent of Japan's land area[.]"⁶⁸

iii. Burakumin

During Japan's feudal period prior to the Meiji Restoration, a caste-like social hierarchy was formed.⁶⁹ At the bottom of this hierarchy, although ethnically identical to

all other Wajin, were senmin (the humble people), who were butchers and leatherworkers, and, even lower, "eta (extreme filth) and hinin (non-humans)."⁷⁰ During this time, "[o]utcasts were forbidden from marrying commoners, living outside their proscribed ghettos, or even serving as commoners' servants."⁷¹ Furthermore, "[t]hey could not eat, sit, or smoke in the company of commoners, dress their hair in the conventional manner, wear geta (wooden sandals), or cross a commoner's threshold."⁷² Although the social hierarchy system was technically abolished during the Meiji Restoration by way of the Emancipation Edict of 1871, afterward the newly named Burakumin⁷³ were forced to register their previous social status in the national family register known as koseki.⁷⁴ It was this register that would carry over the brand of "untouchable []" beyond the so-called Burakumin emancipation.⁷⁵

Today, social discrimination against Burakumin is pervasive even if diminished by time.⁷⁶ This discrimination can take the form of merciless teasing of Burakumin schoolchildren⁷⁷ or harassment by neighbors.⁷⁸ Burakumin are also discriminated against by way of public access to the national koseki, which can disrupt employment and marriages.⁷⁹ Since registrants are required to list a homesite, or honseki, listing a known buraku/hamlet for one's honseki can serve as a red flag for discriminators.⁸⁰ Although modifications to koseki procedure now allow new family registrants (after marriage) to record a new honseki, "a completely new honseki or subsequent change of honseki ... suggest[s] an attempt to hide one or both of the spouses' honseki."⁸¹ "While some [B]urakumin have attempted to change their honseki several times in order to remove themselves from a particular, damning geographic location, the fact of a change, which is itself recorded, is usually sufficiently suspicious to defeat the purpose of the change."⁸²

In addition to problems with the koseki, Burakumin have also had to deal with discrimination stemming from privately created directories of buraku honseki known as Chimei Soka.⁸³ These lists were first revealed in 1975 when private investigators were caught selling Chimei Soka to prominent companies and prospective marriage partners.⁸⁴ Even after publication was halted, new Chimei Soka were discovered up until 1979.⁸⁵ Purchasers of the lists included such international corporations as Toyota and Nissan.⁸⁶

In response to discrimination against Burakumin, the Japanese government instituted the Special Measures law in 1969.⁸⁷ This law was "aimed at improving the living environment of [buraku] districts[] and improving access to employment and education."⁸⁸ The Special Measures law was terminated, however, in 2002, "when the [g]overnment considered that the situation of [Burakumin] had improved and that the question could now be dealt with by common law."⁸⁹ Currently, the Japanese

government seems quite hesitant to admit that any serious ongoing problem of Burakumin discrimination exists.⁹⁰ Nevertheless, since discrimination "against [Burakumin] persists,"⁹¹ it is likely that population counts, currently somewhere between 1.5⁹² and 3 million,⁹³ are not accurate due to concealed identities.⁹⁴

Burakumin have been able to independently develop a moderately effective means of fighting discrimination through private enforcement, which can even involve "the actual or threatened use of limited physical force by large groups of Burakumin."⁹⁵ This strategy is referred to as *kyudan* (denunciation).⁹⁶ Essentially, *kyudan* involves mass "solicit[ation] from the discriminator (or alleged offender) apologies, self-criticism, [and] promises to participate in enlightenment education[.]"⁹⁷ *Kyudan* has even received implicit acceptance from the Japanese judiciary, so long as the measures applied do not "exceed 'the socially reasonable bounds as set by the legal order' [although] 'a certain level of severity is to be approved.'"⁹⁸ One of the reasons for this surprising step was the judiciary's acknowledgment that "legal redress for discrimination is [otherwise] limited[.]"⁹⁹

iv. Zainichi Koreans

In 1910, Japan annexed Korea and Koreans were thereafter considered Japanese nationals until Japan's surrender at the end of World War II.¹⁰⁰ During the interim, many Koreans emigrated to Japan voluntarily, while many others were conscripted into forced labor.¹⁰¹ Korean "liberties were suppressed [and] the use of the Korean language [was] discouraged and then totally forbidden in 1940."¹⁰² Following the war, "about 700,000 of the then [two] million-strong community stayed on rather than return to their homeland, which was then sliding into a war that would kill millions and split the country into two bitterly opposed states."¹⁰³

A peace treaty signed in the early 1950s indicated that "Japan, recognizing the independence of Korea, renounce[d] all right, title[,] and claim to Korea."¹⁰⁴ At the same time, the Japanese government "issued a Circular Notice ... announcing that all Koreans, including those residing in Japan, were to lose their Japanese nationality."¹⁰⁵ Those still in Japan, having been "rendered stateless[.]" began to be referred to as *zainichi*, meaning "foreigners living in Japan[.]"¹⁰⁶ Because of this important status shift, *zainichi* Koreans were denied the ability to register their families on the Japanese *koseki*¹⁰⁷ and they "had to carry alien registration cards with them at all times and were forced to register their fingerprints."¹⁰⁸ Furthermore, there is much evidence of "various forms of discrimination that deny [zainichi Koreans] occupational, educational [,] and social

benefits[.]” even though most of them living now were born in Japan and only speak Japanese.¹⁰⁹

Currently, there are just over 600,000 zainichi Korean permanent residents in Japan.¹¹⁰ While the government allows zainichi Koreans to apply for naturalization, many do not because the process is lengthy and arbitrary— applicants can be refused if the government finds them to be “‘inappropriate’ as a Japanese citizen.”¹¹¹ Furthermore, many zainichi held back due to fears of backlash within their own community, which might consider them to be “‘traitors’ by fellow Koreans.”¹¹² Until 1985, naturalizing zainichi Koreans was “recommended” by Japanese authorities to assume a Japanese name.¹¹³ More recently, however, naturalization is seen as a more plausible option and about 10,000 naturalize annually.¹¹⁴

While conditions for zainichi Koreans in Japan are considered to be improving,¹¹⁵ discrimination still exists.¹¹⁶ In 2004, the U.N. Committee on Rights of the Child urged Japan to “‘undertake all necessary proactive measures to combat societal discrimination and ensure access to basic services’ for children of Korean residents[.]”¹¹⁷ After news “coverage of the return of Japanese abductees” by North Korea, reports indicate[d] several hundred incidents of harassment of Korean schoolchildren in the streets.¹¹⁸ The children were “identified by their distinctive uniforms and [were] subjected to verbal and even physical attack[.]”¹¹⁹ such as the ripping of their traditional Korean dresses.¹²⁰ As a result of this and other kinds of discrimination, many zainichi Koreans attempt to hide their heritage by assimilating into Japanese culture fully.¹²¹ “In primary school, only 14.2 percent of the Korean children use their Korean name [while i]n secondary school, only nine percent” do so.¹²² One popular media pastime is for publications to “out[] many celebrities they have named as zainichi[.]”¹²³

In the judicial arena, zainichi Koreans have found modest success. In 1974, in the Yokohama District Court,¹²⁴ a Korean named Mr. Pak won a discrimination suit he brought against the Hitachi Corporation.¹²⁵ In Pak’s job application to Hitachi, he used an assumed Japanese name.¹²⁶ After passing his employment examination and interview, however, Hitachi retracted its offer of employment when it received Pak’s Korean family registry.¹²⁷ Similarly, in a case brought by a zainichi Korean in 1995, the Tokyo District Court ruled that, “a nationality requirement on membership [to a golf club] was ‘unreasonable under the contemporary ideas accepted by ... society,’ and held it to be unlawful.”¹²⁸ Finally, in 2006, the Kobe District Court ruled in favor of two zainichi Koreans who were refused housing due to their nationality.¹²⁹

In the 1995 Japanese Supreme Court case *Chong v. Tokyo*,¹³⁰ the court held that while the Constitution does not per se prohibit zainichi Koreans from voting in local

elections, laws barring foreign residents from voting are not unconstitutional.¹³¹ Furthermore, in *Chong*, the Supreme Court ruled that so long as Tokyo had a "rational basis" for its decision, it could "uniformly reject all foreign applicants" for all managerial posts.¹³² In this case, *Chong*, a second-generation *zainichi* Korean,¹³³ was for six years "Tokyo's first non-Japanese public health nurse[.]"¹³⁴ After she decided to apply for a management position, however, the city government refused her application to take the employment test.¹³⁵ Under the court's analysis, it determined that due to the likelihood that those in governmental management posts will exercise "the local public body's public authority or participat[e] in public decision-making[.]" such positions cannot be said to be constitutionally guaranteed to individuals other than Japanese citizens.¹³⁶ However, since such duties can vary widely, the government must "distinguish between managerial posts that must not be open to foreign nationals and those that may ..., depending on the contents of the duties as well as how and to what extent the authority granted to each post is involved in performing governing functions."¹³⁷ By looking at the circumstance at hand, however, the court found that it was "within the bounds of vertical discretion" of the city to determine that non-citizen public nurses cannot be promoted to "division director-level or upper management posts" and thus *Chong's* rejection "shall not be deemed to be illegal."¹³⁸

b. The Modern Influx of Foreigners

"Japan, like it or not, is now on the road to becoming a much more culturally diverse nation."¹³⁹ This demographic shift represents a marked difference from Japan's isolationist past. As mentioned previously, Japan was almost exclusively closed off to the rest of the world for several centuries, ending in the Meiji Revolution in the mid-nineteenth century.¹⁴⁰ Even today, not that much has changed; Japan still "has the lowest percentage of immigrants and expatriate workers of any advanced industrialized nation[.]"¹⁴¹ However, relatively speaking, the recent population shift is immense. Japan is currently undergoing "the largest voluntary influx of foreigners in over 1,000 years."¹⁴²

The chief factor motivating changes on this scale is likely a simple combination of economics and population statistics. In terms of economy, after a lost decade of depression in the 1990s, Japan's economy is finally booming again.¹⁴³ One of the reasons for the turnaround is that after "[fifteen] years of stagnation ... [c]orporate restructuring has cut out some of the dead wood" of an otherwise bloated infrastructure.¹⁴⁴ Real estate values have finally started to rise.¹⁴⁵ After several years of zero percent interest rates, Japan has finally started toying with raised rates.¹⁴⁶ "However, such growth and prosperity have in turn created their own limitations in the form of severe manual labor

shortages [.]” particularly for “‘3K’ jobs—dangerous (kiken), dirty (kitanai), and difficult (kitsui).”¹⁴⁷ In some locations, such as Aichi prefecture, “the shortage of workers has reached acute proportions” and “1.7 jobs are offered for every applicant.”¹⁴⁸

Compounding this issue has been the mounting problem of a statistically significant decrease in Japan’s domestic population.¹⁴⁹ According to the Japanese government, the population could fall from approximately 128 million to 100 million by 2050, or to as low as 86 million by some estimates.¹⁵⁰ “By 2030, Japan will have only two workers for every retiree and, by mid-century, three workers for every two retirees.”¹⁵¹ While there are plans in the works to increase the age of retirement¹⁵² and to take advantage of robotic automation as much as possible,¹⁵³ it is impossible to avoid the seeming necessity of foreign labor.

Population statistics have reflected Japan’s need for an influx of labor by way of significantly increased numbers of foreign immigration. Currently, Japan is home to “1.97 million legal foreign residents[.]”¹⁵⁴ out of a total population of 127.7 million.¹⁵⁵ This represents a 45 percent increase since the mid-nineties.¹⁵⁶ In terms of individual ethnic communities, there are 607,419 ethnic Koreans, 487,570 Chinese, 286,557 Brazilians, and 199,394 Filipinos.¹⁵⁷ In fact, it is such a shock to Japan that a full 1.5% of their total population is foreign,¹⁵⁸ “a team of experts led by Vice Justice Minister Taro Kono published a report calling for a new immigration policy, one that limits foreigners to [3] percent of the total population[.]”¹⁵⁹

Perhaps, not surprisingly, population statistics significantly “undercount” in regards to illegal immigrants in Japan.¹⁶⁰ Although it is naturally difficult to determine exactly how many illegal immigrants are in Japan, estimates in 1987 were around 400,000, “a six-fold increase” since 1982.¹⁶¹ In 1998 alone, the Justice Ministry deported 48,500 foreigners.¹⁶² Such illegal immigrant laborers face many challenges in Japan, such as difficulty to access medical care¹⁶³ and free education.¹⁶⁴

Part II—Motivation and Justification for Exclusion of Foreigners

Before examining the reasoning behind the exclusion of foreigners by some private business owners, it should be informative to take a closer look at the scope of the problem itself. There has been no definitive survey across Japan to determine exactly how many businesses are systematically excluding foreigners and, as such, the case should not be overstated. Nevertheless, “[s]imilar cases [to the Otaru Onsen exclusion] exist throughout Japan, where racial discrimination is practiced undisturbed[.]”¹⁶⁵

In addition to the court cases discussed later, there have been many sporadic reports of private business exclusion of foreigners from the media, human rights organizations, and concerned community activists. For example, as part of the fact-finding missions that led to the Otaru Onsen case, the future plaintiffs discovered at various points in their investigation in Hokkaido three exclusionary onsen in Otaru,¹⁶⁶ one in Wakkanai, and exclusionary sports and barber shops, also in Wakkanai.¹⁶⁷ The investigators also found a partially exclusionary onsen in Rumoi.¹⁶⁸ In 2000, the *Japan Times* reported that approximately 100 businesses used "Japanese Only" signs which had been prepared by "a local association of restaurants and bars [.]"¹⁶⁹

The use of such practices has not just been limited to Hokkaido. "Similar cases of discrimination have been reported to the group from cities including Hamamatsu[,] ... Naha, Okinawa Prefecture[, and] also [] in the entertainment districts of Tokyo's Shinjuku Ward."¹⁷⁰ In Shinjuku, ironically, one business "had a sign that read: 'Club International—No foreigners allowed.'¹⁷¹ Some Japanese Only signs are intended mainly for a particular group of foreigners, such as the United States Navy.¹⁷² Although it was not from a private business, there was at least one instance in 1998 of a public pool in Azuma which featured a "Closed to Foreigners" sign.¹⁷³

There are also many reported instances of unequal treatment arguably due to racial discrimination. For example, in the early 1990s, the six private Japan Railway companies were criticized sharply for charging more for Korean students than Japanese students, who normally get a student discount.¹⁷⁴ In another example, HIS, Japan's "largest discount travel agency," was revealed to have a disparate pricing policy based on Japanese or foreign customers.¹⁷⁵ When the policy was reported, HIS denied that discriminatory motives were behind the pricing decision, but rather stated that "business concerns" were the cause.¹⁷⁶ On a smaller scale, there are many cases of reported discrimination in housing. For example, "[w]hen an Indian engineer called a real estate agent to find housing, the staff asked him repeatedly the color of his skin."¹⁷⁷

One relatively well-publicized case of disparate treatment based on nationality came from American Steve Herman.¹⁷⁸ Herman was the chairman of the Foreign Press in Japan and had a salary the equivalent of approximately \$200,000 in U.S. currency.¹⁷⁹ Herman, with his Japanese wife and family, applied to Asahi Bank for a housing loan, but his application was refused outright when the bank discovered that he was neither a Japanese citizen nor a permanent resident.¹⁸⁰ After Herman sued, "[t]he court affirmed the bank's criteria to give housing loans only to Japanese citizens or permanent residents because the bank needed to lower its costs in deciding which applications to accept, and categorically excluding foreigners without permanent resident visas was justifiable."¹⁸¹

There are also many cases of discriminatory practices reported in regards to employment in Japan.¹⁸² The opportunity for discrimination in employment begins early; Japanese resumes generally "require a picture of the applicant."¹⁸³ In one case, a talented Indian computer specialist, Kamal Sinha, was specifically recruited by Mitsubishi Electric to work in Japan.¹⁸⁴ Upon arrival, however, Sinha "was not permitted to take free company classes in Japanese offered to other foreign employees who were [white]."¹⁸⁵ In another example, after a strike by foreign English-language instructors at a Japanese university to protest unequal treatment,¹⁸⁶ the university retaliated by "decreas[ing] the number of English classes it offered and [increasing] the size of some [] classes."¹⁸⁷ Within two years, nearly all of the foreign instructors at the university at the time of the strike had been terminated.¹⁸⁸

a. Presumption of Foreign Incompatibility with Domestic Japanese Culture

Kokusaika is the Japanese word for internationalization,¹⁸⁹ and during the 1980s and 1990s kokusaika was a popular buzzword representing the country's intended movement toward greater international interaction.¹⁹⁰ This welcoming trend represents a marked difference from the Japan of the past. For an extreme example, in 1862, around the time of the Meiji Restoration, foreigner Charles Richardson was beheaded when he failed to follow what was then the proper cultural protocol of dismounting in the presence of a passing Japanese prince.¹⁹¹ However, while the age of kokusaika certainly represents some kind of ideological shift, some observers have pointed out that "simply saying kokusaika has not necessarily made the nation more international."¹⁹²

Some things about Japan are clearly more international than they used to be. Japan's markets have opened significantly to foreign investment since the 1980s.¹⁹³ Also, there are now more foreigners in Japan than ever before.¹⁹⁴ While having more foreigners represents one aspect of internationalization, the question remains as to whether "Japan [has truly] decided to accept people from abroad."¹⁹⁵ According to some, the Japanese have a "pervasive tendency to view everyone in terms of in-groups and out-groups[,] with foreigners always falling on the outside."¹⁹⁶ Can Japan truly represent kokusaika if foreigners will always be soto (outside) to the Japanese uchi (inside)?¹⁹⁷

One way to address this question is by looking at how the Japanese view themselves in relation to Japan's economic success in the post-war era. "Although diffuse, the belief is strong that Japan's domestic stability and international success were achieved partially through adherence to norms and values associated with" a traditional Japanese social order.¹⁹⁸ "In Japan[,] hierarchical patterns of social and national organization combine with an ideology of homogeneity and its necessary counterpart,

exclusivity, as bases of national solidarity."¹⁹⁹ Unlike in the United States, citizenship in Japan is not granted to children "simply by being born within its borders."²⁰⁰ As might be expected, the exclusive, homogenous Japan can sometimes turn against its own—many Japanese who have spent much time abroad complain of discrimination due to so-called *gaijin kusai*, or "reek of foreignness [.]"²⁰¹ Presumably, this is because those individuals have lost touch with the intricate subtleties expected in day-to-day Japanese social interaction.

It is not surprising, then, that there might be a cultural clash between the traditional "communitarian orientation"²⁰² of Japan and a new influx of foreign immigration, ignorant of Japanese culture. It should also be noted, however, that the pervasiveness of the term *kokusaika* roughly coincided with the onset of Japan's "lost decade" of economic downturn in the late 1980s and 1990s.²⁰³ At the same time, two of Japan's closest East Asian Neighbors, South Korea and China, have been undergoing dramatic reformation, representing emerging cultural and economic superpowers, respectively.²⁰⁴ Rivalry between Japan and South Korea came to a head in 2002 when the two "countries were co-hosts of soccer's World Cup and South Korea advanced further than Japan."²⁰⁵

The culmination of these conflicts has led to a distinct rise in anti-foreign hostilities amongst some Japanese. "[M]any ... feel threatened by rapid social change, the protracted economic downturn[,] and rising crime[,] ... spur[ring] a backlash in some quarters against outsiders and the loss of traditional values."²⁰⁶ These feelings have led to complaints that "[t]here are too many foreigners here—throw them out immediately"²⁰⁷ or, more directly, fears that "Japan could be overrun by 'swarms' and 'torrents' of 'cockroach-like' immigrants[.]"²⁰⁸ It could be this "insecurity" of a threatened populace that has led to the rise of nationalist manga (comics) which depict Japan's Asian neighbors in a less-than flattering light.²⁰⁹ Two such best-sellers are entitled "Hating the Korean Wave" and "Introduction to China [.]"²¹⁰ While the former states that "there is nothing at all in Korean culture to be proud of[.]" the latter "portrays the Chinese as a depraved people obsessed with cannibalism[.]"²¹¹ Tellingly, despite the facial similarities between Japanese, Chinese, and Koreans, these manga depict "Japanese characters ... with big eyes, blond hair[,] and Caucasian features; the Koreans are drawn with black hair, narrow eyes[,] and very Asian features."²¹²

While these manga may represent an extreme viewpoint, such feelings in the abstract are quite common. For example, a 2004 survey indicated that 44 percent of all Japanese felt that foreigners are a bad influence on the country—the exact same percent which felt that foreigners were a good influence.²¹³ A different survey indicated that, on

the receiving end of such negative sentiment, 81 percent of foreigners living in one Tokyo ward said that the "Japanese were prejudiced towards them or had discriminated against them."²¹⁴ If the Japanese really do "attribute ... their present economic strength and high standard of living" to Japan's "communal mentality," which requires "voluntary compliance with accepted and well-known norms[.]" it follows that foreigners will typically lack understanding of such norms and will be "ill-suited to ... integration[.]"²¹⁵ When there is a presumption that foreigners will be ignorant of the very cultural attributes that supposedly made Japan a post-war success, such foreigners will be seen as incompatible, posing a threat to continued success in the future or even as a source for past failures.

b. Inflammatory Government Statements and Actions

Despite a supposed governmental policy of *kokusaika*, there have been numerous instances of governmental officials' speeches and actions that have only served to fan the flames of already-existing negative feelings toward foreign incursions into Japan.²¹⁶ These state-sponsored gaffes include statements by prominent politicians, misleading statistics, and crime-prevention campaigns by local police agencies. While at first blush, individually, these actions may seem relatively harmless, when applied collectively they can lead to serious overreaction by the many Japanese who already see foreigners as unfamiliar and suspect.²¹⁷

Perhaps the most famous racially insensitive faux pas made by a Japanese politician was that of former Prime Minister Yasuhiro Nakasone in 1986.²¹⁸ At that time, Nakasone indicated that "Japan was a 'more intelligent society' than the United States, 'where there are blacks, Mexicans [,] and Puerto Ricans, and the level is low.'" ²¹⁹ While Nakasone did later apologize,²²⁰ in 1988 former Finance Minister Michio Watanabe indicated that "American blacks were habitually in debt and had no concern about going bankrupt."²²¹ In 1990, "Justice Minister Seiroku Kajiyama drew a cavalier parallel between the effects of foreign prostitutes on Tokyo's residential districts and the flight of [American] homeowners 'forced out ... because blacks move in ... and ruin the atmosphere.'" ²²²

The most offensive recent comments have come from Tokyo Governor Shintaro Ishihara.²²³ Most notably, in 2000 Ishihara indicated that, in the wake of a major earthquake, "a big riot could be expected" by illegal foreigners.²²⁴ Additionally, in 2001, Ishihara stated "that the 'very pragmatic DNA of Chinese ... [makes them] steal without hesitation in order to satisfy their desire.'" ²²⁵ Although the message that Ishihara appears to be espousing to the public is that "immigration and internationalization seem to equal

more crime" for Japan,²²⁶ his statements have not prompted any reaction from the national government.²²⁷

Police agencies in Japan also seem to be indicating that foreign immigration brings with it the serious risk of increased crime.²²⁸ "The National Police Agency's [NPA] press releases exaggerate the role of foreigners in criminal offenses by mentioning that crimes by foreigners were worsening [] or widespread[.]"²²⁹ However, the statistics hailed by the NPA have been strongly criticized by commentators.²³⁰ While it is true that crime overall is increasing and, with it, crimes committed by foreigners,²³¹ the press releases are nevertheless misleading because they do not address the fact that "[t]he foreign population is growing, [but] the Japanese one is not."²³² In reality, while the foreign population in Japan rose 18 percent in 2004, crimes committed by foreigners rose only approximately 9 percent that year.²³³ Furthermore, that figure includes visa violations, which is a crime only foreigners can commit.²³⁴

In addition to propagating misleading statistics, local police agencies have taken steps that further solidify to the Japanese public the concept that foreigners bring with them a serious risk of criminal activity.²³⁵ For example, the Tokyo Metropolitan Police distributed flyers in 2000 which encouraged citizens to "call the police if you hear someone speaking Chinese."²³⁶ Also in 2000, "the Shizuoka Police Department distributed to shopkeepers a handbook entitled 'Characteristic Crimes by Foreigners Coming to Japan.'²³⁷ Additionally, police in Tokyo's Nakano ward placed posters on subway walls "warning of 'purse-snatching "bad" foreigners[.]'"²³⁸ When the Nakano Police were approached with complaints about the posters, they responded by saying, "It's not as though we're targeting all foreigners[—only] 'bad foreigners[.]'"²³⁹

The national media also has a tendency to support the concept that rising crime is a foreigner problem.²⁴⁰ Sensationalism has led to erroneous headlines such as "Foreign Crime Rises Again, Six-Fold in Ten Years."²⁴¹ Other articles strongly suggest that foreign criminals are solely responsible for the crimes generally reported.²⁴² "[L]urid stories about rings of Indian thieves, Thai and Filipino prostitutes[,] and Pakistani drug smugglers abound in Japan's well-read weekly magazines."²⁴³ Advertisers have also joined in on the sensationalizing of foreigner crime—for example, "Miwa Locks, Japan's best-selling locksmith, ... advertised [its] new foreigner-proof security" system.²⁴⁴

On the receiving end of this trend of misrepresentation of rising foreigner crime, many foreigners are forced to experience unreasonable and unnecessary suspicion from the Japanese public.²⁴⁵ One South Korean-born resident stated that while "[t]here must be bad people among foreign nationals, ... ordinary residents are also made to feel uneasy as if they are suspected only because they are foreigners[.]"²⁴⁶ In the town of

Hamamatsu, as a Brazilian factory worker boarded a city bus, she heard the bus driver announce on the intercom: "Ladies and gentlemen, ... [p]lease watch your bags[, t]here is a foreigner on board."²⁴⁷ As a concrete example, overreaction to the threat of foreign crime was the source of the closing of the Azuma public pool to foreigners.²⁴⁸ While children's safety was the publicly stated reason for the "Closed to Foreigners" sign that briefly adorned the pool, it turns out that the true source was two complaints—one involving horseplay incidents with brown-skinned foreigners and another of sexual molestation by a non-Japanese-speaking pool guest, which a pool official later admitted was a "case of mistaken identity" of a man patting the wrong fourth grader on the bottom.²⁴⁹

Part III—Adjudicating Discrimination in Japanese Courts

If a foreigner in Japan experiences blatant discrimination in the private sphere, going to the authorities is not an option, because, as mentioned previously, there is no law against discrimination.²⁵⁰ Nevertheless, some foreigners who have experienced such discrimination have brought civil suit against the discriminating business owner under domestic tort and international human rights law. This section will detail the three cases brought thus far by foreigners against Japanese private business owners after having been excluded from a place of business due to racial and national origin discrimination.

a. Bortz Case

Hamamatsu, a city in the Shizuoka prefecture, "boasts the highest concentration of Japanese-Brazilians in" Japan.²⁵¹ The relatively large number of Brazilians in Japan stems from the government's decision in 1990 to allow the immigration of unskilled laborers if they were the foreign descendants of Japanese emigrants, known as Nikkeijin—"most of whom originated in Brazil[.]"²⁵² However, the Nikkeijin were not, as officials had hoped, "culturally familiar" [;] they were essentially "cultural strangers."²⁵³ In Hamamatsu, conditions for Nikkeijin are difficult, with low-paying jobs and little or no access to government-sponsored medical services and public education.²⁵⁴ Local media frequently stereotype Brazilians as criminals²⁵⁵ and Hamamatsu police followed suit.²⁵⁶ As a result, many locals generated vague general fears of the local Brazilian population.²⁵⁷

On June 16, 1998, Ana Bortz, a Brazilian journalist and legal Japanese resident since 1992,²⁵⁸ entered a jewelry store in Hamamatsu.²⁵⁹ Once inside, the owner approached Bortz and inquired about her nation of origin.²⁶⁰ When Bortz responded that

she was from Brazil, the shop owner angrily demanded that she leave, pointing to one sign which indicated that foreigners were excluded from the premises and another sign from the police, which warned of robbers.²⁶¹ Bortz nevertheless refused to leave and the police were called.²⁶² When the police determined that there was no criminal action by either party, they left without resolution.²⁶³ The exchange had been documented on the store's video surveillance system.²⁶⁴

Two months later, Bortz filed suit in civil court, claiming that Suzuki, the store's owner, had committed illegal discrimination.²⁶⁵ Although recognizing that no domestic law forbid discrimination, Bortz instead pointed to international human rights treaties that Japan had signed.²⁶⁶ In particular, Bortz made reference to Articles 2(d) and 6 of the International Convention on Eliminating All Forms of Racial Discrimination (CERD).²⁶⁷ CERD Article 2(d) states that signatory parties must "bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group[,] or organization [.]"²⁶⁸ CERD Article 6 indicates that signatory parties "shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."²⁶⁹ In addition to citing to international law, Bortz also pointed to Japanese Civil Code provisions 90, 709, and 719, which generally "rule on the maintenance of public order and compensation for damages incurred."²⁷⁰ In her complaint, Bortz requested 1.5 million yen in compensation as well as an apology from Suzuki.²⁷¹

Suzuki's answer cited Article 22 of the Constitution of Japan,²⁷² which states that "[e]very person shall have freedom ... to choose his occupation[.]"²⁷³ Suzuki argues that this provision accords "the autonomy of a business owner as long as his act does not interfere with public order" and "the right to select his customers in order to protect his business [.]"²⁷⁴ In general, Suzuki presented that "foreigners are unpredictable in behavior and [are] known to be prone to criminal acts[.]"²⁷⁵ In particular with Bortz, Suzuki claimed that her actions were "unnatural [.]"²⁷⁶ in that she "look[ed] directly into his eyes and walk[ed] around the store in a different direction than most Japanese customers would."²⁷⁷

Judge Soh of the Shizuoka District Court, head of a three-judge panel,²⁷⁸ announced his decision in the case on October 12, 1999.²⁷⁹ Although Soh did not find CERD to be directly applicable, "[i]n the absence of Japanese laws covering the

treatment of foreigners,"²⁸⁰ the CERD provisions could "provide standards by which the court can determine discriminatory acts and assure the victim reparation for his/her suffering" under the Japanese Civil Code tort provisions.²⁸¹ "Based on [CERD] Article 2(d), [Soh] ... ruled that discrimination is prohibited at an individual level, and that expelling a customer from the store on the basis of nationality constituted an act of racial discrimination which in itself interfered with public order"²⁸²—thus constituting a tort under Japanese Civil Code Article 90.²⁸³ Judge Soh was not impressed by Suzuki's arguments about Bortz's behavior, since video surveillance "supported Bortz's claim that she wasn't [acting suspiciously]."²⁸⁴ The court awarded Bortz her entire request of 1.5 million yen in damages, approximately \$14,000 at the time,²⁸⁵ but did not require that Suzuki apologize.²⁸⁶ Suzuki chose not to "appeal to a higher court, thus, accepting the District Court's ruling and ending the lawsuit."²⁸⁷

b. McGowan Case

In September of 2004, African American Steve McGowan, designer and resident of Kyoto, visited an eyeglass shop in Daito City, Osaka Prefecture.²⁸⁸ While McGowan had previously visited the shop with his Japanese wife, this time he was accompanied by a black South African friend.²⁸⁹ As McGowan and his friend stood outside the shop talking about the window advertisements, Narita, the shop owner, received a call complaining about the two men.²⁹⁰ Subsequently, Narita rushed outside as the two were about to enter the shop and demanded that they "[m]ove to the other side of the street[.]" and stop "[t]ouching [his] store window[.]"²⁹¹ According to McGowan, Narita also said, with a shooing hand gesture,²⁹² "I don't like black people!"²⁹³

McGowan had never heard the derogatory term *kokujin* (black person) before and called his wife to confirm what it meant.²⁹⁴ The next day, McGowan and his wife returned to the shop to speak with Narita.²⁹⁵ McGowan's wife asked Narita if he had excluded McGowan because he was a foreigner.²⁹⁶ Narita responded "that he had a bad impression of black people during a stay in Germany."²⁹⁷ McGowan decided to sue Narita, claiming "discrimination against black people[.]"²⁹⁸ In court, both sides presented their allegations and, as a witness, Narita admitted that "he has a 'thing' about black people," indicating that it was a "part of his personality."²⁹⁹

On January 30, 2006, Judge Saga of the Osaka District Court announced his verdict, rejecting McGowan's claims of racial discrimination and dismissing the suit.³⁰⁰ Saga's analysis was chiefly factual.³⁰¹ One of the principal reasons for dismissal was that Saga had "doubts about [McGowan's] level of comprehension of the Japanese language."³⁰² Although McGowan was able to recite a *kanji* (Chinese characters used in

the Japanese written language) oath in court,³⁰³ Saga could not "trust [McGowan's] accusation over the use of discriminatory remarks."³⁰⁴ To support this decision, Saga pointed to the fact that McGowan's wife asked Narita about discrimination against foreigners (gaikokujin) instead of against black people (kokujin), as McGowan had claimed in his complaint.³⁰⁵ Furthermore, Saga questioned McGowan's Japanese comprehension because of the supposed illogic of McGowan's claim that Narita told him to "'Get out['] ... [when McGowan and McGowan's] friend were not actually inside the store at the time."³⁰⁶ Finally, Saga found doubt in McGowan's language comprehension abilities due to the fact that Narita told them "Don't touch the window" when McGowan and his friend were not touching and did not intend to touch Narita's shop window.³⁰⁷

Judge Saga also saw McGowan's previous successful experiences with Narita's shop as evidence that Narita did not have a problem with black people.³⁰⁸ Finally, although Saga acknowledged that Narita had made a shooping hand gesture, which could conceivably be linked to discriminatory action, since McGowan's other testimony had been negated, the gesture itself was not enough to find illegal racial discrimination.³⁰⁹ Since "there was no evidence [that] the store owner had made discriminatory remarks against blacks and [that] it was questionable whether McGowan had understood what the owner had said[,] the case would have to be dismissed."³¹⁰

Following the District Court's decision, McGowan decided to appeal.³¹¹ On appeal, his case was heard by the Osaka High Court.³¹² Coming to a decision on October 18, 2006, the Osaka High Court announced that it was reversing the District Court's opinion and ordered Narita to pay 350,000 yen (approximately \$3,000) to McGowan in compensation.³¹³ Presiding Judge Tanaka indicated that the damages were for "McGowan's emotional pain, saying that the entry denial '[was] a one-sided and outrageous act beyond common sense."³¹⁴

While Tanaka acknowledged that "McGowan had been deeply upset by [Narita's] ... gestures and harsh tone[,] "³¹⁵ Tanaka did not go so far as to validate McGowan's original complaint.³¹⁶ Rather, Tanaka indicated that Narita's remarks were "not enough to be recognized as racially discriminatory," and that "the possibility that [McGowan] misheard [Narita] cannot be eliminated."³¹⁷ While Tanaka "avoided ruling [on] whether Narita's words and actions were racially discriminatory," he nevertheless held "the remarks [to be] illegal."³¹⁸ Although the decision in this regard was "very, very carefully, vaguely worded[,] " it held Narita's actions collectively to be illegal due to being "outside social norms."³¹⁹ One commentator complained that the social norms cited were "unwritten" and unclear; in fact, even the words Tanaka used to say "illegal

activities" can also mean "activities not covered by the scope of current laws on the books."³²⁰

c. Otaru Onsen Case

In the early 1990s, after the fall of the Soviet Union, significant trade opened up between Russia and Japan.³²¹ In particular, the northern island of Hokkaido experienced heavy traffic with Russian fishing vessels and did a "booming" trade of consumer goods in exchange for seafood.³²² For example, while the remote port city of Otaru only has a population of 153,000,³²³ it annually sees around 30,000 Russian sailors calling to port each year.³²⁴

Otaru is also notable for its many onsen, a hot springs resort version of the traditional Japanese public baths (sento).³²⁵ In addition to having become an important family tourism industry in recent decades, traditionally sento have represented an important part of Japanese culture, both as a matter of public hygiene and as a means of strengthening communitarian bonds, replete with complicated but expected rules of etiquette.³²⁶ Indeed, in a 1955 case, the Japanese Supreme Court saw fit to take special note of the cultural importance of sento.³²⁷ In a case dealing with a sento licensing ordinance, the court noted that "[p]ublic baths ... are welfare facilities of a highly public nature, indispensable to the daily life of the majority of the people."³²⁸ While the spread of in-home bathing has certainly changed the place of the sento in Japanese culture, the sento is nevertheless still very important to the "public welfare."³²⁹

Along with the influx of Russian fishing vessels, came the desire of Russian sailors on shore leave to take advantage of Otaru's onsen facilities.³³⁰ However, a number of Russian sailors were either ignorant of complex customary public bathing etiquette or uninterested in cultural compliance.³³¹ For example, there were reports of failure to thoroughly bathe before getting in the communal waters, taking soap into the communal waters, drinking vodka in the bath house,³³² wearing shoes indoors,³³³ and general "rowd[iness]."³³⁴ A number of Japanese onsen customers complained about the Russians' "smell[.]"³³⁵ and unconfirmed rumors began to circulate that some Russian sailors had spread lice.³³⁶ In response to these concerns, and in fear of losing loyal Japanese customers, several of the city's onsen began putting up signs excluding all foreigners.³³⁷ Although the chief concern was misbehaving Russians, the owners felt that it would be too difficult to distinguish Russians from other foreigners and, moreover, that banning only Russians "would be discriminatory [.]"³³⁸

In 1999, upon hearing reports of foreigner exclusion, a group of concerned individuals went to Otaru to investigate, leading to the incident described at the

beginning of this article.³³⁹ During that investigation, three Otaru onsen were discovered to conduct exclusionary practices.³⁴⁰ This led a number of interested parties to initiate a broad-reaching and lengthy "antidiscrimination campaign[,] ... including appeals to the municipal government, the Justice Ministry[,] foreign embassies[, and] the domestic and international press[.]"³⁴¹ The campaign was at least somewhat effective, creating a "storm" of national and even international attention on the subject.³⁴² For example, the activists were able to convince the German Embassy to send a letter to the Otaru mayor complaining about the discrimination.³⁴³ As a result of all of the pressure, the city government "repeatedly asked operators of local bathhouses to stop discrimination and also produced and distributed Russian-language posters and flyers explaining Japanese manners at public baths."³⁴⁴

Ultimately, two of the three exclusionary Otaru onsen changed policies and began accepting foreigners.³⁴⁵ By this time, one of the activists, American David Aldwinkle, had naturalized in Japan becoming Debito Arudou.³⁴⁶ On November 28, 2000, Arudou re-visited the remaining offending onsen, Yunohana, and tape-recorded the exchange.³⁴⁷ At first, Arudou is excluded because he is a foreigner.³⁴⁸ However, upon proving that he is now a Japanese citizen Arudou is nevertheless excluded because he "look[s] foreign."³⁴⁹ Subsequently, Arudou and two foreign residents who had also been excluded brought suit against Yunohana for discrimination and against the city of Otaru for failing to pass an anti-discrimination regulation.³⁵⁰ In the complaint, the plaintiffs cited the Constitution of Japan, the CERD treaty, and Japanese Civil Code tort provisions to support their argument.³⁵¹

The Sapporo District Court handed down its decision on November 11, 2002.³⁵² Presiding Judge Sakai³⁵³ first addressed the plaintiffs' constitutional claim in regards to the charges against Yunohana.³⁵⁴ Although Article 14 of the Constitution of Japan clearly prohibits discrimination,³⁵⁵ Sakai states that this constitutional provision only "regulates the relationship between the individual and the [s]tate, and as such is not supposed to directly regulate individual private relationships[.]"³⁵⁶ Essentially the same argument is applied to the use of international treaties—such treaties merely "regulate[] the relationship between the public authorities and the international responsibilities of a [s]tate" and cannot be applied to Yunohana.³⁵⁷

Sakai then examines Yunohana's exclusion of all foreigners as a response to the misbehavior of some foreigners, determining that Yunohana's behavior "lack [s] ... rationality" and amounts to "unrational discrimination ... because it went beyond the bounds of what is deemed socially acceptable."³⁵⁸ As such, the behavior is considered illegal.³⁵⁹ Because of a perceived violation of the plaintiffs' dignity rights,³⁶⁰ Sakai applied

Japanese Civil Code 710³⁶¹ to determine that each of the three plaintiffs will receive one million yen in compensation from Yunohana,³⁶² approximately equaling \$25,000 at that time.³⁶³ However, Sakai rejected the plaintiffs' demands for an apology, ruling that "the Court cannot determine that [p]laintiffs suffered any societal damage to their honor[.]"³⁶⁴

The court completely dismissed all of the plaintiffs' claims against the city, finding that Otaru was not "in dereliction of [any] duty" under the CERD treaty.³⁶⁵ Sakai explained that the duty placed upon Japan by Article 6 of the CERD treaty, detailed previously, is "no more than a political duty, and the [c]ourt interprets this to read that it is not the case where [Otaru] has the specific duty towards each citizen without any other option but to pass an ordinance to outlaw a concrete case of racial discrimination."³⁶⁶ Moreover, the court found that "CERD Article 6 ... makes no concrete reference to" any provisions providing direct remedy for plaintiffs.³⁶⁷ To the extent that CERD requires any action, "[h]ow measures will be carried out must ... be left to [Otaru's] discretion."³⁶⁸ In the present case, Otaru "took several possible measures, bringing about some appropriate results."³⁶⁹ Therefore, the court reasoned Otaru's actions or lack thereof "cannot [be] rule[d] ... [to be] illegal."³⁷⁰

Subsequent to the Sapporo District Court decision, both the plaintiffs and defendant Yunohana decided to appeal.³⁷¹ On September 16, 2004, the Sapporo High Court announced its decision.³⁷² In essence, the District Court was affirmed on every point.³⁷³ However, Presiding Judge Sakamoto³⁷⁴ added in regards to the charges against Otaru that under existing Supreme Court case law there is no liability against the government for failure to pass a law.³⁷⁵ Furthermore, Sakamoto stated that the CERD language indicating that a signatory nation must "by all appropriate means [eliminate] racial discrimination"³⁷⁶ is "general and abstract" and "do[es] not further provide specific measures."³⁷⁷ In the sense that "it is not clear ... [that the CERD] convention ... oblige[s] the introduction of ordinances[.]" Otaru cannot be liable for any failure to enact such an ordinance.³⁷⁸ Following the High Court's decision, Arudou's appeal to the Supreme Court was rejected.³⁷⁹

Part IV—Addressing the Adequacy of Current Remedies for Addressing Discrimination

Part III of this article reviewed three cases addressing discrimination in the form of exclusion from private businesses in Japan. In one sense, all three cases can ultimately be seen as victories against discrimination. In another sense, however, the cases arguably present two shortcomings: in McGowan, the courts' failure to recognize the defendant's actions against McGowan as racial discrimination and, in Arudou, the courts'

unwillingness to find the government in any way responsible under international law for the discrimination it allowed to continue in Otaru. This section will address the extent to which existing judicial avenues can be effective against private discrimination in light of Japan's obligations under international law.

Japan is a party to two international treaties, which directly require each signatory to take steps to eradicate discrimination within its borders.³⁸⁰ One such treaty, previously mentioned, is CERD (International Convention on the Elimination of All Forms of Racial Discrimination).³⁸¹ The CERD treaty states that each participating nation "shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group[,] or organization[.]"³⁸² Additionally, the International Covenant on Civil and Political Rights similarly states that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth[,] or other status."³⁸³ In regards to these international law commitments, Japan is currently of the position that it is "fulfilling the obligations," which treaty law places on it via currently existing legal remedies.³⁸⁴

a. Analysis of Existing Legal Remedies

Because there are no laws prohibiting discrimination in Japan, acts of discrimination are not per se illegal. Nevertheless, victims of discrimination have the option of presenting a number of civil court claims to address their grievances. The following subsections will detail the three types of claims brought in the discrimination cases described above and the standards by which such claims are adjudicated.

i. Constitution of Japan

The Constitution of Japan does have a provision that addresses discrimination. Article 14 states 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."³⁸⁵ This provision is actually a modified version of an earlier draft constitution, developed after World War II, which included language directly protecting foreign nationals against discrimination.³⁸⁶ However, as a result of extensive negotiation between the American occupying forces and the Japanese government, the end product was much less clear in its protection of foreigners.³⁸⁷

"Following the defeat of Japan and during the Occupation, the Supreme Commander of the Allied Powers (SCAP), General Douglas MacArthur, directed his staff" to draft a new constitution after soundly rejecting the draft created by the Japanese.³⁸⁸ The SCAP draft contained one article, SCAP Draft Article 13, which stated that "[a]ll natural persons are equal before the law. No discrimination shall be authorized or tolerated in political, economic [,] or social relations on account of race, creed, sex, social status, caste [,] or national origin."³⁸⁹ Furthermore, SCAP Draft Article 13 stated that "[a]liens shall be entitled to the protection of the law."³⁹⁰ However, a subsequent Japanese edit removed language about national origin from SCAP Draft Article 13 while keeping SCAP Draft Article 14 intact.³⁹¹

Critically, this edit also changed the introductory clause "[a]ll natural persons" in SCAP Draft Article 13, which later become Article 14, to read "[a]ll the people[.]" represented by the Japanese word *kokumin*.³⁹² Somewhat later, Japanese officials were able to negotiate the complete omission of SCAP Draft Article 14.³⁹³ The final step in this progression came several years later in 1950 with the passage of the Law of Nationality.³⁹⁴ This statute is critical because it gives official legal definition to the word *kokumin*, left intentionally vague in the Constitution of Japan by Japanese officials—now only "holders of Japanese citizenship" are covered under what became Article 14.³⁹⁵

Despite these changes, the Japanese Supreme Court has shown some willingness to extend the protections of constitutional human rights privileges to foreign nationals.³⁹⁶ One case which addressed this principle is *McLean v. Justice Minister* in 1978.³⁹⁷ In *McLean*, an American citizen was denied extension of a Japanese visa at least in part due to political demonstrations in opposition to Japan's part in the Vietnam War.³⁹⁸ Ultimately, the court decided that the Minister of Justice had not acted inappropriately in his decision because immigration law gave him broad discretion over visa extensions.³⁹⁹ Most interestingly, however, the court declared that the constitutional "guarantees of fundamental human rights ..., with the exception of those rights which by their nature must be limited to the Japanese, apply equally to aliens staying within our country."⁴⁰⁰ In *McLean*, while "freedom to engage in political activities" generally applies to aliens,⁴⁰¹ it does so, according to one commentator, "only as far as the Ministry of Justice permits [.]"⁴⁰² The court stated that the Minister of Justice's decision would only be overturned if it is "clearly unreasonable."⁴⁰³

Regardless of whether the Constitution of Japan protects foreigners from governmental discrimination, it cannot aid a plaintiff in regards to private discrimination. In another case, *Mitsubishi Jushi K.K. v. Takano*,⁴⁰⁴ the Supreme Court

stated that the human rights' provisions "of the Constitution do not apply directly to mutual relations between private parties."⁴⁰⁵ The rationale for applying these constitutional protections only to state action is that "[w]hile in relations between private parties[,] there is a possibility that one's freedom or right of equality can be mutually contradictory or conflicting against others' in actual instances."⁴⁰⁶ "[I]n the framework of a modern and free society, the regulation of such conflicts is entrusted as a general rule to private self-government and the law will intervene to regulate only when the mode and extent of the infringement go beyond the socially acceptable limit."⁴⁰⁷ This same standard was applied by the courts in the exclusionary cases of the preceding section to determine whether the alleged discriminatory acts were illegal under Japanese tort law.

ii. Civil Code of Japan—Tort Law

Article 1 of the Japanese Civil Code establishes the basis for the private rights of Japanese citizens—" [t]he enjoyment of private rights commences at birth."⁴⁰⁸ Article 2 extends such rights to foreigners, with some minor exceptions.⁴⁰⁹ However, the Civil Code also sets limits to the exercise of such rights. For example, Article 90 states that an act of an individual under private law "whose object is a matter contrary to public order or good manners and customs[] is void."⁴¹⁰ "[W]hether the object [of such an] act is contrary to public order or good manners and customs is a matter to be decided by the opinion of the [c]ourt."⁴¹¹

In cases of alleged discrimination, the Civil Code offers Article 709, stating that "[a] person who has intentionally or negligently violated the right of another is bound to compensate any damages resulting in consequence."⁴¹² Article 709 is the most basic provision of the torts section of the Japanese Civil Code.⁴¹³ Article 710 further adds that whether or not "the person, liberty[,] or [honor] (reputation) of another is injured or his property rights are violated, the person who is bound to make compensation for damage in accordance with the provisions of [Article 709] must make also compensation even for damage other than that to his property."⁴¹⁴ Therefore, in the case of discrimination, the offending party must pay damages "even when the property of the other party has sustained no loss."⁴¹⁵ In addition to providing money damages, Article 710 also provides an additional remedy in the form of public apology where the injured party's honor has been offended.⁴¹⁶

How does the court determine when an act is contrary to public order or injurious to a plaintiff's dignity and honor? After analysis of the facts of the case, the judicial standard applied is to determine if the acts in question "infringe[] upon the basic freedoms or equalities of other individuals, or has the danger of doing so, and has been

judged as going beyond the limits of what is socially permissible[.]”⁴¹⁷ The Japanese Supreme Court had the following to say:

While in relations between private parties there is a possibility that one's freedom or right of equality can be mutually contradictory or conflicting against others' in actual instances. But in the framework of a modern and free society, the regulation of such conflicts is entrusted as a general rule to private self-government and the law will intervene to regulate only when the mode and extent of the infringement go beyond the socially acceptable limit.⁴¹⁸

Ultimately, however, since the standard hinges on a perception of permissible social limits, the outcome of discrimination cases will very much depend on the outlook of the judge or judges in the case.⁴¹⁹ While excluding all foreigners for fear of upsetting regular bathers at an onsen may appear to be highly socially inappropriate to one judge, it may appear to another as a reasonable decision by a business trying to deal with an influx of ill-mannered foreigners who are scaring away local customers.

iii. International Human Rights Law Applied Domestically

Article 98 of the Constitution of Japan states that “[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed.”⁴²⁰ “An overwhelming majority of [Japanese law] scholars take the view that treaties have domestic legal force in Japan.”⁴²¹ As a result, generally speaking, “litigants can invoke international law before Japanese courts.”⁴²² In fact, if there is a conflict, “[t]reaties ... prevail over statutes[.]”⁴²³ Therefore, in theory, a plaintiff alleging discrimination in Japanese courts could cite to applicable provisions of international human rights treaties in lieu of domestic law in Japan prohibiting discrimination.

“Even though international law has domestic legal force in Japan, those international human rights instruments which lack a legally binding character are not regarded as having the force of ‘law’ in Japan.”⁴²⁴ For example, the Osaka High Court has stated that “treat[ies] which require legislative procedures for its contents to be implemented ... cannot directly become a judgment norm[.]”⁴²⁵ This interpretation was applied to the CERD treaty in both the Bortz⁴²⁶ and the Arudou cases.⁴²⁷ For example, in Arudou, while the court recognized that the CERD treaty has the “force of domestic law[,] ... it regulates the relationship between the public authorities and the international responsibilities of a State, but does not directly regulate the relationships between individuals[.]”⁴²⁸

Although Japanese courts are unwilling to apply international human rights treaty provisions prohibiting discrimination directly to private disputes,⁴²⁹ "the provisions of these [treaties] may [nevertheless] be considered in the interpretation of tort law."⁴³⁰ This concept is referred to as the "indirect application" of international law.⁴³¹ One advantage to this approach is that even if the language of a treaty merely creates a political duty rather than a direct private right of action, the treaty provisions can still be used indirectly because under such an approach "[t]he legal character of the international instrument is not so important [.]"⁴³² Particularly in terms of domestic tort law, in determining which actions are void as against public policy, international human rights' provisions can be applied indirectly through the judicial interpretation of Japanese Civil Code Article 90.⁴³³ While some earlier attempts for such indirect application of treaty provisions in tort discrimination cases were unsuccessful,⁴³⁴ courts in the *Bortz* and *Arudou* cases were willing to apply such an interpretation.⁴³⁵ In both cases, the courts applied CERD provisions in the factual analysis in order to determine that the defendants' actions were discriminatory, violated public policy, and were actionable under tort law.⁴³⁶

b. Human Rights Community Observations on Japan

While the Japanese government feels that it is meeting its obligations under international human rights' treaties via existing tort remedies,⁴³⁷ a number of domestic and international observers have come to a different conclusion. There have been numerous calls on the Japanese government from various groups for the creation of a domestic anti-discrimination law. This section will briefly address recommendations from both national and international observers.

On an international level, in 2001 the Committee on the Elimination of Racial Discrimination (CERD Committee), an arm of the Office of the United Nations High Commissioner for Human Rights which oversees the implementation of the CERD treaty worldwide,⁴³⁸ issued its observations on Japan.⁴³⁹ Although the CERD Committee recognized some "[p]ositive aspects" of the Japanese government's approach to discrimination,⁴⁴⁰ ultimately the Committee "believe[d specific legislation is] necessary to ... outlaw racial discrimination[.]"⁴⁴¹ The Ministry of Foreign Affairs of Japan's response to the CERD Committee report was decidedly "defensive"⁴⁴² in tone, taking issue with many of the Committee's findings and generally disregarding the large-scale recommendations.⁴⁴³

Following the CERD Committee's report, Doudou Diène, the United Nation's Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination,

Xenophobia, and Related Intolerance, issued a report on Japan in 2006.⁴⁴⁴ In his report, "[a]fter having collected and analy[z]ed the views of all parties concerned,"⁴⁴⁵ Diène "reached the conclusion that racial discrimination and xenophobia do exist in Japan[.]"⁴⁴⁶ As a result, Diène strongly recommended that the Japanese government "adopt[] ... a national law against racism, discrimination, and xenophobia[.]"⁴⁴⁷ While the publication of Diène's report was followed by a flurry of criticism and support in Japan, the government made no immediate moves to follow the recommendations.⁴⁴⁸

In addition to foreign pressure on Japan to create an anti-discrimination law, there has also been pressure from domestic groups. For example, in 2004 the Japanese Federation of Bar Associations (JFBA) published a "Declaration Seeking the Building of a Harmonious Multiethnic, Multicultural Society, and the Enactment of Legislation for the Basic Human Rights of Non-National and Ethnic Minorities."⁴⁴⁹ In this report, considering in part the denial of entry in "shops and restaurants" for foreigners,⁴⁵⁰ the JFBA recommended that the national government "[i]ntroduce legislation to ban racial discrimination[.]"⁴⁵¹ A similar request was made by the Japanese Civil Liberties Union (JCLU) in 2005.⁴⁵² In its recommendation for legislation, JCLU proposed a law that not only prohibits discrimination but also "[i]mpos[es] criminal sanctions" for violations.⁴⁵³

c. Efficacy of Creating New Anti-Discrimination Legislation

Considering the chorus of voices calling for an anti-discrimination law in Japan, it would seem natural that such a law would at least have been considered on a national level. After all, anti-discrimination laws are quite common in the developed world. This section will discuss the possibility of Japanese anti-discrimination legislation and explore the benefits and pitfalls of such a solution for the problem of racial discrimination in Japan.

i. The Possibility of an Anti-Discrimination Law in Japan

A national law addressing discrimination has in fact already been considered by the Japanese legislature.⁴⁵⁴ A draft of a law known as the Human Rights Protection Bill was submitted to the legislature originally in 2002.⁴⁵⁵ Subsequently, the draft was dropped in 2003, nearly re-submitted in 2005, and ultimately delayed until at least 2007.⁴⁵⁶ The main reason for the uncertainty has been a lack of legislative consensus regarding various controversial provisions.⁴⁵⁷

The Human Rights Protection Bill draft begins by prohibiting "unjust discrimination," taking a flexible approach to discrimination similar to that of the

judiciary.⁴⁵⁸ One of the draft's chief means of achieving this goal is a series of provisions that propose to establish a Human Rights Commission under the auspices of the Minister of Justice.⁴⁵⁹ The Commission's principal responsibilities would be to receive and remedy human rights' grievances and to generally promote human rights' concerns.⁴⁶⁰ For the latter responsibility, the bill provides for a veritable army of Human Rights Commissioners, whose duties are to "disseminate the philosophy of respect for human rights[,] " "[t]o endeavor[]r to promote private activities for the protection of human rights[,] " and "[t]o provide counseling on human rights," amongst others.⁴⁶¹

Upon presentation of a specific discrimination claim, the Commission investigates the accusation⁴⁶² employing broad powers of inquiry.⁴⁶³ If discrimination is found, the Commission may apply any of a series of remedies.⁴⁶⁴ General remedy powers include counseling of the victim, providing guidance to those individuals involved in the discrimination, and so on.⁴⁶⁵ For certain types of serious discrimination, the Commission also has the power to initiate mediation or arbitration,⁴⁶⁶ issue recommendations and publish such recommendations if the offender fails to comply,⁴⁶⁷ and in some cases even initiate legal action against the offender.⁴⁶⁸ Should legal action be initiated, however, no special powers or remedies are granted to the Commission.

Despite the fact that the Human Rights Protection Bill does not per se prohibit racial discrimination, it has nevertheless garnered some degree of support.⁴⁶⁹ It has also received severe criticism from a wide array of sources. For example, on one hand, Amnesty International has argued that to be effective the Human Rights Commission must be autonomous and distinct from the Ministry of Justice.⁴⁷⁰ On the other hand, others have criticized the draft as defining human rights' violations too broadly, for providing overly extensive powers of investigation, and for failing to establish a provision that would prohibit non-nationals from sitting on the Commission.⁴⁷¹

While the creation of a national anti-discrimination law is certainly one approach, another option would be the establishment of a similar local ordinance. In 2005, for example, the Tottori prefecture "approved an ordinance ... that [would] ... protect people from racial discrimination and other human rights violations[,] " a first for Japan.⁴⁷² Similarly to the national law draft, the Tottori ordinance "establish[ed] a five-member committee to deal with complaints about rights violations."⁴⁷³ After investigation, the committee could advise offenders to remedy their actions and, should compliance be lacking, the committee may "disclose the names of the alleged violators."⁴⁷⁴ Additionally, the committee has the power to levy fines of up to 50,000 yen.⁴⁷⁵

Although the Tottori ordinance perhaps showed a promising start, it did not do so without criticism. For example, some claimed that the law gave too much arbitrary

power to the committee in determining which acts constitute human rights violations.⁴⁷⁶ Following the ordinance's enactment, however, came a "deluge" of criticism and concern from citizens and the media.⁴⁷⁷ In addition to the previous complaints, many feared that the disclosure provisions could infringe on the right to privacy and granted too much judicial power in an administrative arm of the government.⁴⁷⁸ Ultimately, these criticisms became too much for the prefecture and in March of 2006, "the Tottori Prefectural Assembly voted unanimously to suspend the ordinance indefinitely."⁴⁷⁹

ii. Preference for a Consensus-Building Model

Based on the above-mentioned examples, an argument could be made that Japan is not ready for a law prohibiting racial discrimination or even one providing more serious human rights oversight. Could this in part be based on a cultural preference not for legislation or litigation but rather for an alternative dispute resolution model? This section will explore the idea that the Japanese would prefer to resolve the problem of racial discrimination through consensus-building rather than taking a more hard-line approach.

Regardless of the feelings of Japan as a whole, the Japanese government clearly does not see legislation as the appropriate solution to the problem of discrimination. In general, "[t]he attitude of [the Japanese government] towards law-making and supervision in [the area of human rights] is conspicuously defensive in nature."⁴⁸⁰ In regards to the exclusion of foreigners from private businesses, the government has stayed true to this general nature. For example, when Ana Bortz called upon the government to create an anti-discrimination law following the Bortz decision, the Hamamatsu mayor responded by saying:

I do not intend to legislate such an ordinance, but I do agree that racial discrimination should not be tolerated. I will make every effort to eliminate it short of legal enforcement. As for causes of racial discrimination, I think that Japanese people may not be used to interacting with foreigners because they have long lived in an island country. Therefore, I believe that [] if the Japanese come to know well about foreign residents in Hamamatsu, their ideas and their activities, this will eventually lead to better understanding of them among Japanese.⁴⁸¹

Time and time again, this same approach was mirrored in the efforts of the Otaru government in the lead-up to the Otaru Onsen lawsuit. Otaru's first official response to a complaint about the exclusionary onsen indicated only a willingness to "coordinate efforts with other related administrative organs and ask again and again that

management improve th[e] situation [,]" despite "sincere[] regret" about the hurt feelings of those who had been excluded.⁴⁸² An Otaru City Assemblyman was unwilling to take action without first "understand[ing] public opinion."⁴⁸³ The Otaru mayor stated more bluntly that discrimination against foreigners "is not a problem that can be solved by ... establishing an ordinance."⁴⁸⁴ In response to pressure, the governor of Hokkaido responded:

We do not believe that establishing an ordinance hastily patched together without the input of each party to the dispute is the best way to reach a solution. So we believe it is necessary to start getting input from every city, town, and village, in solidarity with those affected, and from now on take this up prudently with a view to reaching a solution.⁴⁸⁵

According to Japan's Justice Ministry, "discrimination is 'a matter of the heart' and cannot be solved through legal remedies."⁴⁸⁶ Following this general principle, Vice Justice Minister Kono stated in 2006 that "[e]ven if [the Japanese government] were to pass [a national law outlawing racial discrimination], Japanese attitudes towards foreigners wouldn't change. It's more important to change the culture of Japanese society to one that is accepting of foreigners."⁴⁸⁷ The general Japanese preference for gradualism as a vehicle for societal change is typified by the Japanese aphorism "Don't awaken the sleeping child."⁴⁸⁸ One commentator has stated that this statement "reflects a widespread belief that meaningful change must be shaped by evolution, rather than revolution, through which the public builds a consensus."⁴⁸⁹

"From administrative guidance to trade association cartels, informal, consensual methods of regulation and coercion have seemed to constitute the predominant mechanism of social and economic ordering" in Japan.⁴⁹⁰ The "extent of [Japan's] dependency"⁴⁹¹ on consensus results from Japan's fundamental understanding of its own "communitarian orientation."⁴⁹² "[I]n Japan, the sense of community ... has required that power be widely shared" because "communities are best maintained by sharing power as well as gains."⁴⁹³ As a reflection of this distribution of power, a consensus-based dispute resolution model gives "each participant a voice in decisions[.]" as opposed to "[m]ajoritarian rule, [which] empowers only those who hold the voting balance."⁴⁹⁴

While consensus-building may be a "cumbersome" process,⁴⁹⁵ it is nevertheless regularly employed on a small scale in the Japanese courts in the uniquely Japanese judicial format known as conciliation.⁴⁹⁶ Conciliation is a dispute settlement method that

predates the introduction of Western legal concepts and involves a judge and two community members whose purpose is to encourage voluntary compromise.⁴⁹⁷ Conciliation, as opposed to direct litigation, is so favored by the Japanese government that when conciliation was formalized into the modern Japanese judicial system in 1951, it was determined that "the judiciary's primary function ... is to encourage conciliation."⁴⁹⁸

In addition to the mandate to the Japanese judiciary, there appear to be elements within Japanese culture that also seek to avoid direct litigation,⁴⁹⁹ although this should not be read to indicate that litigation is necessarily uncommon.⁵⁰⁰ However, regardless of how common litigation actually is in Japan, there is nevertheless a general belief that "good people neither trouble nor are troubled by the law."⁵⁰¹ Feelings in this regard are certainly not diminished when the source of the litigation in question is a claim of discrimination. For example, an official of the Tokyo Metropolitan Government's Foreign Residents' Advisory Center specifically advised against bringing suit to combat discrimination.⁵⁰² This sentiment was repeated by a spokeswoman of the Tokyo Bar Association, who stated that "Filing anti-discrimination lawsuits is not the way these problems are solved in Japan."⁵⁰³ Indeed, "virtually all discrimination suits are settled out of court[.]"⁵⁰⁴

A Japanese disinclination to see litigation or legislation as the solution for racial discrimination does not however mean that the Japanese are therefore disinclined to solve the problem altogether. A powerful but informal society-based set of rules of "conduct which function[] for the maintenance of the social order" exists in Japan and is referred to as *giri*.⁵⁰⁵ The preference for employing the rules of *giri* for the resolution of private disputes regarding discrimination has even been recognized by the Japanese Supreme Court, at least where the discrimination in question is not altogether unreasonable.⁵⁰⁶ *Giri* can be defined as the "duty ... of a person who is bound to behave in a prescribed way toward a certain other person."⁵⁰⁷ Reflecting a traditional disinclination to litigate, the rules of *giri* prevent a wronged individual from demanding fulfillment of a social obligation; rather resolution is based on self-enforcement, as required by societal notions of honor.⁵⁰⁸ There is a fear that if legislation attempts to penetrate the honor-bound duties of mutual obligation governing interpersonal relationships, "execution [of *giri*] would no longer depend on the mental attitude of the person under the obligation" and the social order based on mutual self-enforcement might collapse.⁵⁰⁹

The above commentary is not meant to suggest, however, that the rules of *giri* are "something static."⁵¹⁰ Rather, *giri* "is dynamic and constantly changing[.]"⁵¹¹ As

"Japanese attitude[s] ... continue to become more Westernized[,]”⁵¹² it is natural that the social customs demanded by the rules of *giri* will likely eventually grow to encompass the self-enforcement of anti-discrimination norms. In this regard, Japanese governmental efforts to push for societal consensus that discrimination against foreigners is undesirable, in place of simply legislating such a norm, can be seen as an effort to gradually reach the same end as legislation but at the same time uphold traditional Japanese modes of self-regulation.

Furthermore, some commentators have warned that pressure from outsiders for the immediate creation of an anti-discrimination law could ultimately have a harmful effect, such as “foster[ing] further resentment, entrench[ing] opposition, and even promot[ing] a backlash against those already present in Japan.”⁵¹³ Gregory Clark, an Australian long-time resident of Japan and commentator on Japanese society, has pointed out that despite some “ugly” “anti-foreign sentiment[,]” “Japan can be remarkably open and fair.”⁵¹⁴ According to Clark, “[o]ver the years, the Japanese have evolved a value system that for all its faults has created the advanced and reasonably stable society that most [foreigners in Japan] have come to enjoy.”⁵¹⁵ “To demand that Japanese observe [a Western] value system, while pouring scorn on [the Japanese value system],” he states, “is the worst kind of racism.”⁵¹⁶

iii. Analysis

There are many attractive elements of Japan's traditional consensus-building approach as applied toward the resolution of racial discrimination. Hamamatsu's mayor is probably right to suggest that a gradual approach, relying on time and exposure to foreigners, will do more to cure the root cause of discrimination than an anti-discrimination law.⁵¹⁷ The Sapporo High Court, in the *Arudou* case, was correct to point out that “[e]ven if Otaru City [had] officially declared that racial discrimination is illegal, ... it is unclear that th[is] measure[] would have had any effect in stopping this case of refusals.”⁵¹⁸ Most would agree that a nation that disfavors discrimination at its core is preferable to one that merely avoids engaging in discrimination due to the requirements of law.

Be that as it may, there are nevertheless elements of the “gradual approach [that] warrant[] critical examination.”⁵¹⁹ Chiefly, under this approach “victims of discrimination must internalize their grievances and patiently await future improvements” without any realistic or reliable timetable.⁵²⁰ Should someone experience racial discrimination, which can understandably be a humiliating experience, Japanese law is not necessarily on the victim's side.⁵²¹ If the victim decides to bring a civil suit,

there is no guarantee of victory.⁵²² Although McGowan was able to present arguably convincing evidence of racial discrimination, for example, he nevertheless lost at the trial level and only prevailed upon appeal.⁵²³

Even before deciding whether or not to bring suit, one must consider that litigation in Japan can be particularly expensive. "[P]laintiffs ... must pay large retainers for attorneys' fees and filing fees at the beginning of the case."⁵²⁴ For example, McGowan's complaint requested 5.5 million yen in damages,⁵²⁵ but typical attorney fees can range from 7 to 14 percent of such an amount.⁵²⁶ Furthermore, court costs for such a lawsuit would amount to 27,500 yen.⁵²⁷ If attorney fees are set at 14 percent, even at the district court level, McGowan would be faced with 797,500 yen out-of-pocket costs. McGowan's award, however, was only 350,000 yen, and he was granted that only on appeal.⁵²⁸ Although Bortz and the plaintiffs in the Otaru Onsen case were awarded more, their personal risk of loss was nevertheless great. It is not surprising, then, that most discrimination cases, if pursued at all, are settled out of court.⁵²⁹ As a result, such cases are unlikely to receive much national attention, if any.

On the one hand, it cannot be denied that the population of foreigners in Japan is on the rise, in an apparently continuing trend.⁵³⁰ As a result, most Japanese are bound to have some degree of increased exposure to non-Japanese in their day-to-day lives. However, on the other hand, only the rarest cases of discrimination against foreigners receive national attention and at the same time foreigners are increasingly represented as a chief source of elevating Japanese crime in the media.⁵³¹ As mentioned previously, polling has indicated that the Japanese are evenly divided on whether foreigners are a good or bad influence on Japan.⁵³² Considering this, there seems to be little motivation for the Japanese to open themselves up to the kind of meaningful interaction with foreigners that could lead to diminished prejudice. In other words, the gradualism approach could end up being very gradual indeed.

Since the Otaru Onsen case, Debito Arudou has been planning a new series of discrimination suits, which aim to find the national government civilly liable for failing to act on the political duty required by international human rights' treaties.⁵³³ This suit aims to take advantage of new Supreme Court precedent, which holds that "the lack of a law upholding constitutionally guaranteed rights is now considered legally-actionable negligence [.]"⁵³⁴ This Supreme Court decision overturned old case law which the High Court had used in defense of Otaru in the Otaru Onsen case.⁵³⁵ The ultimate goal, of course, is to add the voice of the judiciary to the chorus calling for anti-discrimination legislation in Japan.⁵³⁶

Before dismissing the idea of a new human rights law in Japan because of arguments that it would be disrespectful to Japan's traditional culture, it is important to first consider the likely effect of such a law. Would it necessarily be as broad as critics fear? Analysis of the works of John Owen Haley, an influential Japanese legal scholar, suggests otherwise.

Haley is arguably most well-known for his book *Authority Without Power: Law and the Japanese Paradox*.⁵³⁷ In it, Haley describes a pervasive system in Japan of extensive governmental authority to legislate but a "remarkably weak" "capacity to coerce and compel[.]"⁵³⁸ For example, Japanese courts lack "judicial contempt powers or the usual penal analogies found in most continental legal systems," and administrative officials are "rarely equipped ... with effective coercive powers." In fact,

[f]or administrative officials, the consequence is the necessity to obtain assent by those affected in the formulation of public policies and to bargain for compliance in their implementation. Japanese judges ... similarly recognize that compliance with legal rules, and even court orders, is more voluntary than coerced. Hence, they too seek consensual responses in law enforcement.⁵³⁹

Due to this dichotomy, "legal sanctions [functionally] are remarkably weak in Japan as compared to either common law or other civil law systems."⁵⁴⁰ As a telling example, Japan's Equal Employment Opportunity Law merely imposes a "'duty to endeavor' not to discriminate" against women, while "conspicuously lack[ing real] prohibitory language[.]"⁵⁴¹

However, that is not to suggest that legislation has little effect on Japanese society. Rather, "[l]aw [can serve to] structure[] the [everyday] behavior of people in Japan[.]"⁵⁴² This is possible within the context of traditional self-regulation of interpersonal relationships because "formal law making and law-enforcing processes—whether legislative, bureaucratic, or judicial—function in large measure as consensus-building processes rather than avenues for command and coercion."⁵⁴³ Therefore, so long as there is sufficient "adequacy of processes for creating consensus" in the legislative process,⁵⁴⁴ "social recognition that legal rules do reflect consensus[] gives them a special influence."⁵⁴⁵ In short, laws can "serve[] as a means for legitimating norms[,] both shap[ing] and reflect[ing] consensus."⁵⁴⁶

With an adequate legislative process, a new law prohibiting racial discrimination could prove most effective not in direct enforcement, but rather by working to change the rules of *giri* in regards to interpersonal relations with foreigners. While such a law would not likely change hardened minds, it could nevertheless work to encourage

meaningful interaction between Japanese and foreigners. For example, if prohibition of racial discrimination were incorporated into the rules of *giri*, as encouraged by consensus-reflecting legislation, honor and self-regulation would require that nearly all exclusionary Japanese Only signs would be brought down voluntarily. By encouraging the Japanese not to build walls between themselves and foreigners, the resulting interactions will likely go a long way toward building a mutual understanding.

Conclusion

Most of Japan's leadership recognizes that racial discrimination within its borders reflects poorly on the nation and would certainly like to see it stopped. So too would the many foreigners who experience discrimination at the hands of prejudicial private business owners. The question, then, is not whether anti-discrimination measures are necessary in Japan, but rather which measures would be both the most effective and the least disruptive to the traditional Japanese social order at the same time. Although many would argue that anti-discrimination legislation would be unacceptably damaging to preferred traditional dispute settlement methods and for Japanese society as a whole, analysis of the function and role of law in Japanese society suggests that such legislation might be most effective by subtly working to change traditional rules of conduct rather than by jarring traditional rules of conduct via direct enforcement.

At the same time, some effective and reliable means of combating blatant discrimination would surely be welcomed by discrimination victims who had been told again and again by society that it is best not to upset the delicate social balance by seeking justice against individuals unwilling to self-regulate their prejudicial behavior. Furthermore, it is important not to forget that such legislation could also greatly benefit Japan's traditional minorities, such as the Ainu, Burakumin, and *zainichi* Koreans, for whom the approach of gradualism has not sufficiently alleviated the suffering they have experienced due to discrimination.

Ultimately, the most difficult challenge in drafting an effective anti-discrimination law would be doing so with a sufficiently adequate appearance of consensus-building in the legislation process. Realistically, such a challenge would likely result in a law more similar to the short-lived Tottori ordinance, creating modest human rights oversight rather than the sharp distinctions and heavy sanctions found in the anti-discrimination laws of most developed countries. Nevertheless, even a committee like the one in Tottori can have teeth, albeit somewhat dulled, with which to combat discrimination amongst private individuals when discriminating individuals are unwilling to recognize the evolved social consensus prohibiting discrimination that the

new law would help to build. Undoubtedly, discriminatory signs would gradually come down,⁵⁴⁷ discrimination victims could seek redress, and traditional social customs would continue to change. This would, at least, be a step in the right direction.

Footnotes:

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- ¹ See DEBITO ARUDOU, *JAPANESE ONLY—THE OTARU HOT SPRINGS CASE AND RACIAL DISCRIMINATION IN JAPAN* 27-30 (2d ed. 2006) The title, "Japanese Only," refers to the exclusionary sign at Yunohana and many other establishments around Japan. It is used here with kind permission of Mr. Arudou.
- ² See ARUDOU, *supra* note 1, at 30; see also Mark Magnier, *THE WORLD: Japanese Court Ruling Favors Foreigners; Bathhouse Must Pay Three Men Who Were Denied Entry; Decision Is Called "Significant" in a Nation that Tolerates Discrimination*, *L.A. TIMES*, Nov. 12, 2002, at 3.
- ³ See ARUDOU, *supra* note 1, at 30.
- ⁴ See *id.* at 32; see also Zal Sethna, *Otaru Bathhouse Ordered to Pay 3; Court: Ban on Foreigners Discriminatory*, *THE DAILY YOMIURI* (Tokyo), Nov. 12, 2002, at 2 (revealing that non-Japanese individuals were denied access to the bathhouse because they were considered foreigners).
- ⁵ See ARUDOU, *supra* note 1, at 34.
- ⁶ See U.N. Econ. & Soc. Council [ECOSOC], *Comm. on Human Rights, Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, ¶ 11, U.N. Doc. E/CN.4/2006/16/Add.2 (Jan. 24, 2006); see also Eric Johnston, *Would Permanent UNSC Seat Beget More Responsible Japan?* *JAPAN TIMES* (Tokyo), Dec. 4, 2004 at 1 (Japan "is the only advanced industrial country that does not have specific domestic legislation outlawing [racial] discrimination")
- ⁷ See *KENPO*, art. 14.
- ⁸ See *Arudou v. Yunohana* (Sapporo D. Ct., Nov. 11, 2002), reprinted in ARUDOU, *supra* note 1, at 407; see also Hiroko Hayashi, *Women's Rights as International Human Rights: Sexual Harassment in the Workplace and Equal Employment Legislation*, 69 *ST. JOHN'S L. REV.* 37, 60 n.5 (1995) (commenting that Japanese courts have read a state action requirement into Article 14 of the Japanese Constitution, which prohibits discrimination).
- ⁹ See Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 *U. Pa. J. Const. L.* 415, 419-20 (1999).
- ¹⁰ *Arudou v. Yunohana* (Sapporo D. Ct., Nov. 11, 2002), reprinted in ARUDOU, *supra* note 1, at 407.
- ¹¹ See Matthew R. Hicks, *Note and Comment, Japanese-Auto Products v. BBS—A Threat to Exacerbate U.S.-Japanese Trade Relations?* 19 *LOY. L.A. INT'L & COMP. L. REV.* 479, 499 (1997) (noting that Japan's private businesses serve as market barriers to foreigners). Cf. Jay L. Eisenstat, *Comment, The Impact of the World Trade Organization on Unilateral United States Trade Sanctions Under Section 301 of the Trade Act of 1974: A Case Study of the Japanese Auto Dispute and the Fuji-Kodak Dispute*, 11 *EMORY INT'L L. REV.* 137, 160 (1997) (listing private Japanese automotive businesses and the Kodak business as examples of private businesses that have prevented foreigners from entering). But see *Japanese Firms Eye Oilsands*, *CALGARY SUN* (Alberta), Jan. 14, 2006, at 53 (asserting that Japan's private oil businesses are seeking diversity).

- ¹² See Claire J. Hur, Comment, Returnees from South America: Japan's Model for Legal Multiculturalism? 11 *PAC. RIM L. & POL'Y J.* 643, 686 (2002); Kevin Yamaga-Karns, Note, Pressing Japan: Illegal Foreign Workers Under International Human Rights Law and the Role of Cultural Relativism, 30 *TEX. INT'L L.J.* 559, 560 (1995).
- ¹³ See MIE FUJIMOTO, JAPAN CIVIL LIBERTIES UNION, PRESENTATION BY THE JAPAN CIVIL LIBERTIES UNION FOR MR. DOUDOU DIENE, THE SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE 4-5 (July 6, 2005), available at http://www.jclu.org/katsudou/Special_Rapporteur.pdf (showing JCLU's pressure for change regarding discrimination in Japan); see also JAPAN FED'N OF BAR ASS'NS, DECLARATION SEEKING THE BUILDING OF A HARMONIOUS MULTIETHNIC, MULTICULTURAL SOCIETY, AND THE ENACTMENT OF LEGISLATION FOR THE BASIC HUMAN RIGHTS OF NON-NATIONAL AND ETHNIC MINORITIES (Oct. 8, 2004), available at <http://www.nichibenren.or.jp/en/activities/statements/20040808.html> (outlining the Japan Federation of Bar Associations' efforts to persuade the national and local Japanese governments to pass ordinances that prevent discrimination).
- ¹⁴ See International Movement Against All Forms of Discrimination and Racism [IMADR], Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan, ¶¶ 2-3, CERD/C/58/MISC.17/REV.3 58TH SESSION 6 (Mar. 23, 2001), available at <http://www.imadr.org/old/geneva/cerd.2001.japan.html> (illustrating how the committee has exerted itself in combating the evils of racial discrimination in Japan); Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 11.
- ¹⁵ CIA, *The World Factbook 2006—Japan* (Feb. 8, 2007), available at <https://www.cia.gov/cia/publications/factbook/geos/ja.html>.
- ¹⁶ LAWRENCE W. BEER & JOHN M. MAKI, *FROM IMPERIAL MYTH TO DEMOCRACY — JAPAN'S TWO CONSTITUTIONS, 1889-2002* 142 (Univ. Press of Colorado 2002); see also Douglas W. Cassel, Mass Incarceration: Perspectives on U.S. Imprisonment: An International Perspective, 7 *U. CHI. L. SCH. ROUNDTABLE* 107, 113 (2000) (illustrating that Japan has the narrowest gap between its richest and poorest citizens among countries in the "High Human Development" category).
- ¹⁷ Paul Wolfowitz, Japan, World Bank Must Tackle Poverty Together, *THE DAILY YOMIURI* (Tokyo), Oct. 10, 2005, at 4.
- ¹⁸ See Yamaga-Karns, *supra* note 12, at 571; see also Sumi Shin, Global Migration: The Impact of "Newcomers" on Japanese Immigration and Labor Systems, 19 *BERKELEY J. INT'L L.* 265, 280 (2001); Ronald E. Yates, Immigrants Knocking at Japan's Door, *CHI. TRIB.*, Mar. 13, 1988, at C5.
- ¹⁹ See *The World Factbook 2006—Japan*, *supra* note 15. See generally Kenneth L. Port, Trademark Dilution in Japan, 4 *NW. J. TECH. & INTELL. PROP.* 228, 231 (2006).
- ²⁰ See U.S. DEPT. OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES— 2005: JAPAN* (Mar. 8, 2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61610.htm>.
- ²¹ See Japan's Population Growth Rate Hit Record Low in FY 92, *JAPAN ECON. NEWSWIRE*, Aug. 12, 1993, at 1; see also MINISTRY OF FOREIGN AFFAIRS OF JAPAN, INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (FIRST AND SECOND REPORT)—HUMAN RIGHTS OF FOREIGNERS, ¶ 7 (June 1999), available at http://www.mofa.go.jp/policy/human/race_rep1/intro.html#5 (stating that Japan "does not conduct population surveys from an ethnic viewpoint").

- 22 Mark A. Levin, *Essential Commodities and Racial Injustice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understanding of the United States and Japan*, 33 *N.Y.U. J. Int'l L. & Pol.* 419, 439-40 (2001). But see Marina Hadjoannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous People Under International Law*, 8 *Chap. L. Rev.* 201, 225-26 (2005) (reporting the eventual legislative acknowledgment of the Ainu Shimpou as an ethnic minority).
- 23 See INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (FIRST AND SECOND REPORT)—HUMAN RIGHTS OF FOREIGNERS, *supra* note 21, at ¶ 7 n.3. But see Andrew Daisuke Stewart, *Kayano v. Hokkaido Expropriation Committee Revisited: Recognition of Ryukyuan as a Cultural Minority Under the International Covenant on Civil and Political Rights, an Alternative Paradigm for Okinawan Demilitarization*, 4 *ASIAN-PAC. L. & POL'Y J.* 307, 317-18 (2003) (stating that the Sapporo District Court countered the general notion that Japan is a monoethnic nation).
- 24 See Crane Stephen Landis, *Comment, Human Rights Violations in Japan: A Contemporary Survey*, 5 *D.C. L. J. INT'L L. & PRAC.* 53, 65 (1996); Mie Murazumi, *Comment, Japan's Laws on Dual Nationality in the Context of a Globalized World*, 9 *PAC. RIM L. & POL'Y J.* 415, 427 (2000).
- 25 See BEER & MAKI, *supra* note 16, at 8; KENNETH L. PORT & GERALD PAUL MCALINN, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 25 (2d ed. 2003); Morihiro Ichikawa, *Understanding the Fishing Rights of the Ainu of Japan: Lessons Learned from American Indian Law, the Japanese Constitution, and International Law*, 12 *COLO. J. INT'L ENVTL. L. & POL'Y* 245, 271-72 (2001).
- 26 Yamaga-Karns, *supra* note 12, at 571; see also Hur, *supra* note 12, at 680-81 (stating that the Japanese believe Japan to be a monoracial society and contending that the Japanese government subordinates other ethnic groups through assimilation and seclusion).
- 27 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, 514 (2001); see also Shin, *supra* note 18, at 266 (noting that Japan is the home of nearly 1.5 million foreign residents).
- 28 See BEER & MAKI, *supra* note 16, at 154-55; cf. Hiroshi Matsubara, *Prejudice Haunts Atomic Bomb Survivors*, *JAPAN TIMES* (Tokyo), May 8, 2001, at A1 (asserting that the hibakusha (atomic bomb survivors) often face discrimination within their own country due to the misunderstanding of the effects of radiation poisoning).
- 29 Levin, *supra* note 27, at 420; see also Ichikawa, *supra* note 25, at 271-72 (referring to the Ainu people as the indigenous people of Hokkaido Island, having lived there since "time immemorial").
- 30 See Levin, *supra* note 27, at 420; see also Teri Leon, *The Draft Declaration on the Rights of Indigenous Peoples: Three Case Studies*, 6 *NEW ENG. INT'L & COMP. L. ANN.* 47, 48-49 (2000) (commenting that "[a]nthropologists have yet to propose one universally accepted theory on the origin of the Ainu people").
- 31 See BEER & MAKI, *supra* note 16, at 157; Allen D. Madison, *The Context of Employment Discrimination in Japan*, 74 *U. DET. MERCY L. REV.* 187, 191-92 (1997).
- 32 See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 4.
- 33 See THE MINISTRY OF FOREIGN AFFAIRS OF JAPAN, *COMMENTS OF THE JAPANESE GOV'T ON THE CONCLUDING OBSERVATIONS ADOPTED BY THE COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION ON MARCH 20, 2000, REGARDING INITIAL AND SECOND PERIODIC REPORT OF THE JAPANESE GOV'T*, at ¶ 12 available at <http://www.mofa.go.jp/policy/human/comment0110.html> (last visited Mar. 2, 2007) (providing the Japanese government's opinion that "[s]ince there is no fixed international definition of the term 'indigenous people,' the question of whether the Ainu are actually

'indigenous people' ... needs to be examined carefully"); see also Ichikawa, *supra* note 25, at 282 (referring to Prime Minister Nakasone's statement as one that "denies the Ainu status as an indigenous people and ethnic minority").

34 The World Factbook 2006—Japan, *supra* note 15; Ainu Law Changes Status, Indigenous Question Remains, *JAPAN ECON. NEWSWIRE*, May 30, 1997, at ¶ 1.

35 See Levin, *supra* note 27, at 428.

36 See *id.* at 429 (noting that the Wajin often referred to the Ainu as barbarians). See generally Stewart, *supra* note 23, at 338 (stating that the Japanese considered the Wajin culture to be superior to the Ainu culture and scorned the latter).

37 Levin, *supra* note 27, at 429 (quoting an early description of the Ainu from the *Nihonshiki*, compiled around 720 C.E.).

38 See Levin, *supra* note 27, at 430.

39 See PORT, *supra* note 25, at 26; see also Kiyoko Kamio Knapp, *Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism*, 8 *COLUM. J. GENDER & L.* 143, 195 n.169 (1999).

40 See Levin, *supra* note 27, at 433; see also Stewart, *supra* note 23, at 338 (asserting that after the Meiji Restoration, the Japanese government made Hokkaido a Japanese prefecture in 1869).

41 See *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 22. See generally Hur, *supra* note 12, at 674 (noting the Japanese government's historical policies of dealing with ethnic minorities utilized assimilation, subordination, and exclusion, and suggesting that the Ainu were the subject of these policies).

42 Landis, *supra* note 24, at 67; see also Hadjioannou, *supra* note 22, at 224 (describing the assimilation policies that were implemented by the Japanese government).

43 Levin, *supra* note 27, at 435; see also Ichikawa, *supra* note 25, at 275 (stating that the Japanese government banned car piercing and tattooing "because these were 'savage customs' inconsistent with Japanese traditional norms").

44 Landis, *supra* note 24, at 67 (detailing the Act of the Protection of the Former Primitive Inhabitants in Hokkaido of 1899 under which the Ainu were refused the right to own land).

45 *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 23; see also Hadjioannou, *supra* note 22, at 224 (claiming that the enactment of the Act for the Promotion of Ainu Culture and Dissemination of Knowledge Regarding Ainu was a way to promote the history and culture of the Ainu people).

46 See *The World Factbook 2006—Japan*, *supra* note 15. See generally Ichikawa, *supra* note 25, at 271-72 (documenting that in 1897 the Land Disposition Act conveyed 1,830,000 hectares of Ainu land to Japanese settlers and nobility).

47 See Levin, *supra* note 27, at 438-39. See generally Leon, *supra* note 30, at 48-49 (estimating the Ainu population to be around 25,000); Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *HARV. HUM. RTS. J.* 57, 89 (1999) (commenting on the shameful decimation of the Ainu society and the disintegration of the Ainu culture).

48 *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 24 (reporting that marriage refusal is one type of the social discrimination against the Ainu). See generally Madison, *supra* note 31, at 191-92 (arguing that the Japanese society continues to discriminate against the Ainu, especially in

the context of hiring); Leon, *supra* note 30, at 48-49 (stating that although the Ainu are still discriminated against, they continue to fight for their rights).

49 See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 22; see also Leon, *supra* note 30, at 48-49 (reporting that many Ainu continue to hide their heritage for fear of discrimination).

50 See INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (FIRST AND SECOND REPORT)—HUMAN RIGHTS OF FOREIGNERS, *supra* note 21, at ¶ 7; see also Ichikawa, *supra* note 25, at 266-67.

51 See Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination, *supra* note 6, at ¶ 22; Leon, *supra* note 30, at 51.

52 See Hamano, *supra* note 9, at 479 (asserting that "the prefectural government confiscated sacred Ainu land" for the Nibutani Dam); see also Levin, *supra* note 22, at 445-48 (describing the government's plans for the dam and noting the unique Ainu character of the Nibutani village).

53 Levin, *supra* note 22, at 448 (noting the importance of culture in the Nibutani river valley); see also Kayano et al. v. Hokkaido Expropriation Comm. (The Nibutani Dam Decision), 1598 HANREI JIHO 33 (Sapporo D. Ct., Mar. 27, 1997), translated in 38 I.L.M. 394, 412 (1999) (asserting that the Nibutani area fostered Ainu poetry).

54 Levin, *supra* note 22, at 454; see also Masaya Tomizuka, Belated Recognition for Aboriginal People, DAILY YOMIURI (Tokyo), Apr. 2, 1997, at 3 (stating that the plaintiffs in the eventual challenge to the Nibutani Dam claimed that bringing suit was the only way to gain public attention for the injustices suffered by the Ainu).

55 See Kayano, 38 I.L.M. at 412 (outlining the facts and procedural history of the lawsuit).

56 See Hamano, *supra* note 9, at 479; see also Takashi Nishimura & Hajime Eguchi, Landmark Court Decision Recognizes Ainu as Indigenous Minority, MAINICHI SHIMBUN (Tokyo), Mar. 28, 1997, at 1 (acknowledging the partial failure of the District Court to fully redress the injury suffered by the Ainu community).

57 See Kayano, 38 I.L.M. at 418; Stewart, *supra* note 23, at 312-13.

58 International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by Japan on June 21, 1979) [hereinafter ICCPR]; see also Benedict Kingsbury, Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law, 34 N.Y.U. J. Int'l L. & Pol. 189, 204-6 (2001) (discussing the use of Article 27 of the ICCPR to protect indigenous peoples' cultural rights).

59 Levin, *supra* note 22, at 460-61; see also Kayano, 38 I.L.M. at 418-19 (noting that the court found that Article 13 guaranteed the plaintiffs' right to enjoy the Ainu culture).

60 KENPO, art. 13.

61 See Levin, *supra* note 22, at 462-63; see also Hadjioannou, *supra* note 22, at 225 (noting the District Court's assertion that indigenous minorities are entitled to "enhanced protection of cultural rights").

62 Stewart, *supra* note 23, at 316; see Kayano 38 I.L.M. 394, 426-27 (claiming that the Japanese government did not adequately consider the impact of the Nibutani Dam on the Ainu culture).

63 See Kayano, 38 I.L.M. 394, 428-29; see also Levin, *supra* note 22, at 465-66 (stating that the court denied plaintiffs relief because it did not want to waste the public resources already invested in the dam).

64 Compare Stewart, *supra* note 23, at 318-37 (arguing that Ryukyans would be properly classified as a minority under the ICCPR), with MINISTRY OF FOREIGN AFFAIRS OF JAPAN, COMMENTS OF THE JAPANESE GOVERNMENT ON THE CONCLUDING OBSERVATIONS ADOPTED BY THE COMMITTEE

ON THE ELIMINATION OF RACIAL DISCRIMINATION ON MARCH 20, 2000, REGARDING INITIAL AND SECOND PERIODIC REPORT OF THE JAPANESE GOVERNMENT, ¶ 2, available at <http://www.mofa.go.jp//policy/human/comment0110.html> (last visited Feb. 25, 2007) (rejecting the claim that the people of Okinawa deserve minority group status).

65 Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 6.

66 *Id.*; see also Stephanie Shapiro, *The PR Battle of Okinawa, Japan: The U.S. Military Presence Is a Constant Reminder of the Prefecture's Chronic Inability to Determine Its Own Destiny*, *BALT. SUN*, May 20, 2002, at 2A (describing the Japanese policies aimed at assimilating Ryukyans into the Japanese culture).

67 See *BEER & MAKI*, *supra* note 16, at 155; see also Gwyn Kirk & Carolyn Bowen Francis, *Redefining Security: Women Challenge U.S. Military Policy and Practice in East Asia*, 15 *BERKELEY WOMEN'S L.J.* 229, 235 (2000) (stating that Okinawans have their own culture and language and adding that Okinawans are regarded as inferior by the Japanese majority).

68 *BEER & MAKI*, *supra* note 16, at 156 (citing the opinion of Ota Masahide, former governor of Okinawa, who sees the extensive U.S. military presence in Okinawa as illustrative of the more general problem of inequality in the region); see also Chalmers Johnson, *The Okinawan Rape Incident and the End of the Cold War in East Asia*, 27 *CAL. W. INT'L L.J.* 389, 391 (1997) (arguing that Okinawans have borne the "brunt of American superpower pretensions," despite lacking participation in the decisions that have allowed U.S. forces to be based there).

69 See Ian Neary, *Political Protest and Social Control in Pre-War Japan: The Origins of the Buraku Liberation*, *HUMANITIES PRESS INT'L*, 15-16 (1989) (claiming that the caste system in Japan was first identifiable in the Tokugawa era); Frank K. Upham, *Instrumental Violence and Social Change: The Buraku Liberation League and the Tactic of "Denunciation Struggle,"* reprinted in *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 872-73* (Kenneth L. Port & Gerald Paul McAlinn eds., 2d ed. 2003); see also Harold See, *The Judiciary and Dispute Resolution in Japan: A Survey*, 10 *FLA. ST. U. L. REV.* 339, 340-42 (1982) (analyzing the historical social structures leading up to the Tokugawa era).

70 Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 6; see also Landis, *supra* note 24, at 65 (stating that the Burakamin's status as a cultural minority is rooted in their history of working in "unclean" occupations).

71 Upham, *supra* note 69, at 872-73; see also Knapp, *supra* note 39, at 170.

72 See Upham, *supra* note 69, at 872-73; see also NEARY, *supra* note 69, at 39 (describing the range of private discrimination against the Burakamin, and arguing that this discrimination was sanctioned by various public policies).

73 Burakumin literally translates to "hamlet people," a reference to the ghettos in which the former outcasts were forced to live. See MIKISO HANE, *PEASANTS, REBELS, AND OUTCASTES: THE UNDERSIDE OF MODERN JAPAN* 139 (1982); see also NEARY, *supra* note 69, at 10-11, n.3 (comparing the insult inherent in the term "Burakumin" as equivalent to the racial slurs sometimes used in the U.S.); Knapp, *supra* note 39, at 171 (describing the current social inequalities in Burakumin communities and stating that "[d]espite the abolition of the caste system in 1871, they have continued to suffer discrimination of a most pervasive and pernicious nature").

74 See Upham, *supra* note 69, at 872-73; Emily A. Su-lan Reber, *Comment, Buraku Mondai in Japan: Historical and Modern Perspectives and Directions for the Future*, 12 *HARV. HUM. RTS. J.* 297, 305 (1999) (recounting continued instances of discrimination against the Burakumin, including a Ministry of Justice "Handbook of Japanese Customs and Folkways," which referred to the Burakumin as "the lowliest of people, resembling animals," and a 1922 case of government authorized arson).

- 75 See Tony McNicol, *Color Blinded: A User's Guide to Racism in Japan*, J@PAN, INC. (Tokyo), Apr. 1, 2004, at 60; John Toler, Letter to the Editor, Law or No, the "Burakumin" Live, *JAPAN TIMES* (Tokyo), Feb. 24, 2002; see also Richard Werly, The Burakumin, Japan's Invisible Outcasts, *UNESCO COURIER*, Sept. 1, 2001, at 29 (describing that many Burakumin dislike the term "Burakumin" and prefer to use the term Dowa, which alludes to the existence of discrimination against them as a group but which, as a word, does not carry the same negative connotation).
- 76 See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, supra note 6, at ¶ 16; Reber, supra note 74, at 358 (analogizing discrimination against the Burakumin in Japan with discrimination against the African Americans in the United States, which persists despite the change of laws).
- 77 See, e.g., Editorial, Cultural Conformity Breeds Contempt, *ST. LOUIS POST-DISPATCH* (St. Louis, MO), July 24, 1989, at 2B (reporting that in November 1988, a Burakumin student "found the words 'dirty animal' scrawled on his desktop"); Tomoko Nakajima, Buraku Children and the Convention on the Rights of the Child, *BURAKU LIBERATION NEWS*, Sept. 1999, ¶¶ 9-10, available at http://blhri.org/blhri_e/news/new110/new11004.html (reporting that a second year high school student committed suicide after being routinely bullied by his schoolmates due to his Burakumin status, and that other students from Burakumin neighborhoods were also regularly bullied).
- 78 See, e.g., Mari Yamaguchi, "Burakumin" Descendants Still Suffering, *JAPAN TIMES* (Tokyo), June 5, 2004, at ¶¶ 1-3 (describing that after a daughter was rejected for a marriage due to her family's Burakumin status, the family received a letter that read "[y]ou nonhumans from the hamlets have blood that is vulgar and tainted," and the family's neighbors received letters that appeared to be sent to embarrass the family by revealing its Burakumin status); see also Christine B. Hickman, The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census, 95 *MICH. L. REV.* 1161, 1238 (1997) (claiming that the Burakumin tend to live in segregated communities and social isolation due to the discriminatory treatment they receive from fellow Japanese).
- 79 See Stephen M. Salad, Note, Discrimination from Sea to Shining Sea: Who Fares Better Under Their Respective Country's Anti-Discrimination Laws: The Burakumin of Japan or Gays and Lesbians of the United States? 20 *N.Y.L. SCH. J. INT'L & COMP. L.* 527, 550 (2000); see also Suzanna Sherry, The Pariah Principle, 13 *CONST. COMMENT.* 257, 265 (1996) (reporting that a twenty-three-year-old woman abandoned her husband and her newborn child after learning about her husband's Burakumin status).
- 80 See Taime L. Bryant, For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan, 39 *UCLA L. REV.* 109, 116-19 (1991); Madison, supra note 31, at 193.
- 81 Bryant, supra note 80, at 118; Madison, supra note 31, at 193.
- 82 Bryant, supra note 80, at 118.
- 83 See Reber, supra note 74, at 311-12; Nakajima, supra note 77, at ¶ 8.
- 84 See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, supra note 6, at ¶ 18; Reber, supra note 74, at 311-12. See generally Juan Williams, West Meets East, *WASH. POST*, Jan. 5, 1992, at W12 (estimating that 150 or more companies had been using Chimei Sokan to avoid hiring people with Burakumin status).
- 85 See Madison, supra note 31, at 192-93.
- 86 See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, supra note 6, at ¶ 21; Reber, Note, supra note 74, at 312; see also Williams, supra note 84 (reporting that 150 or more companies in Japan used Buraku lists up until 1992).

- 87 See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 15.
- 88 *Id.*; see also Madison, *supra* note 31, at 193; Reber, *supra* note 74, at n. 61.
- 89 Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 15. But see Eric Johnston, Osaka Rights Funds, "Buraku" Kingpin, Mob Enjoy Shady Ties, *JAPAN TIMES* (Tokyo), Aug. 22, 2006, at ¶ 1 (insinuating that it was possible that opinions toward the Dowa programs soured with news of misappropriation of Special Measures funds and links to organized crime).
- 90 See COMMENTS OF THE JAPANESE GOVERNMENT ON THE CONCLUDING OBSERVATIONS ADOPTED BY THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON MARCH 20, 2000, REGARDING INITIAL AND SECOND PERIODIC REPORT OF THE JAPANESE GOVERNMENT, *supra* note 64, at ¶ 3(2).
- 91 See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 16; see also William H. Lash III, Unwelcome Imports: Racism, Sexism, and Foreign Investment, 13 *MICH. J. INT'L L.* 1, 6 (1991).
- 92 BEER & MAKI, *supra* note 16, at 155 (stating that there are about 1.5 million to 2.5 million Burakumin people in Japan); Bryant, *supra* note 80, at n. 23.
- 93 See COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES —2005: JAPAN, *supra* note 20, at § 5.
- 94 See Werly, *supra* note 75; see also Reber, *supra* note 74, at n.277 (presenting that several factors contributing to the inaccuracy in the estimation of the Burakumin population).
- 95 Upham, *supra* note 69, at 872-73; see James J. Nelson, Culture, Commerce, and the Constitution: Legal and Extra-Legal Restraints on Freedom of Expression in the Japanese Publishing Industry, 15 *UCLA PAC. BASIN L. J.* 45, 78-79 (1996).
- 96 See Reber, *supra* note 74, at 331; see also Kenneth C. Wu, Note, The Protruding Nail Gets Hammered Down: Discrimination of Foreign Workers in Japan, 2 *WASH. U. GLOBAL STUD. L. REV.* 469, 477 (2003) (stating that in the 1920s, Burakumin groups devised kyudan and used forcible interrogation against people who discriminated against them).
- 97 Reber, *supra* note 74, at 331.
- 98 See Upham, *supra* note 69, at 872, 880; see also Reber, *supra* note 74, at 334 (explaining that whether kyudan was socially and legally acceptable depended on the severity of force used in particular cases of denunciation).
- 99 Upham, *supra* note 69, at 872, 880 (explaining that the judges treated kyudan defendants leniently, because the judges acknowledged that the Burakumin had no other recourse against their discriminators); see also Wu, *supra* note 96, at 477-78.
- 100 See YUJI IWASAWA, *INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW—THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW* 130 (1998); see also James Kearney, Local Public Employment Discrimination Against Korean Permanent Residents in Japan: A U.S. Perspective, 7 *PAC. RIM L. & POL'Y J.* 197, 201, 203 (1998). Naturalized Koreans, however, were registered on a segregated koseki from that of Wajin Japanese.
- 101 See Kearney, *supra* note 100, at 201, 203; see also David McNeill, The "Undigested Other": Koreans in Japan, *JAPAN TIMES* (Tokyo), Dec. 11, 2005, at ¶ 4 (discussing both voluntary and involuntary Korean emigrations to Japan during the annexation of Korea).
- 102 Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 8; see also Paul E. Kim, *Darkness in The Land of the Rising Sun: How the Japanese Discriminate Against Ethnic Koreans*

Living in Japan, 4 *CARDOZO J. INT'L & COMP. L.* 479, 481-82 (1996) (explaining how Japan attempted to destroy the Korean culture by forcible assimilation); Landis, *supra* note 24, at 67 (noting the banning of Korean media and language in both Japan and Korea).

103 McNeill, *supra* note 101, at ¶ 4; see also Kim, *supra* note 102, at 481-82.

104 IWASAWA, *supra* note 100, at 130; see also Treaty of Peace with Japan, art. 2, § a, Sept. 8, 1951, T.I.A.S. No. 2490, 3 U.S.T. 3169.

105 IWASAWA, *supra* note 100, at 130 (reporting that the Japanese government issued a "Circular Notice" stating that all Korean-Japanese would lose their Japanese nationality); see also Kearney, *supra* note 100, at 203 (detailing the stripping of Japanese citizenship from Koreans after the Treaty of Peace with Japan came into effect in 1952).

106 See McNeill, *supra* note 101, at ¶¶ 5-6. See generally Kearney, *supra* note 100, at 203.

107 See Bryant, *supra* note 80, at 124-25. "[T]he Ministry of Justice is now considering establishing a family registration system for South Koreans." *Id.* at 126.

108 See Kanako Takahara, Koreans Here Inclined to Assimilate to Dodge Racism, *JAPAN TIMES* (Tokyo), Aug. 6, 2005, at ¶ 43 (also stating that "[t]he fingerprinting system was abolished in 1999"); Kim, *supra* note 102, at 486.

109 See Takahara, *supra* note 108, at ¶ 44 (stating that Koreans were the subjects of multifarious types of discrimination that deprived them of many benefits); see also Kim, *supra* note 102, at 486-87 (acknowledging that Koreans are denied many rights and protections in Japan, as Japan has no civil rights law protecting employment rights of ethnic, racial, and national minorities).

110 See COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005: JAPAN, *supra* note 20; THE MINISTRY OF JUSTICE, IMMIGRATION BUREAU: REGISTRATION OF FOREIGN RESIDENTS, Dec. 2004, available at <http://www.moj.go.jp/ENGLISH/IB/ib-01.html>.

111 See Takahara, *supra* note 108, at ¶ 14; see also COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005: JAPAN, *supra* note 20 (detailing the reasons why Koreans do not apply for naturalization, including the fear of losing their cultural identity as well as the extensive government background checks on their economic status and degree of assimilation).

112 See Takahara, *supra* note 108, at ¶ 17; COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005: JAPAN, *supra* note 20.

113 See IWASAWA, *supra* note 100, at 139; see also COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005: JAPAN, *supra* note 20.

114 See McNeill, *supra* note 101, at ¶ 15.

115 *Id.* at ¶ 18.

116 See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 2; see also End Discrimination Against Koreans: U.N. Child Panel, *JAPAN TIMES* (Tokyo), Feb. 1, 2004.

117 See End Discrimination Against Koreans: U.N. Child Panel, *JAPAN TIMES* (Tokyo), Feb. 1, 2004; see also Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶¶ 57-58 (providing examples of discrimination against Korean children some of which are refusal to provide financial support to schools and failure to protect Korean children from assaults in public).

118 See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 30 (reporting physical violence against female Korean students after the media coverage of the abduction of

Japanese nationals by the North Koreans, which included harassment, verbal abuse, and physical violence); see also McNicol, *supra* note 75 (describing how after the media coverage of the return of Japanese abductees from North Korea, some 400 Korean-Japanese students were harassed and subjected to physical abuse).

119 McNicol, *supra* note 75.

120 Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 30; Pro-N. Korean Schools, Students Harassed Over Missiles, *JAPAN TIMES* (Tokyo), July 16, 2006, at ¶¶ 1, 6.

121 See, e.g., Kim, *supra* note 102, at 488; Takahara, *supra* note 108, at ¶ 5.

122 Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 30.

123 See John Lie, *The Discourse of Japaneseness in JAPAN AND GLOBAL MIGRATION: FOREIGN WORKERS AND THE ADVENT OF A MULTICULTURAL SOCIETY*, 70, 82 (Mike Douglas & Glenda Susan Roberts eds., 2003) (detailing the astonishment of Japanese citizens when they discovered that celebrity Yasuda Narumi was ethnically Korean); McNeill, *supra* note 101, at ¶ 6.

124 Takahara, *supra* note 108, at ¶ 48.

125 See *Pak Chong-Sok v. Hitachi*, 744 HANREI JIHO 29 (Yokohama D. Ct., 1974); see also Bryant, *supra* note 80, at 127.

126 See Bryant, *supra* note 80, at 127.

127 *Id.*

128 1531 HANREI JIHO 53 (Tokyo D. Ct., Mar. 23, 1995).

129 See *Refusing Housing "Discrimination," Rules Kobe District Court Amagasaki*, *MAINICHI SHIMBUN* (Tokyo), Jan. 25, 2006.

130 See *Chong v. Tokyo*, 49 MINSHU 2-639 (Sup. Ct., Feb. 28, 1995).

131 *Id.*; see also *Supreme Court Rejects Appeal from Koreans for Voting Rights*, *JAPAN ECON. NEWSWIRE*, Feb. 28, 1995, ¶¶ 2, 3.

132 Kearney, *supra* note 100, at 217-18 (explaining that the court based its decision on the traditional theory of national sovereignty to require civil servants to have Japanese citizenship); see also Timothy Webster, Note, *Legal Excisions: "Omissions Are Not Accidents,"* 39 *CORNELL INT'L L.J.* 435, 453 (2006) (finding that the city's rational basis for distinguishing between foreigners and Japanese nationals was the principle of national sovereignty).

133 Kearney, *supra* note 100, at 218.

134 Webster, *supra* note 132, at 451.

135 *Chong v. Tokyo*, 59 MINSHU 1 (Sup. Ct., Jan. 26, 2005) (finding that the deputy director refused to accept Chong's application because she lacked Japanese nationality).

136 *Id.*

137 *Id.*

138 *Id.*

139 Sumi Shin, *Newcomer Migrants: Implications for Japan's Administration of Social Services and Nationality*, 6 *UCLA J. INT'L L. & FOREIGN AFF.* 313, 362 (2002) (quoting Daniel Foote, *Japan's 'Foreign Workers' Policy: A View from the United States*, 7 *GEO. IMMIGR. L.J.* 707, 744 (1993)).

- 140 See PORT & MCALINN, *supra* note 25, at 30-31.
- 141 Howard W. French, "Japanese Only" Policy Takes Body Blow in Court, *N.Y. TIMES*, Nov. 15, 1999, at A1; see also Shin, *supra* note 18, at 275-76 (suggesting that due to Japan's reluctance to grant rights to foreigners, the percentage of immigrants in the Japanese population is low).
- 142 BEER & MAKI, *supra* note 16, at 155 (finding that because Japan relaxed their immigration laws in 2002, there has been a great influx of foreigners into the country); see also Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 *CAL. L. REV.* 317, 376 (1992) (showing that since the early 1990s, there has been a growing number of foreign workers arriving in Japan).
- 143 See *On a Roll; Japanese Monetary Policy*, *ECONOMIST* (London), July 8, 2006, at 67 (declaring that Japan's long era of deflation is over); see also Heather Stewart, *Rising Japan Follows Its Leader*, *GUARDIAN* (London), Sept. 18, 2005 (examining statistics of a decrease in unemployment, an increase in wages, and an increase in property prices, all suggesting an economic recovery in Japan); Jonathan Watts, *G2: The Sun Also Rises*, *GUARDIAN* (London), Nov. 14, 2005, at 8 (declaring that Japan's economy is making a comeback and is growing in many sectors).
- 144 See Stewart, *supra* note 143; see also *Yen Weakness to Continue but Japan Corporate Outlook Strong—Merrill Lynch*, *AFX INT'L FOCUS* (London), Nov. 14, 2006 (recognizing that Japan is benefiting from government deregulation and corporate restructuring).
- 145 See *Average Land Values Rise for the First Time in 14 Years*, *ASAHI SHIMBUN* (Tokyo), Aug. 2, 2006, ¶¶ 1-3 (indicating that Japanese land value rose 0.9 percent in the middle of 2006); see also *Roadside Land Price Up 0.9% on Average*, *DAILY YOMIURI* (Tokyo), Aug. 2, 2006, at 1 (finding that the increase in the average land value was facilitated by increasing land prices in three major urban areas).
- 146 See *On a Roll; Japanese Monetary Policy*, *supra* note 143 (explaining that capital expenditures will be the key factor in determining when to raise interest rates); see also *Taking a Step Back*, *CNNMONEY.COM*, Feb. 23, 2006, <http://money.cnn.com/2006/02/23/markets/stockswatch/index.htm> (suggesting that the Bank of Japan may raise interest rates because of Japan's strong economy).
- 147 Yamaga-Karns, *supra* note 12, at 560; see also *Today in Business: Japan's Jobless Rate Drops*, *N.Y. TIMES*, Dec. 26, 2006, at C2 (informing that some of Japan's largest companies are facing the most severe labor shortages in 14 years).
- 148 *Meet the New Salaryman*, *ECONOMIST* (London), Nov. 12, 2005, at 41; see also Elizabeth Peek, *Savvy Investors Look to That Other Asian Giant*, *N.Y. SUN*, Oct. 21, 2005, at 7 (finding that employment is right in manufacturing regions, such as the region in which Toyota is located).
- 149 See *Meet the New Salaryman*, *supra* note 148 (revealing that fewer births have led to a decrease in the population); see also *Japan—Estimated Population Decrease in 2005*, *MEDISTAT NEWS* (West Sussex), Jan. 19, 2006 (suggesting that in 2005, the number of deaths was expected to exceed the number of births); Junichiro Koizumi, Prime Minister of Japan, *General Policy Speech to the 163rd Session of the Diet* (Sept. 26, 2005), available at http://www.kantei.go.jp/foreign/koizumispeech/2005/09/26shoshin_e.html (finding that Japanese society faced the prospect of a serious decrease in the population).
- 150 *Survey—Japan: Visions of 2020*, *ECONOMIST*, Oct. 8, 2005, ¶ 4; see also *Panic over Low Birth Rate Spreading in World's Second-Largest Economy*, *IRISH TIMES*, May 15, 2006, ¶ 3.
- 151 *Japan: Meet the New Salaryman*, *supra* note 148, at ¶ 4; see also *54% of Firms Fear Lack of Skilled Labor*, *ASAHI SHIMBUN* (Japan), Dec. 1, 2006 (finding that a sense of labor crisis is currently already palpable in Japanese businesses).

- 152 See Japan: Meet the New Salaryman, *supra* note 148, at ¶ 10 (declaring that the age of retirement will be raised in stages from 60 to 65 to 70); see also Employers Not Keen on Plan to Raise Retirement Age to 75, *S. CHINA MORNING POST*, Feb. 3, 2005, ¶ 1 (stating that a plan to raise the retirement age to 75 has been met with scorn by employers).
- 153 See Survey—Japan: Visions of 2020, *supra* note 150, at ¶¶ 10-12; see also Yamaga-Karns, *supra* note 12, at 561 (maintaining that an increase in the use of robotics has been proposed to meet the demand for labor).
- 154 JAPAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005, *supra* note 20, at § 5; see also Yoshimi Chitose, Demographic Profiles of Brazilians and Their Children in Japan, 4 *JAPANESE J. POPULATION* 93, 97 (2006).
- 155 Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 4; see also Population Drops for First Time on Record, *CHI. TRIB.*, Dec. 22, 2005.
- 156 DECLARATION SEEKING THE BUILDING OF A HARMONIOUS MULTIETHNIC, MULTICULTURAL SOCIETY, AND THE ENACTMENT OF LEGISLATION FOR THE BASIC HUMAN RIGHTS OF NON-NATIONAL AND ETHNIC MINORITIES, *supra* note 13; see also IMMIGRATION BUREAU, MINISTRY OF JAPAN, CONTROL OF JAPANESE AND FOREIGN NATIONALS ENTERING AND LEAVING JAPAN, available at <http://www.moj.go.jp/ENGLISH/IB/ib01.html> (charting the increase in registered foreign residents in Japan from the nineties to today).
- 157 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005: JAPAN, *supra* note 20, at § 5; see also CONTROL OF JAPANESE AND FOREIGN NATIONALS ENTERING AND LEAVING JAPAN, *supra* note 156 (charting the increase in registered foreign residents in Japan from the nineties to today).
- 158 DECLARATION SEEKING THE BUILDING OF A HARMONIOUS MULTIETHNIC, MULTICULTURAL SOCIETY, AND THE ENACTMENT OF LEGISLATION FOR THE BASIC HUMAN RIGHTS OF NON-NATIONAL AND ETHNIC MINORITIES, *supra* note 13, at 3; see also Yasuo Kuwahara, Migrant Workers in the Post-War History of Japan, 2 *JAPAN LAB. REV.* 25, 25 (2005).
- 159 See Eric Johnston, Trouble Looms as Foreign Labor Floods In, *JAPAN TIMES* (Tokyo), Sept. 12, 2006, ¶ 8.
- 160 See BEER & MAKI, *supra* note 16, at 155; see also Foote, *supra* note 139, at 728-29.
- 161 See Yates, *supra* note 18; see also Yasuzo Kitamura, Evolution of Antitrafficking in Persons Law and Practice in Japan: A Historical Perspective, 4 *TUL. J. INT'L & COMP. L.* 331, 347 (2006) (contending that by the early 1990s, the number of illegal immigrants in Japan increased to nearly 300,000).
- 162 See Racism in Business Rampant: Groups, *JAPAN TIMES* (Tokyo), Apr. 21, 2000, ¶ 26; see also Yates, *supra* note 18 (declaring that an average of 50 illegal immigrants are deported every day); Ronald E. Yates, Foreigners in Japan Say Openness All Talk, *CHI. TRIB.*, Apr. 15, 1990, at C6 (stating that "22,262 foreigners were booted out of Japan [in 1989]—a 27 percent increase over 1988 and double the total of 1986").
- 163 See Shin, *supra* note 139, at 316-38. For example, presumably to scare off illegal immigrants from its facilities, one Tokyo emergency medical center posted a sign that read in English and Chinese, erroneously, "The hospital has an obligation to report to the Immigration Control Bureau." *Id.*; see also Tomoko Otake, Universal Access—If You Speak Japanese, *JAPAN TIMES*, May 9, 2006, ¶¶ 8-10 (describing the difficulties faced when attempting to access health care facilities in Japan without a basic understanding of the Japanese language).
- 164 See Shin, *supra* note 139, at 350-59 (stating that non-citizen children do not have a right to education as a matter of law); see also This Is the New Japan: Immigrants Are Transforming a Once Insular Society, and More of Them Are on Their Way, *NEWSWEEK INT'L*, Sept. 11, 2006, ¶ 1 (stating that foreigners face

difficulties with respect to education as the Japanese government offers "virtually no provisions for teaching Japanese as a foreign language to students entering the system").

165 Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 64.

166 ARUDOU, *supra* note 1, at 30-43; see also Dave Aldwinckle, Photo Substantiation for Otaru Lawsuit, available at <http://www.debito.org/photosubstantiation.html> (showing the "Japanese Only" sign at the onsen in Wakkanai).

167 ARUDOU, *supra* note 1, at 219.

168 See *id.* at 221-22 (describing where "Japanese Only" policies were enforced for certain times of the day); see also Dave Aldwinckle, The Spread of "Hikokusaika," available at <http://www.debito.org/onsennyuuyokutimes041300.html> (finding that an onsen in Rumoi excluded foreigners between the hours of 5 P.M. and 7 P.M.).

169 Takuya Asakura, Shops Continue Discriminatory Practices, *JAPAN TIMES* (Tokyo), Nov. 8, 2000, ¶ 4; see also Dialogue Leads Hokkaido Spa to Lift Ban on Foreigners, *JAPAN WEEKLY MONITOR*, Jan. 14, 2002, ¶ 6 (stating that about half of the 200 restaurants and bars in Monbetsu in Hokkaido posted "Japanese Only" signs).

170 Asakura, *supra* note 169, at ¶ 8; see also Dave Aldwinckle, The Rogues' Gallery, available at <http://www.debito.org/roguesgallery.html#Uruma> (providing discriminatory signs from all parts of Japan, including Naha, Okinawa Prefecture, and Shinjuku).

171 Peter Hadfield, Japan's Foreigners Fight Back Against Widespread Bias—They Say They're Denied Access to Loans, Baths, Bars, *USA TODAY*, Mar. 8, 2000, at 24A.

172 Willis Witter, Japanese Commonly Show Anti-Foreigner Biases; U.S. Military Latin American Settlers Targeted, *WASH. TIMES*, Sept. 18, 1998, at A15; see also Sharon Moshavi, Japanese Foreigners Distrusted, Needed, *BOSTON GLOBE*, Nov. 19, 2000, at ¶ 7 (contending that while the "Japanese Only" signs may be intended for a particular group, such as Russians or Chinese, banning all foreigners is seemingly more neutral).

173 Witter, *supra* note 172 (also mentioning that after complaints, the sign was removed); see also Japan: Neikajin, Foreign Students, 5 *MIGRATION NEWS*, ¶ 5 (1998), available at http://www.migration.ucdavis.edu/mn/more.php?id=1656_0_3_0 (noting that the City of Azuma closed its pool to foreigners because of two incidents of "horseplay" involving people with "brown skin").

174 See Korean Students Pay More on JR Trains, *DAILY YOMIURI* (Tokyo), Aug. 26, 1992, at 2 (stating that Japan Railways' justification for the differences in price was that it categorizes Korean High Schools under the abnormal "miscellaneous" educational institutions).

175 See Vanessa Mitchell, Travel Firm Rapped over Foreign Ticket Policy, *JAPAN TIMES*, July 4, 2006.

176 See *id.* (noting that HIS implemented its pricing policy because many foreigners purchase round trip tickets and do not use the return portion of the ticket).

177 FUJIMOTO, *supra* note 13, at 2; see also Arudou Debito, Lawsuit-Free Land a Myth, *JAPAN TIMES* (Tokyo), Jan. 3, 2006.

178 See Hadfield, *supra* note 171.

179 *Id.*

180 See FUJIMOTO, *supra* note 13, at 2.

- 181 Id. The District Court decision was affirmed by the Tokyo High Court in 2002, and his appeal was refused by the Japanese Supreme Court in 2004, "on the grounds that his case was not a constitutional issue." See ARUDOU, *supra* note 1, at 189.
- 182 See, e.g., Knapp, *supra* note 39 (asserting that many women are denied career opportunities in Japanese international enterprises because of their perception as caregivers).
- 183 See Madison, *supra* note 31, at 190.
- 184 See Robert Guest, A Case of Racial Discrimination? An Indian Worker Sues His Japanese Employer, *AM. CHAMBER OF COM. IN JAPAN J.* 37-39 (Nov. 1992) (noting that this was the first lawsuit ever brought in a Japan court for employment discrimination).
- 185 Indian Sues Mitsubishi for Race Bias, *DAILY YOMIURI* (Tokyo), July 22, 1992, at 2. Sinha eventually brought his case to court, but lost at both the District and the High Court level. See generally Kamal Sinha, *Mitsubishi Lawsuit Ends*, <http://www.kamalsinha.com/mitsubishi/end.html> (last visited Mar. 30, 2007).
- 186 See Foreign Teachers Announce Strike, *JAPAN TIMES* (Tokyo), June 20, 1998.
- 187 Alan Brender, Foreign Lecturers Bear the Brunt of Budget Pains at Japanese Universities, *CHRON. HIGHER EDUC.* (Wash., D.C.), Mar. 23, 2001, at 45.
- 188 See *id.*
- 189 Yates, *supra* note 162.
- 190 See *id.*; Hadfield, *supra* note 171; Yamaga-Karns, *supra* note 12, at 574-75.
- 191 See Madison, *supra* note 31, at 187 (noting that this event is known as the "Namamugi Incident").
- 192 Yates, *supra* note 162.
- 193 Hadfield, *supra* note 171.
- 194 See Johnston, *supra* note 159 (noting the steady increase of foreign laborers in Japan).
- 195 Hadfield, *supra* note 171.
- 196 See Yamaga-Karns, *supra* note 12, at 571 (noting the severe lack of manual laborers in Japan that brings many foreign workers there).
- 197 See Reber, *supra* note 74, at 305.
- 198 See Bryant, *supra* note 80, at 111.
- 199 *Id.* at 164.
- 200 Landis, *supra* note 24, at 61 (explaining that Japan grants citizenship based on the "law of blood" not based on the "law of the soil"); see also Hur, *supra* note 12, at n.34.
- 201 See *BEER & MAKI*, *supra* note 16, at 158. See generally Lash III, *supra* note 91, at 3 (suggesting reasons for Japan's disdain toward foreigners).
- 202 John Owen Haley, *Lessons from a Changing Japan*, 2 *PAC. RIM L. & POL'Y J.* 1, 3-4 (1993), reprinted in *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 40 (Kenneth L. Port & Gerald Paul McAlinn eds., 1996).
- 203 See Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 *B.C. INT'L & COMP. L. REV.* 1, 54 (2005); Watts, *supra* note 143, at 8.

- 204 See Norimitsu Onishi, Ugly Images of Asian Rivals Become Best Sellers in Japan, *N.Y. TIMES*, Nov. 19, 2005, at A1 (asserting that the "Korean Wave—television dramas, movies[,] and music from South Korea—swept Japan and the rest of Asia, often displacing Japanese pop cultural exports"); *Ultrnationalist Manga Gain Popularity in Japan as Regional Tensions Rise*, *MAINICHI DAILY NEWS* (Japan), Dec. 1, 2005, available at <http://mdn.mainichi-msn.co.jp/features/archive/news/2005/12/20051201p2g00m0fe022000c.html> (discussing tensions between Japanese self-identity and China's impressive economic growth).
- 205 See Onishi, *supra* note 204 (attributing the emergence of the full force Japanese/Korean conflict to Korea advancing further than Japan in the 2002 World Cup). But see *Embrace the World's Game*, *DENV. POST*, June 17, 2006 at C13 (alleging that co-hosting the 2002 World Cup was the culmination of Japan and Korea overcoming years of conflict).
- 206 Magnier, *supra* note 2, at 3; see also 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, 773 (2001) (reiterating the fear many Japanese have that unskilled foreign workers will lead to an increase in the crime rate).
- 207 Editorial, *Time to End Discrimination Against Foreigners*, *DAILY YOMIURI* (Japan), Dec. 14, 2004 at 4, available at 2004 *WLNR* 13984706 (quoting a postcard sent to the social welfare council in Higashinari Ward, Osaka asking for all the foreigners to be thrown out of Japan).
- 208 Yamaga-Karns, *supra* note 12, at 563 (referring to angry letters sent to Japanese government and news offices comparing foreigners to cockroaches); see also Wu, *supra* note 96, at 473 (acknowledging the Japanese fear of foreigners and proposing a way to alleviate those fears).
- 209 See Onishi, *supra* note 204; *Ultrnationalist Manga Gain Popularity in Japan as Regional Tensions Rise*, *supra* note 204 (reporting that many readers feel vindicated by Japanese comics that finally depict history from the Japanese point of view and portraying its Asian neighbors as the villains).
- 210 Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 72 (revealing that these new comics have become best-sellers in Japan); see also Kwan Weng Kin, *Japan's "Hate Comics": New Wave of Manga Spreads Disturbing Lies About Country's Past and Its Neighbours*, *STRAITS TIMES* (Singapore), Dec. 3, 2005 (finding Japanese manga such as "Hating the Korean Wave" to be very popular with Japanese youth).
- 211 Onishi, *supra* note 204.
- 212 *Id.* But cf. Michael O'Sullivan, *Manga's Powerful Feminine Mystique*, *WASH. POST*, Feb. 23, 2007, at T22 (noting that white skin in Japanese Manga usually indicates a foreigner, while Asian features depict Japanese characters).
- 213 See *Japanese Divided on Whether Foreigners Are Good Influence*, *JAPAN TIMES* (Tokyo), May 27, 2004. (finding that Japan is equally divided over whether foreigners are a good or bad influence).
- 214 Yates, *supra* note 162.
- 215 Yamaga-Karns, *supra* note 12, at 571-72.
- 216 See Hur, *supra* note 12, at n.234.
- 217 See IWASAWA, *supra* note 100, at 201-2 (describing generally the reasons why "Japanese society is relatively closed to outsiders [,]" particularly to non-Caucasians); see also Shin, *supra* note 18, at 269 (maintaining that Japan is notoriously racist and unwelcoming to foreigners).
- 218 See Kearney, *supra* note 100, at n.6; Yates, *supra* note 162.
- 219 *Tokyo Bigots; Racist Remarks About U.S. Minorities Invite a Backlash that Japan Can Ill Afford*, *NEWSDAY* (New York), Oct. 27, 1990, at 14. Around the same time, American protests forced hit book *Little Black*

Sambo, often criticized for its racially insensitive imagery, off Japanese bookshelves. See Bruce Wallace, "Sambo" Returns to Bookshelves in Japan, *CHI. TRIB.*, June 13, 2005, at 5 (noting that in 2005, the book was republished with modest success); see also Justin McCurry, Page Turner, Japanese Publisher Defies Little Black Sambo Protest, *GUARDIAN* (London), June 15, 2005, at 12 (revealing that after 17 years off the shelves, Little Black Sambo made a comeback).

220 Yates, *supra* note 162; see also 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, 135 (1991-92) (discussing the Japanese reaction to the backlash from Nakosone's statements).

221 Tokyo Bigots; Racist Remarks About U.S. Minorities Invite a Backlash that Japan Can Ill Afford, *supra* note 219.

222 *Id.* Kajiyama's "remark was followed by pained official regrets, hedged and defensive in tone." *Id.*

223 See Eileen M. Mullen, Note, Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Employment Discrimination Law, 45 *STAN. L. REV.* 725, 756 n.188 (1993); McNicol, *supra* note 75 (quoting various offensive comments made by Ishihara including accusing foreigners of bringing new crimes to Japan).

224 See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 62; Racism in Business Rampant: Groups, *supra* note 162; cf. Gregory Clark, Much Ado About Nothing? *JAPAN TIMES* (Tokyo), May 21, 2000 (asserting that the statements made by Ishihara were directed only at non-law-abiding immigrants and were justified by the recent rise in illegal activity being perpetrated by illegal immigrants).

225 See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Addendum—Mission to Japan, ¶ 62, U.N. Doc. E/CN.4/2006/16/Add.2 (Jan. 24, 2006) (prepared by Doudou Diène) [hereinafter Diène]. "The National Police Research Institute of Police Science is [now] trying to develop a DNA test to identify the race of criminal suspects who leave DNA at crime scenes." McNicol, *supra* note 75.

226 See McNicol, *supra* note 75; see also Howard W. French, Tokyo Politician's Earthquake Drill Is a Military Moment, *N.Y. TIMES*, Sept. 4, 2000, at A3 (discussing incendiary xenophobic comments made by Ishihara's administration suggesting that foreigners are responsible for committing heinous crimes in Japan).

227 Diène, *supra* note 225 (indicating that the national government has recently, however, taken some general steps to curtail off-the-cuff statements from politicians on politically sensitive issues); see also LDP Policy Initiative: No More Gaffes, *ASAHI SHIMBUN* (Tokyo), Oct. 28, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY200610270408.html> (indicating Prime Minister Shinzo Abe's reluctance to address incendiary comments made by his various Cabinet Ministers).

228 See McNicol, *supra* note 75; see also Minehiko Oda, Crimes by Foreigners Pose Challenge, *DAILY YOMIURI* (Tokyo), June 9, 1999 at 6 (detailing comments from the National Police Agency's 1998 white paper encouraging public sentiment that foreign immigration causes increased crime, such as "[c]rimes by foreigners have become a frequent occurrence ... Chinese 'snake heads,' pose a serious threat to Japan's security"); Face of the Weeklies, *MAINICHI SHIMBUN* (Tokyo), Apr. 23, 2000, at 7 (stating that the National Police Agency released statistics indicating that the number of foreigners arrested for crimes increased by 700% from 1980 to 1999, but recognizing that the National Police Agency could have just as easily cited a rise in crime among Japanese juveniles).

229 Diène, *supra* note 225, at ¶ 60.

- ²³⁰ See Kakumi Kobayashi, *Ishihara Crime Fight Serving Big Brother, Stoking Xenophobia?* JAPAN TIMES (Tokyo), Aug. 29, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20060829f2.html> (recognizing that published police statistics mislead and manipulate the public into believing that non-Japanese are more likely to commit crimes than Japanese); see also Debito Arudou, *Editorial, Published Figures Are Half the Story: Foreigner Crime Stats Cover Up a Real Cop-Out*, JAPAN TIMES (Tokyo), Oct. 4, 2002, available at <https://search.japantimes.co.jp/member/member.html?file=f20021004zg.html> (criticizing the police statistics for not taking into account the increasing foreign population or the fact that police target foreigners).
- ²³¹ See McNicol, *supra* note 75 (stating that in 2003, a police white paper began with 30 pages describing how foreign nationals have entered Japan and formed criminal gangs); see also Reiji Yoshida, *Poll Finds Growing Crime Concern*, JAPAN TIMES (Tokyo), Sept. 19, 2004, at ¶ 11 (suggesting that crime statistics, including crimes involving foreigners, have shown significant increase since the early 1990s, when Japan was believed to be the safest country in the world).
- ²³² Arudou, *supra* note 230, at ¶ 1; see also Yumiko Miyai & Yosuke Sakurai, *Special Report: Gaikokujin; Criminal Stereotype Questioned*, DAILY YOMURI (Tokyo), Apr. 19, 2002, at 1 (stating that the statistics released by the police fail to address the issue of crime by foreign nationals in a context that reflects the influx of foreigners in the nation).
- ²³³ See Kobayashi, *supra* note 230, at ¶ 5; see also Michael Hoffman, *Ishihara Sticks the Boot into Foreign Thugs*, JAPAN TIMES (Tokyo), Nov. 17, 2002, at ¶ 18 (recognizing that even in 2002, statistics showed that the rate of foreigners committing crimes was already beginning to decline).
- ²³⁴ See McNicol, *supra* note 75 (noting that when visa violations are excluded from the statistics, foreigners account for only 4% of arrests); see also Arudou, *supra* note 230 (noting that the crime rate of foreigners is inflated due to visa violations).
- ²³⁵ See Diène, *supra* note 225, at ¶ 62; see also Miyai & Sakurai, *supra* note 232 (stating that although the National Police Agency has willingly released statistics and sensationalized comments regarding the increase of crime by foreigners, it has refused to comment on whether there is, in fact, a higher crime rate among Japanese or non-Japanese resulting in few reliable studies examining the relationship between immigrants and crime in Japan).
- ²³⁶ Arudou, *supra* note 230, at ¶ 13; Ryann Connell, *Foreigners Slam "Racist" Poster in Nagano*, MAINICHI SHIMBUN (Tokyo), Feb. 22, 2001, at ¶ 1 (discussing public outrage against the posters, which were described as "blatantly racist").
- ²³⁷ Arudou, *supra* note 230, at ¶ 12; see also The Community, *Shizuoka Prefectural Police's Guidebook on "Characteristics of Crime by Foreigners Coming to Japan (Feb. 2000)"*, <http://www.debito.org/TheCommunity/shizuokakeisatsuhandbook.html> (last visited March 4, 2007) (depicting the cartoons included in the handbook). The National Police Agency was embarrassed in 1990 by a leaked internal report that characterized Pakistanis as having "a unique body odor, ... skin diseases[, and a proclivity] to lie a lot." Yates, *supra* note 162.
- ²³⁸ McNicol, *supra* note 75. The posters went on to add that "If a suspicious foreigner ... calls out to you, do not take your eyes or hands off your money or your bag." Arudou, *supra* note 230.
- ²³⁹ Connell, *supra* note 236; see also Volunteer Group, *"Discomfort from Discrimination Towards Foreigners" Demands Removal of Banners etc Distributed by Nakano Police*, MAINICHI SHIMBUN (Tokyo), Oct. 1, 2002, at ¶ 4, available at <http://www.debito.org/TheCommunity/mainichi100102.html>.
- ²⁴⁰ See Arudou, *supra* note 230, at ¶ 3 (indicating the mass media's selective reporting of statistics such as "foreigners are three times more likely than Japanese to commit crimes in groups" in order to arouse public support for the idea that rising crime is a foreigner problem). See generally Marc Lim, *Comment, The First*

Step Forward—The AIDS Dismissal Case and the Protection Against AIDS-Based Employment Discrimination in Japan, 7 *Pac. Rim. L. & Pol'y* 451, 452-56 (1998) (commenting that for years after AIDS was introduced into Japan, Japanese officials and the media treated it as a problem caused and perpetuated by foreigners).

241 Arudou, *supra* note 230, at ¶ 4; see also Miyai & Sakurai, *supra* note 232 (asserting that the Japanese media's sensationalism creates a stereotype that foreigners are more likely than Japanese to commit crimes).

242 See, e.g., Burglaries Down, But Lock-Picking Cases Up 40%, *DAILY YOMIURI* (Tokyo), Sept. 22, 2006, at ¶ 3; Howard W. French, Disdainful of Foreigners, the Japanese Blame Them for Crime, *N.Y. TIMES*, Sept. 30, 1999, at A17 (noting for example, that the Japanese media often blame Chinese residents for crimes before the facts are even known).

243 Yates, *supra* note 162.

244 Arudou, *supra* note 230, at ¶ 8; see also Howard W. French, Still Wary of Outsiders, Japan Expects Immigration Boom, *N.Y. TIMES*, Mar. 14, 2000, § A, at 1 (noting that Japanese lock companies use advertisements that explicitly link crime to foreigners).

245 See Yoshiomi Morishita, Gaikokujin; Media Seen Hindering "Internal" Globalization, *DAILY YOMIURI* (Tokyo), Apr. 19, 2002, at 7.

246 See Natsumi Mizumoto, Ethnic Minorities Hope for Better Life Post-Koizumi, *JAPAN TIMES* (Tokyo), Sept. 26, 2006, at ¶ 5.

247 Disappearing Dreams, *MAINICHI SHIMBUN* (Tokyo), Oct. 11, 1998, at 7.

248 See Witter, *supra* note 172; see also Gumma Swimming Pool Bans Foreigners, *MAINICHI SHIMBUN* (Tokyo), Aug. 15, 1998, at 14 (indicating that the Gumma pool was closed entirely to foreigners because two local families complained that their children had been touched by foreigners).

249 See Moshavi, *supra* note 172 (suggesting that public officials cited concern for the safety of children as the sole basis for the pool closing); Witter, *supra* note 172 (indicating that the inappropriate touching was merely a case of mistaken identity); Gumma Swimming Pool Bans Foreigners, *supra* note 248 (noting that state officials steadfastly maintained that the act of closing the pool was not a racist reaction, but merely a response due to concern for the safety of children).

250 See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, *supra* note 6, at ¶ 11.

251 Court Orders Damages in Discrimination Case, *JAPAN WEEKLY MONITOR*, Oct. 18, 1999, at ¶ 10 (approximately 10,000 Brazilians live and work in Hamamatsu); see also Disappearing Dreams, *supra* note 247. See generally Keiko Yamanaka, New Immigration Policy and Unskilled Foreign Workers in Japan, 66 *Pac. Aff.* 72, 76, 78-79 (1993) (explaining that Japanese-Brazilians commonly worked as subcontractors and Hamamatsu is an area with a high concentration of manufacturing subcontractors).

252 Takeyuki Tsuda, The Stigma of Ethnic Difference: The Structure of Prejudice and "Discrimination" Toward Japan's New Immigrant Minority, 24 *J. JAPANESE STUD.* 317, 319 (1998); see also Keiko Yamanaka, Ana Bortz's Law Suit and Minority Rights in Japan, ¶ 11 (Japan Pol'y Res. Inst., Working Paper No. 88, 2002), available at <http://www.jpri.org/publications/workingpapers/wp88.html>.

253 See Yamanaka, *supra* note 252, at ¶¶ 16-17; see also Takeyuki Tsuda, Transnational Migration and the Nationalization of Ethnic Identity Among Japanese Brazilian Return Migrants, 27 *ETHOS* 145, 150-51 (1999) (highlighting the "cultural distinctiveness" that both Japanese and Japanese-Brazilians recognized between their two cultures).

254 See Yamanaka, *supra* note 252, at ¶¶ 19-24; Shin, *supra* note 139, at 350 n.160.

- 255 See French, *supra* note 141; Tokyo Now: Housing Complex Faces Problems of "Internationalization," *JAPAN ECON. NEWSWIRE*, June 14, 2005, ¶ 7.
- 256 See Toshi Maeda, *Hamamatsu Brazilian Files Suit*, *JAPAN TIMES*, Sept. 3, 1998, ¶ 12; cf. Yamanaka, *supra* note 252, at ¶¶ 26-27 (arguing that, in reality, the volume of crimes committed in Hamamatsu by Brazilians roughly approximated their proportion of the Hamamatsu population).
- 257 See *Disappearing Dreams*, *supra* note 247, at 7. See generally Gregory Clark, *Japan's Particular Racism*, *JAPAN TIMES*, Dec. 25, 1999, ¶ 7 (explaining that there does not seem to be a good reason for locals to want to exclude foreigners from their shops despite the Hamamatsu police's concern with petty theft by Brazilians).
- 258 Yamanaka, *supra* note 252, at ¶ 1. See Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 *SETON HALL L. REV.* 319, 354 n.242 (2000).
- 259 See Webster, *supra* note 132, at 450; see also French, *supra* note 141.
- 260 See Maeda, *supra* note 256, at ¶ 5; see also McNicol, *supra* note 75 (explaining that Bortz was initially approached in a friendly manner by the store owner and asked where she was from).
- 261 See Shin, *supra* note 139, at 361; Maeda, *supra* note 256, at ¶¶ 4-6.
- 262 See Shin, *supra* note 139, at 361 n.213; Webster, *supra* note 132, at 450.
- 263 See Webster, *supra* note 132, at 451 (explaining that after demanding apologies for three hours and threatening legal action, Bortz left without any further action by the police); see also Maeda, *supra* note 256, at ¶ 7 (reporting that the police left after determining that the incident was a "personal matter").
- 264 See *Bortz v. Suzuki*, 1045 *HANREI TAIMUZU* 216 (Shizuoka D. Ct., Oct. 12, 1999); see also Hadfield, *supra* note 171 (remarking that the store's video surveillance indicated that Bortz had not been acting suspiciously, contrary to the owner's claim).
- 265 See *Foreigner Wins Racism Case*, *MAINICHI SHIMBUN*, Oct. 13, 1999, ¶ 8; Yamanaka, *supra* note 252, at ¶ 2.
- 266 See Wu, *supra* note 96, at 483; Yamanaka, *supra* note 252, at ¶¶ 29-30.
- 267 See Webster, *supra* note 132, at 451; Yamanaka, *supra* note 252, at ¶¶ 29-30 (stating that Bortz's claim demanded that Article 2(d) of CERD be applied to determine the illegality of the defendant's behavior and that Article 6 of CERD be applied to give her a remedy for racial discrimination).
- 268 *International Convention on the Elimination of All Forms of Racial Discrimination*, art. 2, ¶ 1(d), Dec. 21, 1965, 660 *U.N.T.S.* 195 [hereinafter *Convention*] (entered into force for Japan on Jan. 16, 1996).
- 269 *Convention*, *supra* note 268, art. 6 (entered into force for Japan on Jan. 16, 1996).
- 270 *MINPO*, art. 90, reprinted in J.E. DE BECKER, *ANNOTATED CIVIL CODE OF JAPAN I* 88 (1979) (1909) (Article 90 states that "[a] juristic act whose object is a matter contrary to public order or good manners and customs is void."); see *MINPO*, art. 709, reprinted in J.E. DE BECKER, *ANNOTATED CIVIL CODE OF JAPAN II* 273 (1979) (1909) (Article 709 states that "[a] person who has intentionally or negligently violated the right of another is bound to compensate any damages resulting in consequence"); *MINPO*, art. 719, reprinted in J.E. DE BECKER, *ANNOTATED CIVIL CODE OF JAPAN II* 281 (1979) (1909) (Article 719 states that "[w]hen damages have been caused to another person by an unlawful act committed in common by several persons, they are all jointly bound to make compensation therefor[e]"), supporting the joining of the co-owners of the jewelry store in the same suit); see also Yamanaka, *supra* note 252, at ¶ 30 (remarking that the Japanese Civil Code supports "public order" and provides a remedy for victims of discrimination).

- 271 See Maeda, *supra* note 256, at ¶ 8; Shop Owner Told to Pay 1.5 Million Yen for Discrimination, *DAILY YOMIURI* (Tokyo), Oct. 13, 1999, ¶¶ 1, 4.
- 272 Yamanaka, *supra* note 252, at ¶ 31.
- 273 KENPO, art. 22.
- 274 See Yamanaka, *supra* note 252, at ¶ 31; Bortz v. Suzuki, 1045 HANREI TAIMUZU 216 (Shizuoka D. Ct., Oct. 12, 1999).
- 275 Yamanaka, *supra* note 252.
- 276 See French, *supra* note 141. See generally Robert Whyman, Japanese Jeweler to Pay for Insult, *TIMES* (London), Nov. 18, 1999 (placing Bortz's encounter in the context of Japanese society, which prides itself on homogeneity and views gaijin, "outside persons," with suspicion).
- 277 Discrimination Case Against Jewelry Store Owner Begins, *JAPAN TIMES* (Tokyo), Oct. 7, 1998; see also Shop Owner Told to Pay 1.5 Million Yen for Discrimination, *supra* note 271 (presenting the defendant's claims that he committed the discriminatory act, but did so because he believed the plaintiff was acting suspicious).
- 278 See Court Orders Damages in Discrimination Case, *supra* note 251. See generally Hadfield, *supra* note 171 (describing the procedure of the Bortz case).
- 279 See French, *supra* note 141 (describing the decision of the judge on October 12, 1999, and positing that the case may one day be looked back on as the Japanese equivalent of Rosa Parks's actions in Montgomery, Alabama); Yamanaka, *supra* note 252.
- 280 See French, *supra* note 141; cf. Webster, *supra* note 132, at 451 (describing Judge Soh's opinion as far-reaching and explaining how Japanese courts can indirectly apply international law in the absence of Japanese law on point).
- 281 See Yamanaka, *supra* note 252; see also Robert Whyman, Japan Faces Its Racism, *AUSTRALIAN*, Nov. 19, 1999, World, at 9 (stating that this was the first time that a Japanese court applied the Convention on the Elimination of All Forms of Racial Discrimination, which Japan had ratified in 1995).
- 282 Yamanaka, *supra* note 252.
- 283 See Shin, *supra* note 139, at 361; Court Orders Damages in Discrimination Case, *supra* note 251.
- 284 See Eric Weiner, Racism in Japan, *NAT. PUB. RADIO*, Sept. 4, 2001 (providing the transcript of an interview in which Ana Bortz explains that she was merely window shopping in a jewelry store, not acting suspiciously). See generally Hadfield, *supra* note 171 (describing the facts of the case in the context of other cases of foreigners who face discrimination in Japan).
- 285 See Hadfield, *supra* note 171; see also French, *supra* note 141 (stating that the court cited Japan's treaty obligations in determining the award of damages).
- 286 Cf. Brazilian Woman Sues Shop Owner over Discrimination, *JAPAN ECON. NEWSWIRE*, Aug. 5, 1998 (describing the reaction of the defendant shop owner, who claimed that an apology was immediately written by his mother at the time of the incident).
- 287 Yamanaka, *supra* note 252 (stating that the defendant did not appeal, and describing the result of the case as a landmark victory, unique in Japan's judicial history). But see French, *supra* note 141 (claiming that because the judgment was based on international law, it could not be appealed under Japanese law).
- 288 See Debito Arudou, Editorial, Twisted Legal Logic Deals Rights Blow to Foreigners, *JAPAN TIMES* (Tokyo), Feb. 7, 2006; see also Shop Must Pay Up for Turning Away Black Man, *DAILY YOMIURI* (Tokyo), Oct. 19, 2006, at 3.

- 289 See Debito Arudou, *Get On Their Case*, JAPAN TIMES (Tokyo), Nov. 30, 2004, available at <http://search.japantimes.co.jp/cgi-bin/fl20041130zg.html> (describing how McGowan was so impressed by the shop the first time he went with his wife, he later invited his South African friend to visit the shop, leading to the incident that sparked the case); *Shop Must Pay Up for Turning Away Black Man*, supra note 288.
- 290 See *Osaka Court Rejects Black American's Discrimination Suit*, MAINICHI SHIMBUN (Tokyo), Jan. 30, 2006; Eric Johnston, *Plaintiff Gets Redress but Not for Racial Bias*, JAPAN TIMES (Tokyo), Oct. 19, 2006.
- 291 Arudou, supra note 289; see also *Black American's Lawsuit over Discrimination Nixed*, DAILY YOMIURI (Tokyo), Jan. 31, 2006, at 2 (quoting the defendant who shouted "Get out ... don't touch the Door!" at the plaintiff).
- 292 See DEBITO ARUDOU, *THE STEVE MCGOWAN COURT DECISION: A LOSS FOR HIM, A BAD PRECEDENT FOR EVERYONE* (2006), <http://www.debito.org/mcgowanhanketsu.html#english> (providing translated excerpts of the original opinion); *Shop Must Pay Up for Turning Away Black Man*, supra note 288.
- 293 Oscar Johnson, *Suffering Ignorance and Discrimination, Japan's Black Community Struggles to Retain Its Pride*, JAPAN TODAY (Tokyo), Mar. 13, 2006, available at <http://www.japantoday.com/jp/feature/1066>; *Black American's Lawsuit over Discrimination Nixed*, supra note 291, at 2.
- 294 See Johnston, supra note 290.
- 295 *Osaka Court Rejects Black American's Discrimination Suit*, supra note 290.
- 296 Arudou, supra note 288; see also Eric Johnston, *On the Road to Apartheid? Japan and the Steve McGowan Case*, ZNET, Feb. 6, 2006, <http://www.zmag.org/content/showarticle.cfm?ItemID=9677> (explaining how the Court held McGowan's wife's use of the term "gaikokujin," which means "foreigner," instead of the term "kokujin," which means "black person," against McGowan during trial, because it was unclear that the defendant's actions were the result of a racist motivation).
- 297 *Osaka Court Rejects Black American's Discrimination Suit*, supra note 290. McGowan, who claimed that during this encounter, Narita repeated that he did not like black people and that McGowan was "making [his] floor filthy." Johnson, supra note 290. Narita denied such a statement. *Id.*
- 298 See Arudou, supra note 288; see also Shia Levitt, *Complaints of Discrimination in Japan*, MARKETPLACE, Aug. 4, 2005 (providing the transcript of an interview with McGowan, in which he explains the defendant's actions and that he decided to sue based on the racist comments).
- 299 See Arudou, supra note 288; Johnston, supra note 296.
- 300 See Arudou, supra note 288; *Black American's Lawsuit over Discrimination Nixed*, supra note 291, at 2.
- 301 See generally ARUDOU, supra note 292 (citing excerpts of McGowan v. Narita [Osaka D. Ct., Jan. 30, 2006], where the District Court considered McGowan's previous visits to the store, his wife's follow-up visit, and a minor difference in terminology to determine that McGowan misunderstood Narita's actions as discriminatory); Arudou, supra note 288 (criticizing the district court for its focus on semantics in deciding the outcome of the case).
- 302 *Osaka Court Rejects Black American's Discrimination Suit*, supra note 290; *Japan: Racial Discrimination Lawsuit Fails*, CSR ASIA WEEKLY, Feb. 2, 2006, at 6.
- 303 See Johnson, supra note 293.
- 304 *Osaka Court Rejects Black American's Discrimination Suit*, supra note 290; see Eric Johnston, *Man Loses Racial Discrimination Suit Against Shop*, JAPAN TIMES (Tokyo), Jan. 31, 2006, available at <http://www.debito.org/mcgowanhanketsu.html#japantimes>.

- 305 See ARUDOU, *supra* note 292; Johnston, *supra* note 296.
- 306 ARUDOU, *supra* note 292; Japan: Racial Discrimination Lawsuit Fails, *supra* note 302, at 6.
- 307 See Johnson, *supra* note 293.
- 308 See ARUDOU, *supra* note 292; Arudou, *supra* note 289.
- 309 See ARUDOU, *supra* note 292; Johnson, *supra* note 293.
- 310 See Johnston, *supra* note 304.
- 311 See Johnson, *supra* note 293.
- 312 See *Shop Must Pay Up for Turning Away Black Man*, *supra* note 288.
- 313 See Johnston, *supra* note 290 (noting that although McGowan recovered damages, the award was small compared with amounts that have been awarded in other discrimination suits, which in turn reflects the court's hesitation to rule that the treatment constituted racial discrimination); *Shop Must Pay Up for Turning Away Black Man*, *supra* note 288 (remarking that McGowan's judgment award of ¥350,000 was significantly less than the ¥5.5 million requested).
- 314 African-American Wins ¥350,000 in Damages for Being Denied Entry into Osaka Shop, JAPAN TODAY (Tokyo), Oct. 18, 2006, available at <http://turing.freelists.org/archives/club99/10-2006>; Court Admits Emotional Pain, Not Discrimination, in *Shop Entry Case*, JAPAN ECON. NEWSWIRE, Oct. 18, 2006.
- 315 See *Shop Must Pay Up for Turning Away Black Man*, *supra* note 288.
- 316 See African-American Wins ¥350,000 in Damages for Being Denied Entry into Osaka Shop, *supra* note 314; Johnston, *supra* note 290.
- 317 African-American Wins ¥350,000 in Damages for Being Denied Entry into Osaka Shop, *supra* note 314; Court Admits Emotional Pain, Not Discrimination, in *Shop Entry Case*, *supra* note 314.
- 318 Johnston, *supra* note 290.
- 319 Eric Johnston, McGowan Court Victory Avoids the Real Issues, <http://www.debito.org/mcgowanhanketsu.html#english> (last visited Feb. 27, 2007). See generally Koreans Win Discrim Case Against Private-Sector Landlord, <http://www.debito.org/mcgowanhanketsu.html#english> (last visited Mar. 10, 2007) (noting that discriminatory behavior that does not conform to socially acceptable limits is illegal).
- 320 Johnston, *supra* note 319 (explaining that there is a dual meaning attributed to "fuhou kouji" [social norms] that the court has wide latitude to interpret).
- 321 See ARUDOU, *supra* note 1, at 102-3; Ginny Parker, Japan's "Russian Invasion" Good Deal for Both, FORT WORTH STAR—TELEGRAM, July 4, 1999 at 24, available at 1999 WLNR 1412916 (acknowledging that reformation of the Soviet Union created new avenues for trade between Russia and Japan).
- 322 ARUDOU, *supra* note 1, at 102-3; Yutaka Okuyama, The Dispute Over the Kurile Islands Between Russia and Japan in the 1990s, 76 *Pac. Aff.* 37, 45-46 (2003) (analyzing the improvement in trade between Russia and Hokkaido throughout the 1990s). See generally Parker, *supra* note 321 (acknowledging that reformation of the Soviet Union created new avenues for trade between Russia and Japan).
- 323 Mark Magnier, City Awash in Controversy Over Hot Springs' Ban on Foreigners, L.A. TIMES, Feb. 19, 2000 at A2.
- 324 Magnier, *supra* note 323, at A2; see also Parker, *supra* note 321, at 10 (recognizing that Russian sailors converge on Otaru each year in search of economic opportunities); Robert Whyman, Japanese Bath Ban on

Foreigners, *TIMES* (London), Feb. 2, 2000 (noting that the 30,000 Russian sailors that invade Otaru every year are primary targets for the ban on foreigners at Otaru's hot springs).

325 See ARUDOU, *supra* note 1, at 1-7 (describing the Japanese bathing culture and the differences between sento and onsen); see also Taupo Hot Springs Spa, Japanese Hot Springs, http://www.taupohotsprings.com/?PK_PAGE_ID=113 (last visited Feb. 25, 2007) (describing the essential difference between the Japanese public bath onsen and sento, in which an onsen uses volcanic spring water while a sento uses ordinary heated water).

326 See ARUDOU, *supra* note 1, at 1-7; see also BOYE LAFAYETTE DE MENTE, *ETIQUETTE GUIDE TO JAPAN: KNOW THE RULES THAT MAKE THE DIFFERENCE* 66-67 (10th ed. 2003) (discussing the etiquette of bathing in a sento).

327 See generally Communal Baths a Vanishing Tradition in Japan (CNN show broadcast Jan. 1, 1994) (reporting the cultural importance of public bathing in the Japanese way of life for thousands of years).

328 See JOHN M. MAKI, *COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60* 295 (1964).

329 See ARUDOU, *supra* note 1, at 1-7 (quoting one Otaru resident for saying that "[Public b]athing is one of the most important things in life"); Magnier, *supra* note 323, at A2.

330 See Magnier, *supra* note 2, at 3. "Life is terrible for Russian sailors[, c]oooped up on rusting hulks for weeks without basic amenities [.]" ARUDOU, *supra* note 1, at 102.

331 See Whymant, *supra* note 324; see also Magnier, *supra* note 323, at A2 (describing the locals' sentiment that the Russian sailors disregard local bathing etiquettes by using soaps in the communal bath, getting drunk and swimming instead of soaking in the water).

332 Magnier, *supra* note 2, at 3 (describing the various local claims that drunken Russian sailors violated the etiquettes of the bathhouse by bringing in prohibited vodka, making loud noises, wearing shoes indoors and entering the water without first washing); see also Good Neighbors to Diversity, *JAPAN TIMES* (Tokyo), Nov. 18, 2002 (reporting on the complaints of the local Otaru bathhouse that Russian sailors displayed extremely bad manners by drinking alcohol and acting boisterous).

333 Magnier, *supra* note 2, at 3.

334 Jonathan Watts, Japanese-Only Public Baths to Pay Damages, *GUARDIAN* (London), Nov. 12, 2002, at 18 (reporting on the justification of the bathhouse to exclude foreigners for their drunkenness, rowdiness and various violations of bathing etiquettes).

335 Takuya Asakura, Otaru Racism Controversy Lingers On, *JAPAN TIMES* (Tokyo), Feb. 21, 2001; see also Stephen Lunn, Great Unwashed Face a Whiff of Bias, *AUSTRALIAN*, Feb. 12, 2001, at 9 (referring to the sentiment of regular Japanese customers regarding the strong smell of Russian sailors as a factor to keep them from returning).

336 Asakura, *supra* note 335; see also Michael Hoffman, Quiet After Otaru Onsen Storm, *JAPAN TIMES* (Tokyo), Apr. 22, 2002.

337 See Magnier, *supra* note 323, at A2; see also Watts, *supra* note 334 (reporting that Yunohana Onsen first erected its sign prohibiting foreigners in 1994 for fear of losing loyal Japanese customers).

338 See ARUDOU, *supra* note 1, at 33; see also Magnier, *supra* note 323, at A2 (reporting that the sign for "Japanese Only" was not intended to be discriminatory, but rather implemented because foreigners/Russians did not follow the rules).

339 See generally ARUDOU, *supra* note 1, at 14-27.

340 See *id.* at 30-43.

341 Asakura, *supra* note 335; cf. Magnier, *supra* note 323, at A2 (commenting on the Hokkaido city officials' preference that Tokyo bureaucrats, national and foreign news groups, and foreign diplomats not get involved so that the local officials could reach a solution in a less publicized manner).

342 See Jeff Kingston, *Bathhouse Pushes a Foreigner into the Doghouse*, *JAPAN TIMES*, Jan. 30, 2005 (describing Arudou's efforts to stir national and international interest in his discrimination case).

343 See Whyment, *supra* note 324. See generally Watts, *supra* note 334 (describing the protest from the German Embassy as well as the local government and Russian embassy).

344 Asakura, *supra* note 335; "Japanese Only" Baths Using Legal Loophole, *DAILY YOMIURI* (Tokyo), Mar. 25, 2000, at 2.

345 Asakura, *supra* note 335; Keiko Watanabe, *Otaru Still in Hot Water over Discrimination*, *DAILY YOMIURI* (Tokyo), May 5, 2001, at 7.

346 See Hoffman, *supra* note 336; see also *Bathhouse Loses Racism Lawsuit: Men Barred at Otaru Bath Awarded 3 Million Yen in Damages*, *JAPAN TIMES* (Tokyo), Nov. 12, 2002, available at <http://search.japantimes.co.jp/print/nn20021112a3.html>.

347 ARUDOU, *supra* note 1, at 271-76; *Bathhouse Loses Racism Lawsuit: Men Barred at Otaru Bath Awarded 3 Million Yen in Damages*, *supra* note 346.

348 See ARUDOU, *supra* note 1, at 272; see also Charles Scanlon, *Bath House in Hot Water*, *BBC NEWS* (Feb. 1, 2001), <http://news.bbc.co.uk/2/low/asia-pacific/1147784.stm> (describing the exclusion from the bathhouse of an American-born professor who had adopted Japanese nationality).

349 ARUDOU, *supra* note 1, at 275; Debito Arudou, *Japanese Only: The Otaru Hotspring Case and Discrimination Against "Foreigners" in Japan*, *ZNET*, Nov. 16, 2004, http://www.zmag.org/content/print_article.cfm?ItemID=6669§ionID=1.

350 Michel A. Lev, *Crusader-Citizen Takes on Japan: American-Born Activist Seeks Some Semblance of Equality for Non-Natives in a Tradition-Bound Society*, *CHI. TRIB.*, May 8, 2003, at 6, available at 2003 WLNR 1538379; *Bathhouse Loses Racism Lawsuit: Men Barred at Otaru Bath Awarded 3 Million Yen in Damages*, *supra* note 346 (reporting that on February 1, 2001 Debito Arudou, Olaf Karthuas of Germany, and Ken Sutherland of the U.S. filed a lawsuit against the bathhouse and the municipality seeking 6 million yen in damages). As a result of this and other activities, Arudou received many harassing calls and even a letter which threatened "We will kill your kids." Asakura, *supra* note 335.

351 See *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, *supra* note 1, at 407-8.

352 See *id.* at 407.

353 See *Bathhouse Loses Racism Lawsuit: Men Barred at Otaru Bath Awarded 3 Million Yen in Damages*, *supra* note 346.

354 See *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, *supra* note 1, at 407; Barry Brophy, *The Fight for Equal Protection of the Law: Judgment Could Deal Blow to Discrimination*, *JAPAN TIMES* (Tokyo), Jan. 17, 2001.

355 See *KENPO*, art. 14, para. 1; see also HIROYUKI HATA & GO NAKAGAWA, *CONSTITUTIONAL LAW OF JAPAN* 111-13 (1997) (discussing the scope of the protections afforded by Article 14 of Japan's Constitution).

356 *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, *supra* note 1, at 407.

- 357 See *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, supra note 1, at 408. See generally SHINICHI FUJII, *THE ESSENTIALS OF JAPANESE CONSTITUTIONAL LAW* 355 (1979) (explaining that a treaty does not become an effective domestic law in Japan until the Japanese legislature, the Gikai, enacts a separate domestic enabling law).
- 358 See *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, supra note 1, at 408-9; 3 Win Lawsuit Against Discriminatory Bathhouse, *CHI. TRIB.*, Nov. 12, 2002, at 10, available at 2002 WLNR 12687644.
- 359 See *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, supra note 1, at 408-9.
- 360 See *id.* at 410; see also MERYLL DEAN, *JAPANESE LEGAL SYSTEM* 4-5 (2d ed. 2002) (discussing Japanese law's recognition of concerns over "honour" and "loss of face").
- 361 See MINPO, art. 710, reprinted in *ANNOTATED CIVIL CODE OF JAPAN II* 274 (J.E. de Becker, trans. 1979) (1909) (stating that compensation must be paid for damage to intangibles such as a person's liberty or reputation); see J.E. DE BECKER, *THE PRINCIPLES AND PRACTICE OF THE CIVIL CODE OF JAPAN I* 433 (1979) (1921) (discussing that under Art. 710, pecuniary damages must be paid for any material or immaterial loss suffered whether the loss is to property or not).
- 362 See *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, supra note 1, at 407; High Court Rejects Compensation Claim over Racial Discrimination at Bathhouse, *JAPAN TIMES* (Tokyo), Sept. 17, 2004, available at <http://search.japantimes.co.jp/print/nn20040917a3.html>.
- 363 See James Brooke, *Japan: Antiforeigner Discrimination Draws Fine*, *N.Y. TIMES*, Nov. 13, 2002, at A6, available at 2002 WLNR 4439755; see *Hot-Spring Resort Gets Chilling Lesson*, *CHI. TRIB.*, Nov. 12, 2002, at 8, available at 2002 WLNR 12687327.
- 364 *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, supra note 1, at 410; see also MINPO, art. 710, reprinted in *ANNOTATED CIVIL CODE OF JAPAN II* 274 (J.E. de Becker, trans., 1979) (1909) (explaining the detail regarding the differences between honor and non-property-related tort damages).
- 365 See *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, supra note 1, at 407, 409.
- 366 *Id.* at 409; cf. Convention, supra note 268, art. 6 (obligating signatories to assure that everyone within their jurisdiction has adequate remedies through national tribunals against racial discrimination).
- 367 *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, supra note 1, at 409. But see NATAN LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY* 72-73 (1970) (indicating that one of the intentions of the CERD was to provide an effective remedy to victims of racial discrimination).
- 368 *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, supra note 1, at 409; *Bathhouse Loses Racism Lawsuit: Men Barred at Otaru Bath Awarded 3 Million Yen in Damages*, supra note 346 (reporting that the judge said that the city had no obligation under the treaty to "stamp out" racial discrimination).
- 369 *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, supra note 1, at 409; *Bathhouse Loses Racism Lawsuit: Men Barred at Otaru Bath Awarded 3 Million Yen in Damages*, supra note 346.
- 370 *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, supra note 1, at 409.
- 371 ARUDOU, supra note 1, at 363, 366-67.

- 372 Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, supra note 1, at 411; see also Preliminary Report on the Otaru Onsens Lawsuit: Sapporo High Court Decision Handed Down Sept 16, 2004, <http://www.debito.org/highcourtdecisionopinion.html> (last visited Feb. 28, 2007) (providing an in-depth analysis of the Sapporo High Court's decision by one of the plaintiffs, Debito Arudou).
- 373 See Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, supra note 1, at 411; High Court Rejects Compensation Claim over Racial Discrimination at Bathhouse, supra note 362.
- 374 See High Court Rejects Compensation Claim over Racial Discrimination at Bathhouse, supra note 362.
- 375 See Arudou v. Yunohana (Sapporo High Ct., Sept. 16, 2004), reprinted in ARUDOU, supra note 1, at 412.
- 376 Convention, supra note 268, art. 2(1)(d); see also Ryan F. Haigh, Note, South Africa's Criminalization of "Hurtful" Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression, 5 WASH. U. GLOBAL STUD. L. REV. 187, 199, n.80 (2006) (stating that although the CERD Treaty sets boundaries by which states might fight racial discrimination, the agreement leaves the details of the implementation to states' discretions).
- 377 Arudou v. Yunohana (Sapporo High Ct., Sept. 16, 2004), reprinted in ARUDOU, supra note 1, at 412. But see Convention, supra note 268, art. 5(f) (providing a list of specific rights that all signatories must ensure pursuant to Article 2 of the CERD, including everyone's entitlement to access any place or service that is intended for use by the general public without discrimination).
- 378 Arudou v. Yunohana (Sapporo High Ct., Sept. 16, 2004), reprinted in ARUDOU, supra note 1, at 412-13. But see Convention, supra note 268, art. 2(1)(d) (requiring the termination of racial discrimination using "all appropriate means," including "legislation as required").
- 379 See Arudou v. Yunohana (Sup. Ct., Apr. 7, 2005) reprinted in ARUDOU, supra note 1, at 415-16; City Off Hook Over Bathhouse Barring of Foreigners, JAPAN TIMES (Tokyo), Apr. 8, 2005, available at <http://search.japantimes.co.jp/print/nn20050408a4.html>.
- 380 Article 2 of the International Covenant on Economic, Social and Cultural Rights also, somewhat indirectly, requires government action in this regard—all signatories "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth[,] or other status." See International Covenant on Economic, Social and Cultural Rights, art. 2, opened for signature Dec. 19, 1966, 6 I.L.M. 360, 361 (ratified by Japan June 21, 1978).
- 381 See Convention, supra note 268.
- 382 Id., art. 2(1)(d).
- 383 ICCPR, supra note 58, art. 26
- 384 See COMMENTS OF THE JAPANESE GOVERNMENT ON THE CONCLUDING OBSERVATIONS ADOPTED BY THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON MARCH 20, 2000, REGARDING INITIAL AND SECOND PERIODIC REPORT OF THE JAPANESE GOVERNMENT, supra note 64, at ¶ 4(2) (concluding that Japan has been honoring its duty to eliminate racial discrimination as imposed by Article 2 of CERD); see also MINISTRY OF FOREIGN AFFAIRS OF JAPAN, INT'L CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIM. (FIRST AND SECOND REPORT) art. 2, ¶¶ 40-42 (1999), available at http://mofa.go.jp/policy/human/race_rep1/index.html (reporting that, for example, Japanese ministries have conducted educational seminars and research to further their anti-discriminatory stance pursuant to the Japanese Constitution and CERD, and that the Investigation and Treatment Regulations of Human Rights Infringement Incidents and the Civil Liberties Commissioners Law provide redress for racial discrimination).

385 KENPO, art. 14, ¶ 1.

386 See Hamano, *supra* note 9, at 426-27, 433-38; see also Amy Gurowitz, *Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State*, 51 *World Pol.* 413, 425 (1999) (stating that protections for foreigners were effectively removed with the exclusion of the alien provision).

387 See Kenpō, art. 14, ¶ 1 (providing that "all of the people" are equal before the law); see Hamano, *supra* note 9, at 426-27 (recognizing that major provisions of the SCAP Draft were diluted or excluded from the final postwar Constitution after a series of negotiations between the Japanese government and the SCAP).

388 See James A. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, 53 *L & CONTEMP. PROBS.* 171, 171, 173 (1990) (stating that General Douglas MacArthur was the Supreme Command of the Allied Powers or "SCAP" and that he personally endorsed three provisions to be included in Japan's postwar Constitution); Lynn Parisi, *Lessons on the Japanese Constitution*, *JAPAN DIGEST* (Nat'l Clearinghouse for United States-Japan Studies, Bloomington, Ind.), Nov. 2002.

389 Koseki Shōichi, *The Birth of Japan's Postwar Constitution* 114 (Ray A. Moore trans., 1997).

390 *Id.*

391 See *id.* (pointing to a later Japanese version that replaced "national origin" with "family" origin). See generally Tadashi Aruga, *The Declaration of Independence in Japan: Translation and Transplantation, 1854-1997*, 85 *J. Am. Hist.* 1409, 1424 (noting that the Japanese government tried to preserve the original language of the SCAP draft as much as possible in the official English version of the Japanese Constitution).

392 See SHOICHI, *supra* note 389, at 114-15; see also Aruga, *supra* note 391 (defining *kokumin* as "national people").

393 See SHOICHI, *supra* note 389, at 119-20; Hamano, *supra* note 9, at 436-37; see also Gurowitz, *supra* note 386, at 425 (stating that protections for foreigners were effectively removed with the exclusion of the alien provision).

394 See SHOICHI, *supra* note 389, at 179-80; see also Hamano, *supra* note 9, at 437.

395 See SHOICHI, *supra* note 389, at 179-80; see also Hamano, *supra* note 9, at 439-42 (noting that the Constitution of Japan was denied popular referendum when it came into effect in 1947 and it has so remained to this day).

396 E.g., Judgment Nov. 18, 1964, 18 *KEISHU* 579, 582 (Sup. Ct., Nov. 18, 1964) excerpt reprinted in IWASAWA, *supra* note 100, at 85 (ruling that despite Article 14's intended application to only Japanese nationals, it must be construed to include aliens as well in light of Article 7 of the Universal Declaration of Human Rights, which provides that "all ... are entitled without any discrimination to the equal protection of the law"); see also Yuji Iwasawa, *Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law*, 8 *HUM. RTS. Q.* 131, 137 (1986) (stating that the Japanese courts appear to acknowledge protections for aliens).

397 See *McLean v. Justice Minister*, 32 *MINSHU* 7, 1233 (Sup. Ct., Oct. 4, 1978), reprinted in LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990* 471 (1996).

398 *Id.*; see Lawrence W. Beer, *Group Rights and Individual Rights in Japan*, 21 *ASIAN SURV.* 437, 448 (1981) (explaining that *McLean* had engaged in lawful and peaceful protest activities, challenging the U.S.-Japan Security Treaty and U.S. involvement in the Vietnam War).

- 399 See *McLean v. Justice Minister*, 32 *MINSHU* 7, 1233 (Sup. Ct., Oct. 4, 1978), reprinted in *BEER & ITOH*, supra note 397, at 478; *Beer*, supra note 398.
- 400 *McLean v. Justice Minister*, 32 *MINSHU* 7 (Sup. Ct., Oct. 4, 1978), reprinted in *BEER & ITOH*, supra note 397, at 471, 477 (stating that fundamental rights apply to aliens); see also *Hur*, supra note 12, at 672-73 (stating that in light of international law, Japan interprets its own constitution as applying to aliens as well as nationals).
- 401 *McLean v. Justice Minister*, 32 *MINSHU* 7 (Sup. Ct., Oct. 4, 1978), reprinted in *BEER & ITOH*, supra note 397, at 471, 477; see also *Hamano*, supra note 9, at 464-65.
- 402 *Hamano*, supra note 9, at 465; see also *Hur*, supra note 12, at 672-73 (discussing the role of the Minister of Justice in determining an alien's rights).
- 403 See *McLean v. Justice Minister*, 32 *MINSHU* 7 (Sup. Ct., Oct. 4, 1978), reprinted in *BEER & ITOH*, supra note 397, at 471, 478 (1996). But see *Kikuyo Matsumoto*, *Aliens, Resident Aliens, and U.S. Citizens in the Never-Never Land of the Immigration and Nationality Act*, 15 *U. HAW. L. REV.* 61, 96-97 (1993) (suggesting that the rulings of the Minister of Justice will generally stand even in cases where they appear to be unreasonable).
- 404 *Mitsubishi Jushi K.K. v. Takano*, 27 *MINSHU* 1536 (Sup. Ct., Dec. 12, 1973).
- 405 *Id.*
- 406 *Id.*
- 407 *Id.*
- 408 *MINPO*, art. 1, reprinted in *J.E. DE BECKER, ANNOTATED CIVIL CODE OF JAPAN I 3* (J.E. de Becker, trans., 1979) (1909).
- 409 *MINPO*, art. 2, reprinted in *DE BECKER*, supra note 408, at 4-6 (exceptions include land ownership, becoming public officials, owning stock in Japanese banks, and others).
- 410 *MINPO*, art. 90, reprinted in *DE BECKER*, supra note 408, at 86-89; see *Takehiro Nobumori*, *Aspects of Collective Will of Bondholders Under Japanese Law*, 35 *GEO. J. INT'L L.* 755, 773 (2004).
- 411 See *MINPO*, art. 90, reprinted in *DE BECKER*, supra note 408, at 89; see also *Hiroko Hayashi*, *Sexual Harassment in the Workplace and Equal Employment Legislation*, 69 *ST. JOHN'S L. REV.* 37, 56-57 (1995) (positing that because the language of Article 90 is vague the courts must use discretion in deciding when there has been a violation of public good).
- 412 See *MINPO*, art. 709, reprinted in *DE BECKER*, supra note 408, at 3; see also *Scott K. Dinwiddie*, *A Shifting Barrier? Difficulties in Obtaining Patent Infringement Damages in Japan*, 70 *WASH. L. REV.* 833, 846-47 (1995) (restating the general damages provision in Article 709).
- 413 See *MINPO*, art. 709, reprinted in *DE BECKER*, supra note 408, at 272-73; see also *Marcy Sheinwold*, *International Products Liability Law*, 1 *TOURO J. TRANSNAT'L L.* 257, 280 (1988) (describing the elements of a basic torts claim under Article 709).
- 414 See *MINPO*, art. 710, reprinted in *DE BECKER*, supra note 408, at 274; see also *Dan Rosen*, *Private Lives and Public Eyes: Privacy in the United States and Japan*, 6 *FLA. J. INT'L L.* 141, 159 (1990) (providing the provisions of Articles 709 and 710).
- 415 See *MINPO*, art. 710, reprinted in *DE BECKER*, supra note 408, at 274; see also *Jae-Jin Lee*, *Freedom of the Press and Right of Reply Under the Contemporary Korean Libel Laws: A Comparative Analysis*, 16 *UCLA PAC. BASIN L.J.* 155, 180 (1998) (noting that under the Civil Code a person may be required to make compensations regardless of whether the injury done is to property or reputation).

- 416 MINPO, art. 710, reprinted in DE BECKER, *supra* note 408, at 274; see also Ilhyung Lee, *The Law and Culture of Apology in Korean Dispute Settlement (With Japan and the United States in Mind)*, 27 *MICH. J. INT'L L.* 1, 38-40 (2005) (explaining that the Japanese courts accept apologies as an appropriate and constitutional means of redress).
- 417 *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, *supra* note 1, at 408; see also Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 *CASE W. RES. J. INT'L L.* 3, 25 (1996) (reviewing the judicial standard of social permissibility used by Japan to determine injury).
- 418 *Mitsubishi Jushi K.K. v. Takano*, 27 *MINSHU* 1536 (Sup. Ct., Dec. 12, 1973).
- 419 See Hamano, *supra* note 9, at 415-60 (critiquing the lack of judicial independence in the Japanese judiciary and pointing out many reasons why judges might want to maintain a conservative posture when deciding opinions). I have been able to confirm some of Hamano's points of critique in conversations with members of the Japanese judiciary.
- 420 KENPO, art. 98.
- 421 IWASAWA, *supra* note 100, at 29; see also David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?* 32 *COLUM. J. TRANSNAT'L L.* 533, 576-77 (1995) (establishing that international laws have full domestic force in Japan).
- 422 IWASAWA, *supra* note 100, at 28; Jeff Vize, *Torture, Forced Confessions and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System*, 20 *UCLA PAC. BASIN L.J.* 329, 357 (2003).
- 423 IWASAWA, *supra* note 100, at 27; Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?* 8 *EMORY INT'L L. REV.* 127, 153 (1994).
- 424 IWASAWA, *supra* note 100, at 37; see also Katharina Heyer, *From Special Needs to Equal Rights: Japanese Disability Law*, 1 *ASIAN-PAC. L. & POL'Y J.* 7, 3-4 (2007) (remarking that although Japan gives domestic recognition to international law, it has shown reluctance to sign on to certain international agreements).
- 425 See IWASAWA, *supra* note 100, at 57 (quoting Judgment Dec. 19, 1984, 35 *GYOSAISHU* 2220, 2282-3 (Osaka High Ct., Dec. 19, 1984)); Landis, *supra* note 24, at 76 n.130.
- 426 See Webster, *supra* note 132, at 451; Yamanaka, *supra* note 252, at ¶¶ 29-30, 34.
- 427 See *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, *supra* note 1, at 408.
- 428 *Id.*
- 429 See *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan*, *supra* note 14, at ¶ 10 (admitting that CERD is not self-executing, making Japanese courts' reluctance to apply it understandable); Jessica Neuwirth, *Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of all Forms of Discrimination Against Women and Through the Beijing Platform for Action*, 18 *HARV. HUM. RTS. J.* 19, 36 (2005).
- 430 FUJIMOTO, *supra* note 13, at 1; see Shin, *supra* note 139, at 361.
- 431 See IWASAWA, *supra* note 100, at 82; see also Webster, *supra* note 132, at 451 (acknowledging the indirect effect given CERD in the Bortz case, where the judge applied internationally derived standards to domestic law since there was no constitutional provision, Supreme Court case, or anti-discrimination statute on point).
- 432 IWASAWA, *supra* note 100, at 83; see also *Preserving Affirmative Action in Higher Education: Amicus Curiae Brief of NOW Legal Defense Fund for Grutter v. Bollinger*, 23 *WOMEN'S RTS. L. REP.* 145, 152 (2002) (arguing that non-self-executing treaties can be used indirectly as aids for interpretation of other laws).

433 See IWASAWA, *supra* note 100, at 89-90; see also Joseph P. Nearey, *Seeking Reparations in the New Millennium: Will Japan Compensate the "Comfort Women" of World War II?* 15 *TEMP. INT'L & COMP. L.J.* 121, 142 (2001) (stating that courts have avoided the application of human rights treaties by basing their rulings on tort law).

434 See IWASAWA, *supra* note 100, at 91-92.

435 See *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, *supra* note 1, at 408-9; Yamanaka, *supra* note 252, at ¶ 34.

436 See *Arudou v. Yunohana* (Sapporo Dist. Ct., Nov. 11, 2002), reprinted in ARUDOU, *supra* note 1, at 408-9; Yamanaka, *supra* note 252, at ¶¶ 29-30, 34.

437 See COMMENTS OF THE JAPANESE GOVERNMENT ON THE CONCLUDING OBSERVATIONS ADOPTED BY THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON MARCH 20, 2000, REGARDING INITIAL AND SECOND PERIODIC REPORT OF THE JAPANESE GOVERNMENT, *supra* note 64, at ¶ 4 (stating that Japan has been fulfilling its obligation under the Convention to eliminate racial discrimination).

438 See Committee on the Elimination of Racial Discrimination, *Monitoring Racial Equality and Non-Discrimination*, <http://www.ohchr.org/english/bodics/cerd/index.htm> (identifying the CERD Committee as the body of independent experts that monitors the State Parties' implementation of the Convention on the Elimination of All Forms of Racial Discrimination). See generally Rugaijah Yearby, *Is It Too Late for Title VI Enforcement?—Seeking Redemption of the Unequal United States' Long Term Care System Through International Means*, 9 *DEPAUL J. HEALTH CARE L.* 971, 973 (2005) (mentioning that private parties can file a complaint to the CERD Committee concerning a member state's violation when there is no meaningful way to address the issue domestically).

439 See *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan*, *supra* note 14, at ¶¶ 4-27 (discussing the positive aspects, concerns, and recommendations for Japan's implementation of the treaty as a State Party).

440 See *id.* at ¶¶ 4-6 (Japan's successes include some legislative and administrative efforts, endeavors to raise awareness about existing human rights' standards, and the dissemination of reports on the implementation of treaties).

441 *Id.* at ¶ 10, 12.

442 See IWASAWA, *supra* note 100, at 7; see also Patrick Thornberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 *HUM. RTS. L. REV.* 239, 265 n.152 (2005) (noting Japan's disagreement with the Committee's definition of "descent").

443 See COMMENTS OF THE JAPANESE GOVERNMENT ON THE CONCLUDING OBSERVATIONS ADOPTED BY THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON MARCH 20, 2000, REGARDING INITIAL AND SECOND PERIODIC REPORT OF THE JAPANESE GOVERNMENT, *supra* note 64, at ¶¶ 1-21.

444 See *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, *supra* note 225, at ¶ 69. See generally Michael J. Dennis, *Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economic and Social Council*, 97 *AM. J. INT'L L.* 364, 369 (2003) (discussing the appointment of Diene as the new special rapporteur on racial discrimination).

445 *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, *supra* note 225, ¶ 69; see also Eric Johnston, *Racism Rapporteur Repeats Criticism*,

JAPAN TIMES (Tokyo), May 18, 2006 (discussing the report, which contained criticisms of the Japanese government as well as a call for the legislature to enact anti-discrimination laws).

446 Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *supra* note 225, ¶ 69.

447 Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *supra* note 225, at ¶ 75. See generally Wu, *supra* note 96, at 489-90 (proposing that the Japanese government structure a legal system that will address potential incidences of discrimination such as making the citizenship procedure more concrete in order to expand citizenship rights).

448 See Debito Arudou, Editorial, Righting a Wrong, JAPAN TIMES (Tokyo), June 27, 2006; Johnston, *supra* note 445.

449 DECLARATION SEEKING THE BUILDING OF A HARMONIOUS MULTIETHNIC, MULTICULTURAL SOCIETY, AND THE ENACTMENT OF LEGISLATION FOR THE BASIC HUMAN RIGHTS OF NON-NATIONAL AND ETHNIC MINORITIES, *supra* note 13, at 1. See generally Carl F. Goodman, Japan's New Civil Procedure Code: Has It Fostered a Rule of Law Dispute Resolution Mechanism? 29 BROOK. J. INT'L L. 511, 604 n.359 (2004) (stating that the JFBA is composed of local Bar Associations and individual lawyers).

450 See DECLARATION SEEKING THE BUILDING OF A HARMONIOUS MULTIETHNIC, MULTICULTURAL SOCIETY, AND THE ENACTMENT OF LEGISLATION FOR THE BASIC HUMAN RIGHTS OF NON-NATIONAL AND ETHNIC MINORITIES, *supra* note 13, at 1.

451 *Id.* at 2.

452 See FUJIMOTO, *supra* note 13, at 4-5 (2005).

453 See *id.* at 5.

454 See Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *supra* note 225, at ¶ 34; Try Again with Rights Bill, JAPAN TIMES (Tokyo), Sept. 8, 2005.

455 See Hurights Osaka, Government of Japan to Give up Submission of the Human Rights Protection Bill in the Present Diet Session, http://www.hurights.or.jp/news/0604/b12_e.html (last visited Mar. 6, 2007) (reporting that the draft human rights protection legislation was originally submitted to the Japanese Diet in 2002). See generally Media Regulation Bills Spark Heated Debate, DAILY YOMIURI (Tokyo), Apr. 27, 2002, at 3 (discussing some of the controversy surrounding the proposed bill when it was first introduced to the legislature).

456 See Hurights Osaka, Draft Human Rights Protection Bill Abandoned Due to Diet Dissolution, <http://www.hurights.or.jp/whatsnew/031010.html> (last visited Feb. 23, 2007).

457 See Hurights Osaka, *supra* note 455; see also Koizumi Says Media Bills Will Pass This Session, JAPAN TIMES (Tokyo), May 9, 2002 (showing that despite political promises to the contrary, many of the contentious issues of the draft bill had not been worked out and that passage was unlikely in 2002).

458 See HUMAN RIGHTS PROTECTION BILL (draft), arts. 2-3 (Japan), <http://www.jca.apc.org/jhrf21/eng/hrpb.html>.

459 See *id.*, arts. 5-20; cf. Philip Brasor, The Free Press Exercise Their Muscles, JAPAN TIMES (Tokyo), May 13, 2002 (chastising the proposed bill as a Ministry of Justice machination to comply with pressure from the United Nations Human Rights Committee while increasing its authority to censor the media).

460 See HUMAN RIGHTS PROTECTION BILL (draft), art. 6 (Japan), <http://www.jca.apc.org/jhrf21/eng/hrpb.html>.

461 *Id.*, art. 28.

462 See *id.*, art. 38(2). See generally MINISTRY OF JUSTICE, ACTIVITIES OF THE HUMAN RIGHTS ORGANS OF THE MINISTRY OF JUSTICE (2005), <http://www.moj.go.jp/ENGLISH/HB/hb-01.html> (promulgating existing procedure where a human rights investigation can be launched upon receipt of a complaint or by a report in the media).

463 See HUMAN RIGHTS PROTECTION BILL (draft), art. 39(1) (Japan), <http://www.jca.apc.org/jhrf21/eng/hrpb.html>; see also *id.*, art. 44 (providing for specific instances where special inquiry powers become available and also granting the Commission the ability to levy punitive fines for noncompliance with inquiries and procedure). See generally Editorial, Human Rights Bill Needs Drastic Changes, *DAILY YOMIURI* (Tokyo), Apr. 23, 2005, at 4 (attacking the proposed Human Rights Commission for having too much investigatory power, especially the ability to have on-the-spot investigations).

464 See HUMAN RIGHTS PROTECTION BILL (draft), arts. 41-42 (Japan), <http://www.jca.apc.org/jhrf21/eng/hrpb.html>.

465 See *id.*, art. 41(1). But cf. Editorial, Defects in Rights Bill Can't Be Left to Later, *DAILY YOMIURI* (Tokyo), Feb. 28, 2005, at 4 (arguing that the remedy provisions of the bill should not be applied to media organizations and newsgathering procedures because it would stifle a free media).

466 See HUMAN RIGHTS PROTECTION BILL (draft), arts. 45-59 (Japan), <http://www.jca.apc.org/jhrf21/eng/hrpb.html>; Toward a Basic Law on Human Rights, *JAPAN TIMES* (Tokyo), May 30, 2001.

467 See HUMAN RIGHTS PROTECTION BILL (draft), arts. 60-61 (Japan), <http://www.jca.apc.org/jhrf21/eng/hrpb.html>; Editorial, Protect Freedom of the Press, *DAILY YOMIURI* (Tokyo), Mar. 20, 2002, at 8.

468 See HUMAN RIGHTS PROTECTION BILL (draft), arts. 62-63 (Japan), <http://www.jca.apc.org/jhrf21/eng/hrpb.html>.

469 See FUJIMOTO, *supra* note 13, at 4; Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *supra* note 225, at ¶ 34.

470 See Press Release, Amnesty Int'l, Japan: Serious Concerns over Human Rights Bill (Nov. 11, 2002) <http://web.amnesty.org/library/Index/engASA220082002>; see also U.N. Body Voices Concern About Human Rights Bill, *DAILY YOMIURI* (Tokyo), July 3, 2002, at 2 (reporting that the United Nations High Commissioner had concerns that the proposed human rights committee would be too closely affiliated to the Ministry of Justice and would therefore not comply with the U.N. resolution).

471 See Editorial, Revision Essential to Human Rights Bill, *DAILY YOMIURI* (Tokyo), June 7, 2005, at 4 (arguing that the draft bill must be revised to better define the violations and to place safeguards to prevent political abuses and overbroad application); see also Editorial, Start From Scratch on Human Rights Bill, *DAILY YOMIURI* (Tokyo), July 25, 2005, at 4 (arguing that the proposed legislation is so fundamentally flawed that it must be rewritten from scratch to prevent being used as an overly powerful political weapon).

472 See Debito Arudou, Editorial, How to Kill a Bill: Tottori's Human Rights Ordinance Is a Case Study in Alarmism, *JAPAN TIMES* (Tokyo), May 2, 2006; Tottori Rights Law a First but Irks Critics, *JAPAN TIMES* (Tokyo), Oct. 13, 2005.

473 Tottori Rights Law a First but Irks Critics, *supra* note 472.

474 Tottori Rights Law a First but Irks Critics, *supra* note 472; Tottori Rights Ordinance Dies a Credibility Death, Prefecture Cites Lack of Support from Bar, *JAPAN TIMES* (Tokyo), Oct. 25, 2006.

475 See Arudou, *supra* note 472; Tottori Rights Law a First but Irks Critics, *supra* note 472.

476 See Tottori Rights Law a First but Irks Critics, *supra* note 472; Tottori to Shelve "Vague" Human Rights Ordinance, *JAPAN TIMES* (Tokyo), Mar. 25, 2006.

477 See Arudou, *supra* note 472; see also Tottori Rights Ordinance Dies a Credibility Death, Prefecture Cites Lack of Support from Bar, *JAPAN TIMES* (Tokyo), Oct. 25, 2006 (citing lack of support from the Tottori Bar Association, as well as criticism from scholars and a flood of phone calls and e-mails from protesters as the reason for suspending the bill).

478 See Arudou, *supra* note 472.

479 Arudou, *supra* note 472; see also Tottori to Shelve "Vague" Human Rights Ordinance, *supra* note 476 (explaining that the Tottori Assembly passed a bill to suspend the ordinance indefinitely so that authorities have time to examine actual rights violations in the prefecture and to determine how to better address them).

480 IWASAWA, *supra* note 100, at 5.

481 Yamanaka, *supra* note 252.

482 See ARUDOU, *supra* note 1, at 54-55 (noting that the Otaru mayor later declared the intention to "redouble [the city's] efforts to tell [the discriminating onsen] to improve th[e] situation"). But see *City Off Hook Over Bathhouse Barring of Foreigners*, *supra* note 379 (stating that despite the fact that the local government has no duty to enact specific ordinances against racial discrimination, the Otaru government did request that the bathhouses stop rejecting foreigners).

483 See ARUDOU, *supra* note 1, at 87, 127 (also noting that a consensus-based approach was also applied by two of the offending onsen in the form of a customer poll to determine feelings on allowing foreigners to bathe with the locals). But see Hoffman, *supra* note 336 (explaining that despite a 1999 survey showing that a majority of visitors preferred not to bathe with foreigners, the Osupa bath dropped its "Japanese Only" policy).

484 ARUDOU, *supra* note 1, at 210.

485 *Id.* at 237.

486 See Madison, *supra* note 31, at 208.

487 See Johnston, *supra* note 159.

488 See Knapp, *supra* note 39, at 145.

489 See Knapp, *supra* note 39, at 145-46; see also Loraine Parkinson, Note, Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change, 89 *COLUM. L. REV.* 604, 605 (1989) (discussing Japan's belief that a change in the social fabric is best achieved not suddenly through imposition of force from within, but rather incrementally, on a voluntary basis through a series of graduated steps).

490 JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 198 (1991).

491 *Id.*

492 Haley, *supra* note 202, at 4 (noting that Japan's solution for cumbersome community decision-making is to delegate the responsibility to the many communities that each claim a degree of autonomy and decision-making authority).

493 Id.

494 Haley, *supra* note 202, at 4; see also Martha Jean Baker, *The Different Voice: Japanese Norms of Consensus and "Cultural" Feminism*, 16 *UCLA PAC. BASIN L.J.* 133, 137 (1997) (discussing Japan's use of consensus dispute resolution as a means of minimizing the possibility that one person or group will be able to use the system to dominate others).

495 See Haley, *supra* note 202, at 4.

496 See KENNETH L. PORT, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 458 (1st ed. 1996) (remarking on the implementation of consensus-building in the Japanese judicial process through the system of conciliation); see also Eric A. Feldman, *The Tuna Court; Law and Norms in the World's Premier Fish Market*, 94 *CAL. L. REV.* 313, 367 (2006) (commenting that while Japanese people will go to court when necessary, the government is more interested in ensuring that Japanese morals and not law govern dispute resolution, and so the use of extrajudicial conciliation is encouraged); Robert G. Kondrat, *Comment, Punishing and Preventing Pollution in Japan; Is American Style-Criminal Enforcement the Solution?* 9 *PAC. RIM L. & POL'Y J.* 379, 394 n.106 (2000) (discussing the support for conciliation in Japan and noting that, like the American system of litigation, conciliation can also take a great deal of time).

497 See PORT, *supra* note 496; see also Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (Saiban-in-Seido) from Domestic Historical and International Psychological Perspectives*, 37 *VAND. J. TRANSNAT'L L.* 935,968-70 (2004) (explaining the different parties involved in the conciliation process).

498 Lynn Berat, *The Role of Conciliation in the Japanese Legal System*, 8 *AM. U. J. INT'L L. & POL'Y* 133 (1992), reprinted in *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 450 (Kenneth L. Port & Gerald Paul McAlinn eds., 2d ed. 2003); see also David Broiles, *When Myths Collide: An Analysis of Conflicting U.S.-Japanese Views on Economics, Law and Values*, 1 *TEX. WESLEYAN L. REV.* 109, 133-34 (1994) (discussing the preference for conciliation in Japan, and the fact that it is inhibiting the development of court-made commercial and civil law).

499 See Harold See, *The Judiciary and Dispute Resolution in Japan: A Survey*, 10 *FLA. ST. U. L. REV.* 339 (1982), reprinted in *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 439 (Kenneth L. Port & Gerald Paul McAlinn eds., 2d ed. 2003) (discussing the social stigma that is associated with being involved in a court proceeding, and noting this as a reason for the emphasis on dispute resolution); see also Margaret A. Boulware et al., *An Overview of Intellectual Property Rights Abroad*, 16 *HOUS L. INT'L L.* 441, 490 (1994) (noting that a driving force in Japanese culture is the avoidance of open conflict and the resolution of disputes without litigation).

500 See John Owen Haley, *The Myth of the Reluctant Litigant*, 4 *J. JAPANESE STUD.* 359 (1978), reprinted in *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 108-22 (Kenneth L. Port & Gerald Paul McAlinn eds., 1st ed. 1996). See generally J. Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 *J. JAPANESE STUD.* 1, 118-19 (1988) (discussing Japanese perceptions of litigation and litigation rates).

501 See, *supra* note 499, reprinted in *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 439 (Kenneth L. Port & Gerald Paul McAlinn eds., 2d ed. 2003).

502 Yates, *supra* note 162.

503 Id.

504 Id.; see also John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 *J. JAPANESE STUD.* 2, 265-68 (1982) (discussing the scarcity of meaningful sanctions or effective legal remedies in Japanese law, which in turn encourages out-of-court dispute resolution).

505 YOSIYUKI NODA, *INTRODUCTION TO JAPANESE LAW* 174 (Anthony H. Angelo ed. & trans. 1976); see
R.E. Watts, *Briefing the American Negotiator in Japan*, 16 *INT'L LAW* 597, ¶¶ 12-14 (1982).

506 See *Mitsubishi Jushi K.K. v. Takano*, 27 *MINSHU* 1536, 1536 (Sup. Ct., Dec. 12, 1973).

507 NODA, *supra* note 505, at 175; see also Madison, *supra* note 31, at 189-90 (noting that giri or obligation
defines every relationship so that all followers know what to expect in interpersonal Japanese relations).

508 See Watts, *supra*, note 505, ¶ 15.

509 See NODA, *supra* note 505, at 179.

510 *Id.* at 183 (recognizing that giri means something different to the younger members of the Japanese
community than it does the older as Japanese attitudes change).

511 *Id.*

512 *Id.*

513 Yamaga-Karns, *supra* note 12, at 571-72.

514 Clark, *supra* note 257; see also Gregory Clark, Editorial, *Problematic Global Standards*, *JAPAN TIMES*
(Tokyo), Nov. 1, 1999, at 21 (discussing the pluses and minuses of Japanese standards and noting that there
are pluses for every minus).

515 Clark, *supra* note 514, at 21; see also Clark, *supra* note 257 (identifying aspects of Japanese society that benefit
foreigners).

516 Clark, *supra* note 514, at 21; see also Clark, *supra* note 257 (recognizing differences between Japanese and
Western value systems and noting that Japanese values may be unfairly characterized as racist).

517 See Yamanaka, *supra* note 252, at ¶¶ 28-45; see also Howard W. French, *Westerner Crusades Against
Discrimination in Japan; Fights Injustice Against Foreigners and Finally Becomes a Citizen*, *S.F. CHRON.*,
Dec. 3, 2000, at A20 (noting that a national discussion is underway in Japan about opening the country to
more foreign immigration).

518 *Arudou v. Yunohana* (Sapporo High Ct., Sept. 16, 2004), reprinted in *ARUDOU*, *supra* note 1, at 413.

519 Knapp, *supra* note 39, at 144-45 (describing the principle of gradualism cherished by Japanese culture, which
states that meaningful change must be shaped by evolution, rather than revolution, through which the public
builds consensus). See generally Helen A. Goff, *Glass Ceilings in the Land of the Rising Sons: The Failure of
Workplace Discrimination Law and Policy in Japan*, 26 *L. & POL'Y INT'L BUS.* 4, 1147, ¶¶ 25-35 (1995)
(recognizing shortcomings of the gradual approach to change in discrimination law and policy as
exemplified by the Equal Employment Opportunity Law).

520 Knapp, *supra* note 39, at 144-45.

521 See generally Sam Jameson, *Japan's "Untouchables" Suffer Invisible Stain: Class: Facing Discrimination
Solely Because of Their Ancestors' Birthplace*, *BURAKUMIN Hope that Society Will Finally Forget the Past*,
L.A. TIMES, Jan. 2, 1993, at A24 (describing the discrimination against burakumin despite laws enacted to
protect them and widespread recognition of the practice).

522 See Haley, *supra* note 504, at 265-68 (discussing the scarcity of meaningful sanctions or effective legal
remedies in Japanese law).

523 Johnston, *supra* note 290.

- 524 Nobutoshi Yamanouchi & Samuel J. Cohen, *Understanding the Incidence of Litigation in Japan: A Structural Analysis*, 25 *INT'L LAW* 443 (1991), reprinted in *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 107 (Kenneth L. Port ed., 1st ed. 1996).
- 525 *Shop Must Pay Up for Turning Away Black Man*, supra note 288.
- 526 Yamanouchi & Cohen, supra note 524, reprinted in *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 105 (Kenneth L. Port ed., 1st ed. 2003); see also Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 *NW. U. L. REV.* 1436, 1457 (1994) (demonstrating the disincentives of Japanese litigation due to the extent of attorney's fees and other litigation costs).
- 527 See Yamanouchi & Cohen, supra note 524, reprinted in *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 107 (Kenneth L. Port ed., 1st ed. 2003) (calculating that a claim amounting to more than 3 million yen would require court fees of 1,000 yen for each 200,000 yen claimed); see also Phil Rothenberg, Note, *Japan's New Product Liability Law: Achieving Modest Success*, 31 *LAW & POL'Y INT'L BUS.* 453, 510 (2000) (explaining that court filing fees, like attorney's fees, deter litigation in Japan).
- 528 *Shop Must Pay Up for Turning Away Black Man*, supra note 288. See generally Johnston, supra note 290 (affirming that the amount awarded to McGowan was comparably smaller than the amount awarded in other discrimination suits).
- 529 See Kiyoko Kamio Knapp, Article, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 *HARV. WOMEN'S L.J.* 83, 118 (1995); see also Yates, supra note 162 (remarking that most discrimination suits in Japan settle out of court because of the difficulty in proving discrimination).
- 530 *BEER & MAKI*, supra note 16, at 155; *Census Confirms Nation in Era of Population Decline*, *NIKKEI WEEKLY* (Tokyo), Nov. 6, 2006.
- 531 See Arudou, supra note 230; see also *Homestays Help Eradicate Biases Against Foreigners*, *JAPAN ECON. NEWSWIRE*, Jan. 2, 2004 (revealing that the media, like the police and the government, tend to highlight crimes allegedly committed by foreigners).
- 532 *Japanese Divided on Whether Foreigners Are Good Influence*, supra note 213.
- 533 See *ARUDOU*, supra note 1, at 387-92. See generally *Statement on the Lawsuit Against Japan's National Government to be Filed in 2006 in Tokyo District Court When We Have Some More Plaintiffs on Board*, [http:// www.debito.org/kunibengodanenglish.html](http://www.debito.org/kunibengodanenglish.html) (last visited Feb. 24, 2007) (claiming that the Japanese national government violated the International Convention on the Elimination of All Forms of Racial Discrimination).
- 534 *ARUDOU*, supra note 1, at 389; *Statement on the Lawsuit Against Japan's National Government to be Filed in 2006 in Tokyo District Court When We Have Some More Plaintiffs on Board*, supra note 533.
- 535 See *Judgment Concerning Whether or Not the Public Offices Election Law (Before Amendment by Law No. 47 of 1998) Was in Violation of Article 15(1) and (3), Article 43(1), and the Proviso of Article 44 of the Constitution for the Reason That It Completely Precluded Japanese Citizens Residing Abroad from Voting in National Elections at the Time of the General Election of Members of the House of Representatives Held on October 20, 1996*, 59 *MINSHU* 7 (Sup. Ct., Sept. 14, 2005). See generally *Counting the Overseas Vote*, *JAPAN TIMES* (Tokyo), Sept. 20, 2005 (referring to the Supreme Court's finding that the omission by the Japanese legislature to ensure voting equality, by failing to enact legislation to allow Japanese citizens living abroad to vote, was unlawful).
- 536 See *ARUDOU*, supra note 1, at 388.

- 537 See HALEY, *supra* note 490, at 198 (emphasizing that in Japan, the legitimacy of its government is based on creating consensus rather than seeking methods for command and coercion).
- 538 See *id.* at 14. See generally *Improving the Sources of Growth and Higher Living Standards*, OECD ECON. SURVEYS—JAPAN, Jan. 1, 2003, at 99 (stressing the weakness in enforcing legislation by Japan's regulatory authority).
- 539 John O. Haley, *Dispute Resolution in Japan: Lessons in Autonomy*, 17 CAN.-U.S. L.J. 443 (1991), reprinted in *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 448 (Kenneth L. Port & Gerald Paul McAlinn eds., 2d ed. 2003).
- 540 *Id.*; see Haley, *supra* note 504.
- 541 See PORT & MCALINN, *supra* note 500.
- 542 MARK D. WEST, *LAW IN EVERYDAY JAPAN: SEX, SUMO, SUICIDE, AND STATUTES* 268 (2005).
- 543 See HALEY, *supra* note 490, at 198. See generally Clifford C. Clarke & G. Douglas Lipp, *Conflict Resolution for Contrasting Cultures: Multinational Companies*, 52 TRAINING & DEV. 20 (1998) (demonstrating the applicability of consensus-building processes).
- 544 See HALEY, *supra* note 490, at 198.
- 545 *Id.* at 199; see also Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 967 (1984) (establishing that societal consensus in the legal process is reflected in the enjoyment of rights by the Japanese people).
- 546 HALEY, *supra* note 490, at 199; see also John O. Haley, *Mixed Reception: Culture, International Norms, and Legal Change in East Asia: Comment: Law and Culture in China and Japan: A Framework for Analysis*, 27 MICH. J. INT'L L. 895, 899 (2006) (reasoning that legal norms reflect widely shared community interests and values that build on consensus and shape the structure of political authority).
- 547 See Yamanaka, *supra* note 252 (reporting that after the Bortz decision, for example, one commentator noted that "signs reading, 'No Foreigners Allowed,' disappeared from the city's stores and bars"). But see Moshavi, *supra* note 172 (suggesting that signs forbidding foreigners are still posted due to crime prevention measures targeting foreigners)