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# Local Public Employment Discrimination Against Korean Permanent Residents in Japan: A U.S. Perspective

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# LOCAL PUBLIC EMPLOYMENT DISCRIMINATION AGAINST KOREAN PERMANENT RESIDENTS IN JAPAN: A U.S. PERSPECTIVE

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*Abstract*: Japanese government officials have recently indicated a willingness to relax restrictions that have prohibited Korean permanent residents of Japan from competing for local civil service jobs, though changes have not yet been forthcoming. The current bar on resident aliens has important symbolic and practical significance in a country widely criticized for its entrenched racism and for its lack of substantive civil rights law. This Comment traces the history and special circumstances of Koreans in Japan and argues that Koreans are already protected from most kinds of public employment discrimination by Article 22 (freedom to choose an occupation) and Article 14 (equal protection) of the Japanese Constitution. It also suggests a framework in which Japanese courts should consider claims in public employment discrimination cases, drawing on precedents and lessons from both Japanese and U.S. law.

## I. INTRODUCTION

On November 12, 1996, Japan's Minister of Home Affairs Katsuhiko Shirakawa announced that his agency would review longstanding restrictions on the ability of non-citizens in Japan to compete for jobs in Japan's public sector.[1] His statement followed a partial relaxation of nationality requirements one week earlier by his predecessor Hiroyuki Kurata,[2] and responded to building pressures from local authorities[3] and from long-time Korean residents[4] to allow non-citizens access to public employment.[5]

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[1] *Gov't to Review Public Service Nationality Requirement*, Japan Econ. Newswire, Nov. 12, 1996, *available in* LEXIS, Asiapc Library, Japan File.

[2] In a November 1 announcement, Kurata broadened the permissible public occupations of non-citizens to include clinical test examiners, dietitians and kindergarten teachers in addition to such already approved specialist posts as public health nurses and midwives, as well as posts involving international issues and telecommunications. *Ministry Agrees to More Municipal Posts for Foreigners*, Japan Econ. Newswire, Nov. 1, 1996, *available in* LEXIS, Asiapc Library, Japan File.

[3] The City of Kawasaki, southwest of Tokyo, became the first municipality in Japan to eliminate the nationality requirement for all positions except that of firefighter and for managerial positions. *Gov't to Review Public Service Nationality Requirement, supra* note 1. The Kochi prefectural government and the Osaka municipal government had also moved toward admitting foreigners as public servants, but put their plans on hold in April 1996 due to opposition from the Ministry of Home Affairs. *Id.* Since Shirakawa's statement, several other local governments have moved toward lessening the impact of the nationality clause. Yokohama's municipal government plans to abolish the clause's application for up to 70% of municipal jobs. *See Yokohama May Open Up Municipal Jobs to Foreigners*, JAPAN WKLY. MONITOR, Jan. 13, 1997, *available in* LEXIS, Asiapc Library, Japan File. Kanagawa and Kochi

The rationale for current restrictions is that public service jobs involve the exercise of "public authority" which is derived from the sovereign state—non-citizens should not be allowed to wield the state's sovereign power, especially vis-á-vis citizens. Countering this concern is the symbolic and practical significance of excluding permanent resident Koreans from a substantial sector of the economy in a country widely criticized for the entrenched racism of its citizenry.[6]

This Comment suggests a framework for considering to what extent Korean permanent residents can claim constitutional protection[7] from

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prefectures and the City of Kobe plan to accept foreigners for public clerical jobs. *See Kanagawa, Kochi, Kobe to Hire Foreigners*, JIJI PRESS TICKER SERV., Jan. 6, 1997, *available in* LEXIS, Asiapc Library, Japan File.

[4] *See, e.g., Council to Fight Discrimination in Government Hiring*, Japan Econ. Newswire, Nov. 24, 1990, *available in* LEXIS, Asiapc Library, Japan File. The South Korean Government has also been vocal in encouraging abolition of the public employment restrictions. *See, e.g., Kim Young Sam Urges Full Rights for Korean Residents*, Japan Econ. Newswire, Mar. 19, 1990, *available in* LEXIS, Asiapc Library, Japan File. In January 1991, the Japanese and South Korean Governments signed a Memorandum giving each Japanese locality the authority to decide which jobs may be held by non-Japanese nationals. *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996: JAPAN 681, 686, S. PRT. No. 105-10 (1997). The Memorandum is not a binding treaty, however, and the Japanese Government continues to send mixed signals to local officials.

[5] "Public employment" presents an initial problem of definition. Studies contrasting public and private employment often focus on the legal nature of the employer, the type of services being provided, or a combination of the two. Others focus simply on the locus of control or funding. *See* Gillian S. Morris & Sandra Fredman, *Is There a Public/Private Labour Law Divide?*, 14 COMP. LAB. L. 115, 119-20 (1993). In this Comment, the term is used to indicate a job where hiring decisions are made by government officials or require taking some type of civil service exam.

[6] Viewed from the U.S., Japan's racist outlook is evident in casual comments by Japanese politicians reported in the international press, and in the actions of Japanese subsidiaries operating in the United States. Prime Minister Yasuhiro Nakasone's gaffe in 1986, for example, was widely reported. In explaining Japan's economic success, Nakasone said: "Japan has become a highly educated society; it has become quite an intelligent society on the average, much more so than America. In America there are many blacks, Puerto Ricans, Mexicans, and others, and the average level is still very low." Yoshimi, *Japan's Racial Myopia*, 14 JAPAN ECHO 47, 48 (1987), *quoted in* 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 (1991/1992). A great deal of scholarly attention has accompanied the clash of the United States/Japan Friendship, Commerce and Navigation ("FCN") Treaty and Title VII of the Civil Rights Act; articles typically analyze and criticize the ability of Japanese subsidiaries in the United States to discriminate in hiring and promotion practices based on their rights under the FCN Treaty. *See, e.g.*, William H. Lash III, *Unwelcome Imports: Racism, Sexism, and Foreign Investment*, 13 MICH. J. INT'L L. 1 (1991).

[7] As discussed in Section II, *infra*, there is little statutory or international law that offers protection to non-citizens. The Constitution of Japan is the only legal vehicle for attacking public employment prohibitions. The need for legal protection of Koreans has not been mooted by recent statements by the Japanese Government. Shirakawa's pledge, after all, was only to study *whether* and how the Government should change its nationality requirements for local public service. Though he has stated that "the decision of whether to hire foreign nationals (as public servants) is in the end one to be made by the elected local leader," no formal commitment to change has been made. *Minister Hints at Foreign Nationals in Public Service*, Japan Econ. Newswire, Nov. 8, 1996, *available in* LEXIS, Asiapc Library,

discrimination in the public sector under Articles 22 (freedom to choose an occupation) and 14 (equal protection). It focuses on Koreans and on local civil service to emphasize both the practical effect (Koreans are the largest minority group in Japan; civil service job opportunities are greater at the local, rather than national level) and the injustice of blanket nationality restrictions (Koreans have a unique history in Japan; the rationale for restricting Koreans from local public service is weaker than restricting them from federal positions). Much of the analysis presented, however, is generally applicable to all alien groups in Japan[8] and to both national and local civil service jobs.

In order to provide a context within which to consider Japan's current prohibition against allowing Koreans to participate in civil service, Section II is devoted to a brief overview of the social and legal history of Koreans in Japan. Section III emphasizes the lack of employment protections for permanent resident Koreans under Japanese statutory and applicable international law. It suggests that the Japanese Constitution is the only plausible legal vehicle for redress of public employment discrimination and stresses the importance of the balancing test articulated by the Japanese Supreme Court in *K.K. Sumiyoshi v. Governor of Hiroshima Prefecture*[9] for resolving Article 22 disputes. Section IV analyzes current public employment restrictions in Japan and describes the Tokyo District Court's 1996 decision in *Chong Hyun Gyun v. Tokyo Municipal Government*,[10] Japan's most recent public employment discrimination case. In Section V, this Comment draws from U.S. case law to highlight factors which should motivate Japanese courts to adopt the *K.K. Sumiyoshi* test in public employment discrimination cases involving permanent Korean residents in Japan.

This Comment concludes that applying broad nationality restrictions to all non-citizens is unconstitutional. Japanese courts must step in to provide legal guidance to local governments, since the Federal Government (and the Tokyo District Court) has failed to articulate coherent, reasonable public employment limits on Korean permanent residents in Japan. Japanese courts should subject public employment restrictions based on nationality to a

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Japan File. Even assuming the central government follows through with its pledge, it is not necessarily true that local governments will formulate constitutional policies governing the limits of public employment opportunities.

[8] This Comment does suggest, however, that distinguishing between some classes of Korean permanent residents and other non-citizens may be desirable. *See infra* notes 176-78 and accompanying text.

[9] SAIBANSHO JIHŌ (No. 66) 1; JURITSO (No. 592) 60 (Sup. Ct., Apr. 30, 1975).

[10] 1566 HANREI JIHŌ 23 (Tokyo Dist. Ct., May 16, 1996).

heightened standard of review and their analysis must recognize the unique history of Koreans residing in Japan.

## II. THE SPECIAL CIRCUMSTANCES OF KOREANS IN JAPAN

Japan's officials proclaim their country's homogeneity as an example of its strength.[11] Japan is less "pure" than many of its officials believe, however, and Japanese attitudes toward those of a different race or ethnicity is felt by the 1,345,000 foreigners living legally in Japan, by illegal aliens, by naturalized Japanese citizens, and by Japan's indigenous Ainu population.[12] By far the largest ethnic minority in Japan is the Koreans, with an estimated 677,000 people.[13] Not included in this figure are a number of Koreans with Japanese citizenship[14] as well as illegal Korean aliens living in Japan.[15]

Japanese Government officials often argue that if Koreans want to enjoy various rights to the same extent as Japanese nationals, they can do so as naturalized citizens.[16] So long as they remain aliens, the argument runs, it cannot be helped that their rights are restricted.[17]

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[11] *See, e.g.*, Yoshimi, *supra* note 6.

[12] Ethnic Japanese groups also face discrimination. Such groups include women, the handicapped, Japanese living on Okinawa, and the Buraku (ethnic Japanese historically engaged in "degrading" professions (beggars, actors, or jugglers) or "filthy" professions (tanners, butchers, executioners, etc.)). *See* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 79 (1987). *See generally* WHITE PAPER ON HUMAN RIGHTS: FROM THE VIEWPOINT OF THE DISCRIMINATED (Buraku Kaiho Kenkyusho ed., 1984).

[13] *Japan Minister Orders Nationality Study*, UPI, Nov. 12, 1996, *available in* LEXIS, Asiapc Library, Allnws File. Koreans account for approximately 0.8 percent of the population. Onuma Yasuaki, *Interplay Between Human Rights Activities and Legal Standards of Human Rights: A Case Study on the Korean Minority in Japan*, 25 CORNELL INT'L L.J. 515, 515 (1992).

[14] From 1952 to 1989 the number of naturalized Koreans holding Japanese citizenship was about 150,000. Their offspring automatically acquire citizenship status. Other Koreans have acquired citizenship either through marriage or as offspring of a mixed marriage. The total number of Koreans legally in Japan has been estimated at over one million, or roughly one percent of Japan's population. Yasunori Fukuoka & Yukiko Tsujiyama, *MINTOHREN: Young Koreans Against Ethnic Discrimination in Japan*, 10 Bulletin of Chiba College of Health Science No. 2, 14 n.2 (John G. Russell trans.), *available at* The HAN Homepage (visited Nov. 15, 1997) <http://www.han.org/a/fukuoka92.html>.

[15] In 1992, the number of Koreans remaining in Japan illegally reached 50,614. IMMIGRATION BUREAU, MINISTRY OF JUSTICE, IMMIGRATION AND EMIGRATION STATISTICS (1993), *cited in* HARUO SHIMADA, JAPAN'S "GUEST WORKERS": ISSUES AND POLICIES 28 (1994).

[16] This attitude is still reflected by Japanese officials, though voicing such thoughts is usually quickly condemned by Korean residents and in the press. Such criticism was aimed, for example, at an Osaka elementary school teacher who urged Koreans to take Japanese citizenship: "Japan is a wonderful country. Korean residents had better become Japanese by obtaining citizenship because there are problems like suffrage and employment." *School Head Rapped for Remarks About Korean Residents*, Japan Econ. Newswire, Sep. 12, 1996, *available in* LEXIS, Asiapc Library, Japan File. The press also criticized the mayor of Chiba for claiming that "naturalization is the best solution . . . many problems arise when foreigners demand suffrage and employment (in public posts) without trying to become

These statements reflect a failure to understand the historical realities of the Korean experience in Japan and to explain why the overwhelming majority of Koreans in Japan have not naturalized, though ninety percent of Korean residents are second, third, or fourth generation.[18] Such attitudes also ignore the reality that even naturalized Koreans continue to suffer discriminatory treatment in Japan.

### *A. The Legal Status of Koreans in Japan*

#### *1. Koreans in Japan Before 1945*

Japan invaded and took control of Korea at the outbreak of the Russo-Japanese war in 1904.[19] Korea became a Japanese protectorate shortly thereafter and was eventually annexed in 1910 and ruled through a colonial government.[20] Internationally, Koreans were considered Japanese nationals, but the Japanese maintained a family registry that identified "true" Japanese from "colonial" Japanese.[21] Largely as a result of Japanese land management policies on the Korean peninsula, thousands of Koreans migrated to Japan to earn a living.[22] By 1920, 40,000 Koreans resided in Japan;[23] by 1938 the number was near 800,000.[24]

Migration to Japan increased in conjunction with Japan's mobilization efforts at the start of the Sino-Japanese War in 1937. A policy of *naisen ittai*, "unification of the homeland and Korea," was implemented to strengthen Japanese military power and the Korean economy was reorganized to provide raw materials and unfinished products for Japan.[25] After Japan entered World War II in 1942, and as labor shortages worsened throughout the war, Japan exercised its authority under the 1938 National Mobilization Law to

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naturalized." *"Naturalization Is Best" to Seek Rights, Public Posts*, Japan Econ. Newswire, Nov. 25, 1996, *available in* LEXIS, Asiapc Library, Japan File.

[17] Onuma Yasuaki, *supra* note 13, at 518.

[18] *Id.* at 515-16.

[19] 4 KODANSHA ENCYCLOPEDIA OF JAPAN 281 (1983).

[20] International Commission of Jurists, *The Korean Minority in Japan*, THE REVIEW, Dec. 1982, at 28, 28.

[21] Yuji Iwasawa, *Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law*, 8 HUM. RTS. Q. 131, 144 (1986).

[22] Japan's imposition of a land registration system and the high rents it extracted from Korean share-croppers resulted in mass evictions of Korean farmers. International Commission of Jurists, *supra* note 20, at 28.

[23] *Id.* at 28.

[24] Yasunori Fukuoka & Yukiko Tsujiyama, *supra* note 14, at 1.

[25] 4 KODANSHA ENCYCLOPEDIA OF JAPAN, *supra* note 19, at 284.

require the transfer of thousands of Koreans to Japan to work in strategic industries.[26] The most horrific and best-known incident was the forced migration of 50,000 to 70,000 "comfort women"[27] (young Korean girls) to "serve the needs of the Japanese soldiers."[28] Simultaneously, Koreans were conscripted into the Japanese military; an estimated 364,186 Korean soldiers were in the Japanese armed forces at the end of the Pacific war.[29]

Despite Japanese subjugation of Korea and its policies of forced assimilation of Koreans, Koreans residing in Japan were treated much like citizens, though distinguishable on the basis of the family registry. They gained the right to vote in 1925 and were subject to compulsory military service in 1944 along with Japanese.[30] By the end of WWII, an estimated 410 Koreans held civil service jobs in Japan.[31]

### 2. *Status of Koreans in Japan After WWII*

The majority of the estimated 2,300,000 Koreans[32] in Japan at the end of WWII were repatriated during the allied occupation of Japan. The "foreignness" of Korean residents was explicitly recognized by the Allied Commander[33] in his 1946 decree:

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[26] New evidence reveals the Korean population in Japan may have also been supplemented by kidnapped workers. Documents discovered in 1990 indicate that forced labor was prevalent enough to warrant a published manual with instructions on how to control laborers forcibly brought from Korea and China. *Manual on Forced Labor Discovered*, JAPAN TIMES, June 28, 1990, at 2.

[27] International Commission of Jurists, *supra* note 20, at 29. These estimates may be low. According to Mie Kawashima, "Historians say some 100,000 to 200,000 Asian women, mainly from the Korean Peninsula then under Japanese colonial rule, were forced into sexual slavery . . . ." Mie Kawashima, *Japan Aims Apology, Not Liability, to Ex-Sex Slaves*, Japan Econ. Newswire, June 5, 1996, *available in* LEXIS, Asiapc Library, Japan File.

[28] International Commission of Jurists, *supra* note 20, at 29.

[29] *Id.* The thorny issue of nationality restrictions has arisen in this context as well. Chong Sang Gun, a Korean resident drafted by the Japanese Military during World War II, was denied compensation for war injuries. *See Korean Resident Sues Japanese Govt. for WWII Army Draft*, Japan Econ. Newswire, Jan. 31, 1991, *available in* LEXIS, Asiapc Library, Japan File. The Court's ruling in this case led Hiroshi Tanaka, a professor at Hitotsubashi University, to state that "nationality is excessively emphasized in Japan." Kyoko Sato, *Non-Japanese Need Not Apply*, JAPAN TIMES WKLY. INT'L EDITION, 7, Oct. 30-Nov. 5, 1995.

[30] International Commission of Jurists, *supra* note 20, at 29.

[31] *Id.* at 29. *See also* Tadahiro Fujikawa, *Editorial: Foreign Civil Servants Should Be Local Option*, THE NIKKEI WKLY., June 24, 1996, at 7, *available in* LEXIS, Asiapc Library, Japan File ("In fact, Japan at one point had 83 ethnic Koreans in its national civil service and 122 in local public positions.").

[32] Yasunori Fukuoka & Yukiko Tsujiyama, *supra* note 14, at 2.

[33] Many Koreans also did not consider themselves Japanese, especially those conscripted into the Japanese military or otherwise forced to aid Japan's war efforts, many of whom felt liberated, not defeated, by Japan's fall. Cheong Sung-hwa, *A Study of the Origin of the Legal Status of Korean Residents in Japan: 1945-1951*, 32 KOREA J. 43, 44 (1992).

> The Koreans who refuse to return to their homeland under the repatriation program will be considered as retaining their Japanese nationality, *until such time* as an officially established Korean government will recognize them as Korean people.[34]

In preparation for recognition of resident Koreans as foreign nationals, the Japanese Government subjected Koreans to the strictures of its 1947 Alien Registration Law: "Chosenjin (Koreans) shall be regarded as aliens for the time being for the purposes of administration of this law."[35]

When the San Francisco Peace Treaty came into effect in 1952, Koreans' de facto denationalization became official. The Japanese Government claimed that the peace treaty brought Koreans' prewar legal status formally to an end and provided that Japan recognize Korea and renounce all rights, claims, and title to Korea;[36] liberating Koreans from the personal jurisdiction of Japan required stripping Koreans of Japanese citizenship. Koreans were notified of their change of status by the Ministry of Justice nine days before the Treaty came into force.[37]

Though this unilateral deprivation of Japanese citizenship has been criticized both internationally[38] and within Japan, these nationality designations have withstood attacks under both the Japanese Constitution[39]

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[34] International Commission of Jurists, *supra* note 20, at 29 (emphasis added). The decree seems to ignore the history of Koreans in Japan, treating all Koreans as newcomers with no ties to Japan. Nevertheless, many Koreans vigorously protested against the decree for different reasons—feeling it was intended to prolong their enslavement under Japanese rule. *See* CHANGSOO LEE & GEORGE DE VOS, KOREANS IN JAPAN: ETHNIC CONFLICT AND ACCOMMODATION 77 (1981).

[35] Gaikokujin Tōroku Hō [Alien Registration Law], Law No. 125 of 1952, *translated in* EIBUN-HŌREI SHA, 10 EHS LAW BULL. SERIES. The Registration Law required that all non-citizens be fingerprinted and required to carry registration certificates with them at all times. The fingerprinting requirement has since been targeted by a number of foreigners and human rights advocates as a symbol of Japan's discriminatory bent. Mandatory fingerprinting was abolished for permanent foreign residents in 1993, due to intense internal and international pressure. However, aliens are still required to carry registration certificates. U.S. DEP'T OF STATE, *supra* note 4, at 686.

The Alien Registration Law was heavily influenced by the outlook of the U.S. occupation force, which was then gripped by McCarthyism. Japanese officials were concerned about potential subversive actions by Korean residents, especially given the power of left wing organizations which were formed in order to establish an independent Korean community after decades of oppressive Japanese rule. *See* Cheong Sung-hwa, *supra* note 33, at 46; *see also* Onuma Yasuaki, *supra* note 13, at 518.

[36] Treaty of Peace with Japan, art. 2(a), Sept. 8, 1951, U.S.-Japan, 3 U.S.T. 2490 (also known as the San Francisco Peace Treaty of 1951).

[37] International Commission of Jurists, *supra* note 20, at 30.

[38] *See id.* at 29 ("Thus [the Alien Registration Law], without giving a hearing to the Koreans, classified them as aliens and arbitrarily deprived them of the rights they were enjoying as Japanese citizens.").

[39] *See* Judgment of 5 April 1961, 15 SAI-HAN MINSHŪ 656 (Sup. Ct.), 8 JAPANESE ANN. INT'L L. 153 (1964), *cited in* Yuji Iwasawa, *supra* note 21, at 145.

and international law.[40] Even had Koreans been offered a choice of nationality, it seems unlikely that many would have chosen to become Japanese in 1952.[41] Koreans had been ill-treated by Japanese prior to and especially during the war and such treatment was not easily forgiven.

Though 500,000 Koreans remained in Japan following the war, this was due predominantly to the harsh economic reality and political uncertainty of life in Korea and to a lesser degree to restrictions on the amount of personal wealth Koreans were allowed to take with them,[42] rather than a desire to retain Japanese citizenship. In the words of one commentator, Koreans at the time "detested the thought of acquiring Japanese citizenship, which they considered an act of betrayal to their own national integrity."[43] Japanese treatment of Koreans since 1952 has reinforced this attitude, which persists among many second and third generation Koreans.[44]

### 3. *Current Status*

The indeterminate status of most Koreans in Japan was resolved through the Republic of Korea-Japan Normalization Treaty (1965), which conferred permanent resident status to South Koreans living in Japan and their offspring.[45] This group of Koreans is referred to as "permanent resident

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[40] In a 1980 decision, the Kyoto District Court held that provisions in the Universal Declaration of Human Rights had been established neither as "customary international law" requiring the Court's adherence, nor as a principle without exception. Judgment of 6 May 1980, 431 HANREI TAIMUZU 142 (citing Universal Declaration of Human Rights, art. 15(2), G.A. Res. 217, U.N. GAOR, 3d. Sess., at 71, U.N. Doc. A/810 (1948) ("No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality")), *cited in* Yuji Iwasawa, *supra* note 21, at 145-46. Although the Court noted that a legislative measure allowing Koreans to choose their nationality would have been appropriate, it held that the Peace Treaty was adequate to define the legal status of Koreans in Japan. *Id.*

[41] Onuma Yasuaki, *supra* note 13, at 517.

[42] In the first wave of repatriations, the Allied Commander had limited Koreans to 1,000 yen in cash and any personal belongings that they could carry by hand. Ostensibly, this was to preserve Japan's capital base, for which the U.S. was then responsible. Cheong Sung-hwa, *supra* note 33, at 45. When the Republic of Korea was recognized in August 1948, the Allied Command changed its policy to allow Koreans to exchange 100,000 yen for 100,000 Korean won, apparently in an effort to ease the U.S. burden of supporting Koreans to improve the security of Japan. Nevertheless, even 100,000 yen (about 200-300 dollars) was a negligible sum for most Koreans. *Id.* at 52.

[43] Onuma Yasuaki, *supra* note 13, at 517.

[44] For a study of attitudes among young Koreans, *see* Yasunori Fukuoka, *Beyond Assimilation and Dissimilation: Diverse Resolutions to Identity Crises among Younger Generation Koreans in Japan*, (Young-mi Lim & James M. Raeside trans.), 31 SAITAMA UNIV. REV. No. 2, *available at* The HAN Homepage (visited Nov. 14, 1997) <http://www.han.org/a/fukuoka96b.html>; *see also* Yasunori Fukuoka & Yukiko Tsujiyama, *supra* note 14, at 10-16.

[45] Agreement on the Legal Status and Treatment of the Nationals of the Republic of Korea Residing in Japan, June 22, 1965, Japan-South Korea, art. 1, 584 U.N.T.S. 3. Under the treaty, Koreans residing in Japan continuously since Aug. 15, 1945, their "lineal descendants" born before 1971, and their children

aliens by treaty" or "Peace Treaty Residents."[46] In 1982, similar status was conferred to Koreans claiming an allegiance with North Korea.[47] Other permanent Korean residents in Japan include those who have applied through the procedures available to all aliens;[48] such Koreans are classified as "General Permanent Residents."[49]

### *B. Barriers to Naturalization*

Japanese law takes explicit recognition of ethnic identity in awarding citizenship. Citizenship is determined by the nationality of one's parents,[50] rather than place of birth. Though not unique to Japan, this system reflects the larger Japanese conception that race and nationality go hand-in-hand with citizenship.[51] This is a fundamentally different conception of citizenship than exists in the United States and explains why Japanese officials so often insist that Japan is a homogenous nation.[52]

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born after 1971 were given permanent residence status if they applied for it. Yuji Iwasawa, *supra* note 21, at 151-52. Of the 351,262 applicants, 97.5% were granted permanent residence as of 1974. CHANGSOO LEE & GEORGE DE VOS, *supra* note 34, at 148. "It can be assumed that 250,000 Koreans did not attempt to apply for permanent residence because of ineligibility, allegiance to North Korea, or other reason." *Id.*

[46] *See* CHANGSOO LEE & GEORGE DE VOS, *supra* note 34, at 48.

[47] Shutsu-nyū-koku oyobi nanmin nintei-hō no ichibu wo kaisei suru hō [Law to Revise a Part of the Immigration Control Order], Law No. 85 of 1981, *cited in* Yuji Iwasawa, *supra* note 21, at 152. Under this law, "Special Permanent Residency" status was conferred on those supporters of North Korea who had refused to obtain permanent residency under the agreement with South Korea in order to stabilize their legal status.

[48] *See* Shutsunyūkoku Kanri Oyobi Nanmin Nintei Hō [Immigration Control and Refugee Recognition Order], Cabinet Order No. 314 of 1951, art. 4, para. 1; *See also,* Daniel H. Foote, *Japan's "Foreign Workers" Policy: A View from the United States*, 7 GEO. IMMIGR. L.J. 707, 729 (1993).

[49] *See* Yuji Iwasawa, *supra* note 21, at 151.

[50] In 1985, changes in Japan's nationality laws redefined Japan's system from one based on *jus sanguinis a patre* (nationality inherited from the father) to one of *jus sanguinis* (nationality inherited from either parent). *See* Onuma Yasuaki, *supra* note 13, at 515 n.3. This change was influenced by the United Nation's International Covenant on the Elimination of All Forms of Discrimination Against Women. *Id.* at 79 (citing G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/180 (1980)).

[51] Telephone interview with Professor John Haley, University of Washington School of Law, July 11, 1996, *quoted in* Christopher B. Johnstone, *"Virtual" Citizens: Japan's Foreign Residents and the Quest for Expanded Political Rights*, JEI REPORT, July 13, 1996, at 13. *See also* CHANGSOO LEE & GEORGE DE VOS, *supra* note 34, at 355 ("The Japanese still pride themselves on their uniqueness and resist the idea of assimilating or accommodating any ethnic minority fully within a concept of citizenship that remains almost identical with a concept of racial purity"). Perhaps not surprisingly, few Japanese mention citizenship when discussing immigration. In a several-hundred-page manual published under the auspices of the Ministry of Justice, naturalization procedures are not discussed at all. Johnstone, *supra*, at 13.

[52] For example, Japan's 1980 Report to the U. N. Human Rights Committee stated that "minorities of the kind mentioned in the Covenant [Covenant on Civil and Political Rights] do not exist in Japan." Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Human Rights

Legal requirements are not a major barrier to naturalizing in Japan.[53] Rather, both unofficial governmental "guidance" to Japanese immigration officials and the psychology of Koreans in Japan hinder the ability and desire of Koreans to naturalize. Despite the rather straightforward official requirements of naturalization, the process remains opaque and subject to subtle discrimination. Anecdotal evidence indicates citizenship grants are arbitrary.[54] Immigration officials apparently consider to what degree a candidate has assimilated into Japanese culture[55] and "suggest" adoption of a Japanese name.[56] Many Koreans resist the erasure of their ethnic identity and, therefore, these informal "assimilation" requirements. For older Koreans, the memories of the past remain too bitter; for the younger generation, there is the reality that naturalization does not mean acceptance or an opportunity to participate fully in Japanese society.[57] Furthermore, since a majority of Koreans are opposed to naturalization, those who naturalize must also run the risk of being rejected by Korean society in Japan.[58]

Second and third generation Koreans have seemed more willing than their ancestors to naturalize. The numbers of Koreans naturalizing has increased annually since 1950.[59] The number of Koreans marrying Japanese has also increased, as has the number of Korean-Japanese children born with Japanese citizenship.[60] Nevertheless, as discrimination against Koreans

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Committee (Initial Reports of States Parties Due in 1980, Addendum, Japan), 12, 12th Sess., CCPR/C/10/Add.1. (1980).

[53] *See* CHANGSOO LEE & GEORGE DE VOS, *supra* note 34, at 151-57 (summary of Japanese naturalization procedures).

[54] *See* Johnstone, *supra* note 51, at 7. In practice, the naturalization process may limit grants of citizenship to those of Japanese ancestry. *See* Foote, *supra* note 48.

[55] Dave Adwinckle, *Citizenship Status in the US and Japan: Requirements for Naturalization*, Nov. 27, 1996 (electronic posting to Dead Fukuzawa Society) (on file with author). According to Mr. Adwinckle, he was asked who his Japanese friends were and how many he had, whether he got along well with his neighbors, and what the interior of his house looked like. Apparently, the questions were intended to ensure his lifestyle was not "incongruous" (*iwakan*) with being Japanese.

[56] Yuji Iwasawa, *supra* note 21, at 149 n.82.

[57] Being a citizen of Japan and being Japanese are not necessarily the same thing. Being "Japanese" is, perhaps, a more fundamental concept than is encompassed by the legal rights to vote and hold government office guaranteed to citizens. The distinction is important, since discrimination in the private sector is largely unchecked by Japanese law. Japanese employers may distinguish "true" Japanese from "naturalized" Japanese, at least when making initial hiring decisions, without apparent recrimination. *See infra*, notes 63-70 and accompanying text.

[58] Yuji Iwasawa, *supra* note 21, at 148-49.

[59] Onuma Yasuaki, *supra* note 13, at 519.

[60] The ratio of mixed marriages exceeded 50% in 1976 and were up to 76% in 1990. *Id.* (citing STATISTICS AND INFORMATION DEPT., MINISTRY OF HEALTH AND WELFARE, 1 VITAL STATISTICS 1989 JAPAN, 370-71 (1991) and Pak Sun Il, *Kekkon Junan Jidai*, SENURI, 61 (March 1992)). In 1991, 82.5% of

persists, the likelihood that Koreans will naturalize in large numbers remains slight.[61]

## III. EMPLOYMENT PROTECTIONS FOR PERMANENT RESIDENT KOREANS

It is commonly understood that certain legal rights are appropriately reserved to citizens and that a state may justly discriminate against non-citizens in some circumstances. The unique position of the majority of Koreans in Japan, of course, is that though their connection to Korea is marginal, they are denied many rights and protections enjoyed by Japanese citizens. Even Koreans who have been naturalized are often not adequately protected by Japanese Law. Unlike the United States, Japan has no comprehensive statutory civil rights law specifically dealing with the employment rights of ethnic, racial, and national minorities.[62] Rather, protections are provided generally by human rights provisions in the Constitution and the Civil Code, and are woven into other legislation and incorporated in various International Human Rights Treaties.

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registered Korean marriages in Japan were to Japanese. *See* Yasunori Fukuoka, *Koreans in Japan Past and Present*, 31 SAITIMA UNIV. REV. (No. 1, 1996), *available at* The HAN Homepage (visited Nov. 14, 1997) <http://www.han.org/a/fakuoka96a.html>.

[61] In the words of Kim Kyong-duk, "I find no justification for declaring an intent to naturalize into a society in which my own rights are frequently denied." CHANGSOO LEE & GEORGE DE VOS, *supra* note 34, at 279; *see also discussion infra* notes 121-27 and accompanying text. On the other hand, some discriminatory treatment of aliens has been defended on the ground that it encourages naturalization. *See, e.g.*, Hampton v. Wong, 426 U.S. 88, 104 (1976) (U.S. Civil Service defended restriction on resident aliens' access to federal civil service jobs, in part, because restriction encouraged aliens to naturalize and thereby participate more effectively in society); *see also* Johnstone, *supra* note 51, at 14 (arguing that if foreign residents are successful in securing broader political and societal rights, there will be less pressure to seek and to grant citizenship).

[62] Even in the U.S., however, prohibitions against "national origin" discrimination do not bar discrimination based on citizenship. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). The Japanese view is less clear. According to Japan's Representative to the U.N., Mr. Tomika, "[h]is Government took the view that 'national origin' included 'nationality' and that therefore a State party [to the Covenant on Civil and Political Rights] was prohibited from making any distinction on the basis of their nationality." Consideration of the reports submitted by States parties under the International Covenant on Civil and Political Rights, U.N. Committee on Human Rights, ¶ 7, U.N. Doc. CCPR/C/SR.324. Such an interpretation would be necessary (given the Japanese view that race and nationality are equivalent) to give meaning to the "national origin" provision of the Covenant on Civil and Political Rights. Oddly, Mr. Tomika also stated that the Japanese Government did not consider Koreans (or any other groups living in Japan) to be "minorities" within the meaning of the Covenant. A "minority group," according to the Japan delegation's interpretation, was "a group of nationals who ethnically, religiously or culturally differed from most other nationals and could be clearly differentiated from them from a historical, social or cultural point of view"; apparently, no one in living in Japan fell within this definition. *Id.* at ¶ 45.

### *A. Statutory Protections*

Private employers are constrained from discriminating against Koreans through Article 3 of the Labor Standards Law,[63] Article 3 of the Employment Security Law,[64] and Article 90 of the Civil Code.[65] Japanese Courts have been reluctant to place employment discrimination rulings on civil rights grounds and have shied away from governing private relations with reference to human rights arguments.[66] Instead, courts rely on contract law.[67]

Protection of the contract relationship motivated the court deciding *Pak Chong-sŭk v. Hitachi, Ltd.*,[68] one of the few "discrimination cases" filed by Koreans in Japan. Pak Chong-sŭk, a Korean born in Japan, applied for a job with Hitachi using his Japanese name rather than his legal (Korean) name. After passing the requisite exam and accepting an offer of employment, Pak was asked by Hitachi to submit a certificate of family registry. Upon discovering his Korean nationality, Hitachi sent a letter of rejection claiming Pak had committed perjury. Pak filed suit alleging Hitachi's claim hid a discriminatory policy. While the Court sympathized with the motive of the

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[63] "An employer shall not engage in discriminatory treatment with respect to wages, working hours, or other working conditions by reason of the nationality, creed, or social status of any worker." Rōdō Kijun Hō [Labor Standards Law], Law No. 49 of 1947, art. 3, *translated in* EIBUN-HŌREI SHA, 8 EHS LAW BULL. SERIES.

[64] "No one shall, in employment exchange, vocational guidance, etc., be discriminated against or for, by reason of race, nationality, political or religious belief, sex, social status, family origin, previous profession, affiliation or non-affiliation with a labor union, etc. Provided that the terms of agreements entered into between employers and unions in accordance with the Labor Union Law shall not be considered to be in conflict with the above [Functions of Government] provisions." Shokugyō Antei Hō [Employment Security Law], Law No. 141 of 1947, art. 3, *translated in* EIBUN- HŌREI SHA, 8 EHS LAW BULL. SERIES.

[65] "A juristic act which has for its object such matters as are contrary to public policy or good morals is null and void." MINPŌ [CIVIL CODE], Law No. 89 of 1896, art. 90, *translated in* EIBUN-HŌREI SHA, 2 EHS LAW BULL. SERIES.

[66] The state of Japanese civil rights law is such that judicial discussion of discrimination usually arises not directly, but in the context of other disputes. *See, e.g.*, UPHAM, *supra* note 12, at 96-103 (heavy-handed tactics of the Burakumin in their "denunciation strategy" (confrontation with and intimidation of local officials to secure reform ensuring Burakumin rights) were found not deserving of sanction in a criminal trial because of the limits of legal redress available to the Burakumin).

[67] *See, e.g.*, Mitsubishi Jushi v. Takano, 27 MINSHŪ 1536 (Sup. Ct., Dec. 12, 1973), *translated in* SERIES OF PROMINENT JUDGMENTS OF THE SUPREME COURT UPON QUESTIONS OF CONSTITUTIONALITY, NO. 15, 9 (General Secretariat, Supreme Court of Japan trans., 1980) (Constitution's protection of employer's property rights and the guarantee of freedom of business and other economic freedoms sufficiently outweigh an employee's rights, at least at the hiring stage). For discussion of Takano, *see generally* Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of – Stability?*, 43 UCLA L. REV. 635, 657-60 (1996).

[68] 744 HANJI 29 (Yokohama Dist. Ct., June 19, 1974), *discussed in* 4 KODANSHA ENCYCLOPEDIA OF JAPAN, *supra* note 19, at 291-92.

plaintiff, "because Japanese society had compelled him to hide his Korean name in order to escape discrimination," it based its holding on the finding that "the issuance of the hiring notice specifying the amount of salary and the date to report for work constituted a consummation of a labor contract between the two parties,"[69] the cancellation of which "should be construed as an arbitrary breach of the labor contract, which was a violation of Article 3 of the Labor Standards Law and Article 90 of the Civil Code of Japan."[70] Private employers in Japan appear legally free to discriminate against even naturalized Korean-Japanese, however, provided they do so before a contract is signed.[71]

### *B. International Law*

Japan has been criticized for addressing problems only after strong social and media protests or international pressures.[72] Focussing international attention on Japanese domestic problems has, however, proven a useful tool for minority advocates.[73] Unfortunately, with the exception of gender discrimination, international law has had little impact on employment discrimination law in Japan. Because permanent resident Koreans are legally classified as aliens, the potential influence of international law is severely limited. In any country, aliens are typically subject to restrictions of their civil and political rights and denied certain categories of economic and social rights.[74] The host of U.N. International Covenants which Japan has signed[75] offer little promise in aiding the cause of Koreans.[76]

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[69] *Id.* at 291.

[70] *Id.* at 292. Even illegal immigrants are protected by the freedom to contract provisions in Japan. Other protections also apply to illegals. For example, the Japanese Supreme Court has recently ruled that an illegal foreign worker must be compensated for lost income resulting from an on-the-job accident. Supporting a previous decision by the Tokyo High Court, the Supreme Court awarded Boby Maqsood, a Pakistani working illegally in Japan, the equivalent of three years of lost income (the longest an undocumented worker could earn income in Japan, according to the Court). *Illegal Worker Gets Lost Pay: Supreme Court Awards Damages to Man Injured on Job*, JAPAN TIMES, Jan. 29, 1997, at 1.

[71] *Takano*, 27 MINSHŪ 1536 (Sup. Ct., Dec. 12, 1973), *translated in* SERIES OF PROMINENT JUDGMENTS OF THE SUPREME COURT UPON QUESTIONS OF CONSTITUTIONALITY, *supra* note 67.

[72] *See* Kikuyo Matsumoto-Power, *Aliens, Resident Aliens, and U.S. Citizenship in the Never-Never Land of the Immigration and Nationality Act*, 15 U. HAW. L. REV. 61, 98 (1993).

[73] *See generally* Lawrence Repeta, *The International Covenant on Civil and Political Rights and the Human Rights Law in Japan*, 20 LAW IN JAPAN 1, 1-2 (1987).

[74] The Covenant on Civil and Political Rights addresses public service directly, stating: "Every *citizen* shall have the right and opportunity . . . (c) to have access on general terms of equality, to public service *in his country*." International Covenant on Civil and Political Rights, art. 25, adopted by U.N. General Assembly Dec. 19, 1966, S. Exec. Doc. E, 95-2, 1 (1978), 999 U.N.T.S. 171 (emphasis added). Permanent resident Koreans are excluded by the plain language of the Covenant.

Japan's recent signing[77] of the International Convention on the Elimination of All Forms of Racial Discrimination has not provided new legal avenues of attack for non-citizen Koreans. At its outset, the Convention makes clear that: "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."[78]

### C. *Constitutional Protection of Non-citizens*

Given the uncertain authority and applicability of International Human Rights law in Japan, and the nascent stage of Japanese Civil Rights laws, the Japanese Constitution offers the only plausible legal vehicle for alleging public employment discrimination.

Though there has been some debate,[79] it is generally accepted among scholars and courts that foreigners are afforded equal protection under the Japanese Constitution "except for such rights as voting rights which are by their nature reserved for nationals."[80] Most rights are inalienable[81] and

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[75] For a summary of the provisions of U.N. treaties which might protect Koreans, *see generally* Yuji Iwasawa, *supra* note 21; BARONESS ELLES, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, INTERNATIONAL PROVISIONS PROTECTING THE HUMAN RIGHTS OF NON-CITIZENS, U.N. Doc. E/CN.4/Sub 2/392/Rev. 1 (1980).

[76] Japanese courts have cited international treaties in important decisions affecting foreign residents, though the degree to which decisions rest on international legal grounds is unclear. *See, e.g.*, Judgment of 20 October 1983, 1092 HANREI JIHŌ 32, 33-34, *quoted in* Yuji Iwasawa, *supra* note 21, at 170 n.170 (Covenant on Economic, Social and Political Rights cited favorably by Tokyo High Court in striking down nationality requirement in Japan's National Pension System).

[77] *See Japan Notifies U.N. of Ratifying Anti-Discrimination Pact*, JIJI PRESS TICKER, Dec. 21, 1995, *available in* LEXIS, Asiapc Library, Japan File.

[78] International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, para. 2, adopted and opened for signature and ratification by General Assembly, Dec. 21, 1965 S. Exec. Doc. C, 95-2, 1 (1978), 660 U.N.T.S. 195.

[79] *See, e.g.*, Koseki Shoichi, *Japanizing the Constitution*, JAPAN Q. 234, 236 (1988). Koseki Shoichi argues that substituting *kokumin* ("the semantic equivalent of 'Japanese'") for *jinmin* (inhabitants of Japan including foreign nationals) in draft Article 13, effectively equated "all of the people" with "all nationals" and limited the rights of aliens in Japan. In Japanese, the literal translation of *Kokka* (state) is "national family." *Id.* at 235-36. Draft Art. 13 was adopted as Art. 10, "The conditions necessary for being a Japanese national shall be determined by law." *Id.*, *quoting* JAPAN. CONST., art. 10.

[80] THE JAPANESE LEGAL SYSTEM, 721 (Hideo Tanaka ed., 1976). Interestingly, movements in Japan to secure voting rights for Koreans have had some success, at least on the local level. *See* Katsuaki Inowe, *Redefining Foreigners' Rights*, THE DAILY YOMURI, Oct. 25, 1994, *available in* LEXIS, Asiapc Library, Allnws File. In February 1995, the Japanese Supreme Court held that the Constitution does not bar permanent foreign residents from voting in local elections. *See* U.S. DEP'T OF STATE, *supra* note 4, at 687.

[81] JAPAN CONST., art. 97: "The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting

extend equally to *illegal* aliens.[82] Under the Japanese Constitution: "All 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."[83] This view comports with that of U.S. constitutional interpretation, which affords Due Process and Equal Protection to any person, including aliens, within the jurisdiction of a state.[84]

The Japanese Constitution's protections of human rights, however, are limited. Only "unreasonable" differential treatment is prohibited.[85] Furthermore, the Supreme Court has held that constitutional guarantees are intended to protect individuals from the state and are not directly applicable to private employers.[86] However, constitutional protections apply directly to the employment relationship between governments and civil servants.[87]

In addition to guarantees of individual liberties similar to those in the U.S. Constitution, the Japanese Constitution guarantees the rights of

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tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate."

[82] In 1950, the Supreme Court stated, in dicta, that: "The Court below said in its opinion that a foreigner who had entered Japan illegally was not entitled to demand protection of his human rights. This is erroneous as the appellant's brief points out. Even such a person is entitled to ask protection of such human rights as appertain to him as a human being." Judgment of 28 December 1950, 4 MINSHŪ 683, 686 (Sup. Ct.), *quoted in* THE JAPANESE LEGAL SYSTEM, *supra* note 80, at 721.

[83] JAPAN CONST., art. 14, para. 1.

[84] Plyler v. Doe, 457 U.S. 202, 210 (1982).

[85] *See* Judgment of 27 May 1964, 18 MINSHŪ 676 (Sup. Ct.), *quoted in* THE JAPANESE LEGAL SYSTEM, *supra* note 80, at 722 ("Article 14, Paragraph 1 does not guarantee absolute equality to all of the people. It is to be construed as prohibiting differential treatment without reasonable ground therefor. It does not prohibit some differential treatment being regarded as reasonable in view of the nature of the matter.").

[86] The Japanese Supreme Court has held that "each of the . . . provisions of the Constitution [is aimed] at the vindication of the fundamental freedom and equality of individuals from governmental actions of the state or public entities and is not expected directly to regulate the mutual relations between private parties . . . . [T]he 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." Mitsubishi Jushi v. Takano, 27 MINSHŪ 1536, *translated in* SERIES OF PROMINENT JUDGMENTS OF THE SUPREME COURT UPON QUESTIONS OF CONSTITUTIONALITY, *supra* note 67, at 6-7. This statement may extend beyond the corners of the Constitution and reflect the general feeling of the Japanese that courts have a limited role to play in regulating private interactions. *See, e.g.*, UPHAM, *supra* note 12, at 117 (citing a statement by the Minister of Justice that discrimination has been regarded as a "matter of the heart" not suitable for legal attention). To the extent a private employer violates a Constitutional provision, he can only be legally challenged with a violation of Article 90 of the Civil Code. *See supra* note 65.

[87] *But cf.* Ishizuka et al. v. Japan et al., 43 MINSHŪ 6, 385 (Sup. Ct., June 20, 1989), *translated in* THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, 130 (Lawrence Beer & Hiroshi Itoh, eds., 1996). In *Ishizuka*, the Court held that the Government's purchase of land for a military base did not violate Article 9 of the Constitution (renunciation of war) because the Government was acting in a private, not public capacity. *Id.* at 131. Conceivably, such a rationale might be expanded beyond Article 9 to encompass government employment.

individuals to "demand support and care from the state so that he may enjoy the minimum degree of cultural life appropriate to a human being."[88] Articles 26 through 28 further articulate the means by which "social rights" are to be secured. Article 27 states that: "All people shall have the right and obligation to work. Standards for wages, hours, rest and other working conditions shall be fixed by law. . . ."[89] Although Articles 26 through 28 are without direct legal effect, relying instead on statutes or administrative acts for implementation,[90] Japanese courts have nevertheless found social rights to be litigable[91] and have extended social guarantees to alien residents.[92]

### D. *Freedom to Choose an Occupation and K.K. Sumiyoshi v. Governor of Hiroshima Prefecture*

Article 22 is consistent with Article 27. It provides that: "Every person shall have the freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare."[93] As with other social guarantees, the Japanese Supreme Court has recognized that Article 22 is a substantive right and cannot be abridged through legislative enactment without reasonable justification.[94] In *K.K. Sumiyoshi v. Governor of Hiroshima Prefecture*, the Supreme Court adopted a balancing test for analyzing Governmental infringements on Article 22 rights.

In *K.K. Sumiyoshi*, the plaintiff pharmacy owner challenged an amendment to the licensing standards of the Pharmaceutical Affairs Law, which provided for "unsuitability" of a proposed site for a pharmacy as a

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[88] Sakae Wagatsuma, *Guarantee of Fundamental Human Rights Under the Japanese Constitution*, in LEGAL REFORMS IN JAPAN DURING THE ALLIED OCCUPATION, 1977 WASH. L. REV. 124, 154 (Special Reprint Edition). Article 25 declares: "All people shall have the right to maintain the minimum standards of wholesome and cultured living . . . . In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health." JAPAN CONST., art. 25, paras. 1 & 2.

[89] JAPAN CONST., art. 27, para. 1.

[90] THE JAPANESE LEGAL SYSTEM, *supra* note 80, at 793.

[91] *See* Asahi v. Japan, 21 MINSHŪ 5, 1043 (Sup. Ct., May 24, 1967), *translated in* THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS 1961-1970, 130 (Hiroshi Itoh & Lawrence Beer eds., 1978).

[92] *See, e.g.*, Judgment of 20 October 1983, 1029 HANREI JIHŌ 32 (Tokyo High Ct.), discussed *infra* note 142.

[93] JAPAN CONST., art. 22, para. 1.

[94] K.K. Sumiyoshi v. Governor of Hiroshima Prefecture, SAIBANSHO JIHŌ (No. 665) 1; JURITSO (No. 592) 60 (Sup. Ct., Apr. 30, 1975), *translated in Translation*, 8 LAW IN JAPAN 194 (Maurine Kirkpatrick trans., 1975) [hereinafter Kirkpatrick].

basis for denying a pharmacy license, and a Hiroshima Prefecture Ordinance which provided that a license would not be granted if there was an existing pharmacy within 100 meters of the proposed site. The Court announced that the restrictions could only be upheld if "necessary and reasonable" in light of the legislative aim.[95] The new test overturned prior cases holding that "any law regulating fundamental economic rights will be held valid [under the Constitution of Japan] unless proved to be completely arbitrary and contrary to reason."[96]

The Government's proffered rationales for the restriction were to prevent the sale of substandard drugs[97] (a result, according to defendants, of increased competition among pharmacies) and to promote an even distribution of pharmacies throughout Japan.[98] Neither of these declared aims was reasonably met through the restriction. As to the former, other controls on drug quality were found adequate—the marginal protection against a "subordinate cause" (competition) provided by the restriction could not outweigh the constitutionally protected right to choose one's occupation.[99] The effectiveness of the restriction to cure the latter problem was thought to be "meager"; in the Court's view, "the means lie elsewhere to secure a supply of drugs in areas with few or no pharmacies."[100] The Supreme Court was willing to strike down a legislative enactment despite a strong public welfare argument (protection of the public from unsafe drugs) in a way that could have broad prospective impacts on the way local governments conduct business (similar location restrictions are evident in other licensing laws).[101]

Although the *K.K. Sumiyoshi* test departed from prior decisions, it appears drawn directly from the text of Article 22, which requires that

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[95] *Id.* at 197.

[96] *See, e.g.*, Koizumi v. Japan, 17 KEISHŪ 12, 2434 (Sup. Ct., Dec. 4, 1963), *translated in* THE CONSTITUTIONAL CASE LAW OF JAPAN, *supra* note 91, at 80-81 (upholding Taxi Cab licensing provisions against a similar constitutional attack).

[97] Kirkpatrick, *supra* note 94, at 199-200.

[98] *Id.* at 199.

[99] *Id.* at 203.

[100] *Id.*

[101] John O. Haley, *The Freedom to Choose an Occupation and the Constitutional Limits of Legislative Discretion—K.K. Sumiyoshi v. Governor of Hiroshima Prefecture*, 8 LAW IN JAPAN 188, 194 (1975). For a direct contrast of the *K.K. Sumiyoshi* approach with the Court's earlier approach to Article 22 cases, *see* Shimizu v. Japan, 9 KEISHŪ 89 (Sup. Ct., Jan. 26, 1955), *cited in* LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS 51-52 (Yukio Yanagida et al. eds., 1994). Although the *K.K. Sumiyoshi* test is the Supreme Court's latest word on the subject, the Court reaffirmed the *Shimuzu* holding. *See* Judgment of 20 January 1989, 1302 HANREI JIHŌ 159, *cited in* LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS 58.

freedom to choose an occupation be balanced against public welfare concerns. Such a balancing test should also be applied to public employment discrimination cases.[102]

## IV. PUBLIC EMPLOYMENT RESTRICTIONS

### *A. Rationales for Restricting Public Employment*

Governments typically justify restricting public employment opportunities to their own citizens on grounds that only citizens stand in a relationship to the state that allows the exercise of public authority. Citizens owe a duty of loyalty to the state; they "know" the psychology and sociology of the state; they speak the language; and they are "representative of" and "acceptable to" the population.[103] In addition, excluding non-citizens helps ensure that public servants are dedicated to promulgating a democratic form of government.[104] A more cynical explanation for public employment restriction, at least in the United States, is to view it in its historical context: as a natural outgrowth of voting restrictions on non-citizens and the traditional patronage system which rewarded political supporters with public posts.[105]

### *B. Public Employment Restrictions on Permanent Resident Koreans*

#### *1. Administrative Guidance*

Public employment restrictions on permanent resident Koreans are typically implemented through "administrative guidance" and not by statute, though some statutes governing particular industries and occupations do have

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[102] *See* Itsuo Sonobe, *Human Rights and Constitutional Review in Japan*, in HUMAN RIGHTS AND JUDICIAL REVIEW 135, 145-55 (D. M. Beatty ed., 1994) (discussing balancing method in constitutional review). In striking a balance, restrictions on the fundamental rights of workers "should be kept to the minimum which is necessary and reasonable." *Id.* at 146 (citing Japan v. Sotoyama, 20 KEISHŪ 901 (Sup. Ct., Oct. 26, 1966); Japan v. Tsuruzono, 27 KEISHŪ 547 (Sup. Ct., April 25, 1973)).

[103] John Handoll, *Article 48(4) EEC and Non-National Access to Public Employment*, 13 EUR. L. REV. 223, 223 (1988), *cited in* Morris & Fredman, *supra* note 5, at 128.

[104] This is not a trivial point, since many pro-Pyongyang Koreans are also permanent Japanese residents. *See supra* note 47 and accompanying text. The U.S. Supreme Court has also expressed that the distinction between citizens and non-citizens is "fundamental to the definition and government of a State." Ambach v. Norwick, 441 U.S. 68, 75 (1979).

[105] *See* Hampton v. Wong, 426 U.S. 88, 107 (1976).

explicit nationality restrictions.[106] Neither the Local Public Servants Law[107] nor the National Public Servants Law[108] contains any clear reference to nationality. Permanent resident Koreans are nevertheless restricted from choosing occupations in the civil service.

At the national level, limits are imposed by regulations promulgated by the National Personnel Authority and on the local level by a 1953 guideline promulgated by the first secretary of the Ministry of Justice's Legal Systems Bureau shortly after Japan regained its independence.[109] Various translations of the 1953 guideline exist; an adequate one is that "public servants involved in wielding administrative authority or creating the will of the general public must be Japanese nationals."[110] The Ministry has expounded on its position: "because of a natural legal principle concerning public service personnel, one must hold Japanese nationality to become a public official who is concerned in [the] exercise of public power or participation in the formulation of national policy."[111]

This provision is the type of "administrative guidance" which has no direct analogue in U.S. law.[112] The common view in Japan is that such guidance does not require a basis in an express statutory provision,[113] though it is also accepted that administrative agencies may not exercise public authority arbitrarily without some statutory basis.[114] Opponents of the provision complain that as a non-juristic provision, it does not and should not have the force of law. At a minimum, such guidance, if valid, does not deserve the degree of judicial deference due a legislative act.[115]

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[106] For example, aliens may not legally procure mining leases, own ships or aircraft, obtain radio operation licenses, or become notaries public or port pilots. *See* Yuji Iwasawa, *supra* note 21, at 161.

[107] Chihō-Kōmuin Hō [Local Public Servants Law], Law No. 261 of 1950.

[108] Kokka Kōmuin Hō [National Public Servants Law], Law No. 120 of 1947.

[109] HIROSHI KOMAI, MIGRANT WORKERS IN JAPAN, 238 (Jens Wilkinson trans., 1995).

[110] *Minister Hints at Foreign Nationals in Public Service*, *supra* note 7.

[111] Head of the First Department, Cabinet Legislation Bureau, Answer to the Chief of the Minister's Secretariat, Prime Minister's Office, on the Status of Public Service Personnel in Case of Loss of Japanese Nationality (Cabinet Legislation Bureau, First Department, No. 29), Mar. 25, 1953, *quoted in* Yuji Iwasawa, *supra* note 21, at 162.

[112] THE JAPANESE LEGAL SYSTEM, *supra* note 80, at 354-55.

[113] *Id.* at 397.

[114] *See id.* at 371-80.

[115] The Home Affairs Ministry has no legal authority to interfere in the personnel decisions of local governments; its guidance should therefore not be given deference. *See* U.S. DEP'T OF STATE, *supra* note 4, at 687.

### 2. *Exceptions*

Both the national and local governments have adopted a hodge-podge of exceptions to requiring Japanese citizenship for civil service jobs. For example, specialists such as doctors and nurses may be foreigners,[116] as may clinical test examiners, dieticians and kindergarten teachers.[117] Municipal governments have varied considerably in which posts they open to foreigners.[118] Particularly strong pressure on the educational front has resulted in several local governments opening teaching positions in public schools to resident aliens, despite counter pressure from the national Ministry of Education;[119] in 1982, the Diet passed a law allowing the appointment of alien professors to national and municipal universities.[120]

### 3. *Abdication by the Courts*

Japanese courts have addressed occupational restrictions on permanent resident Koreans in only two cases. In the first, Kim Kyong-duk, born in 1949 to parents of Korean nationality, petitioned the Japanese Supreme Court for admission to the Judicial Research and Training Institute, a necessary step to becoming an attorney in Japan.[121] Though no law specifically prohibited non-citizens from becoming attorneys[122] if they met the testing criteria and followed proper procedures, the Institute had since 1955 been admitting aliens only if they declared an intent to become Japanese citizens. Kim passed the judicial examination given by the Ministry of Justice, but was

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[116] *See* Reija Yoshida, *Foreigners Need Not Apply*, JAPAN TIMES WKLY. INT'L EDITION, June 17-23, 1996, at 7. Barriers still exist, however, for such professionals who exercise "managerial authority." *See, e.g.*, Chong Hyan Gyun v. Tokyo Municipal Government, 1566 HANREI JIHŌ 23, discussed *infra* notes 128-137 and accompanying text.

[117] *See Ministry Agrees to More Municipal Posts for Foreigners*, *supra* note 2.

[118] *See generally supra* note 3.

[119] Onuma Yasuaki, *supra* note 13, at 522-23.

[120] Kokuritsu oyobi kōritsu no daiguku ni okeru gaikokujin kyōin no ninyō ni kansuru tokubetsu sochihō [Special Law Concerning Appointment of Alien Professors at National and Municipal Universities], Law No. 89 of 1982. Despite the easing of the restriction generally, University and the Japanese Ministry of Education (Monbusho) officials have restricted or urged restrictions on participation of foreign faculty within Universities and on the types of contracts foreign academics should be offered. Not surprisingly, there is a wealth of information in English concerning treatment of foreign academics in Japan. *See, e.g.*, debates archived at <http://www.iac.co.jp/~issho/faj/>, especially David Adwinckle, *Academic Apartheid in Japan: Japan is Instituting "Ninki-sei" for All Foreign Educators* (visited Nov. 15, 1997) <http://www.iac.co.jp/~issho/faj/aa.html>.

[121] CHANGSOO LEE & GEORGE DE VOS, *supra* note 34, at 278.

[122] The Patent Attorney Law apparently does have an explicit nationality requirement. *See* Benrishi Hō [Patent Attorney Law], Law No. 100 of 1921, art. 2, *cited in* Yuji Iwasawa, *supra* note 21, at 164.

denied admission to the Institute because he was unwilling to renounce his Korean nationality. The Institute rationalized the exclusion because during the two-year Institute training period, trainees received government stipends and could thus be considered government employees.[123] Additionally, trainees were required to serve apprenticeships under judges and public prosecutors, and were officially considered to wield state authority.[124]

Kim filed a petition with the Supreme Court on November 20, 1976 requesting that they accept him without forcing him to renounce his Korean identity. In his petition, Kim argued that he had no desire to be a judge or prosecutor, but meant to use his legal skills to advance the civil rights of Koreans in Japan. To require him to naturalize, he argued, would contradict his reasons for wanting to be an attorney:

> Kim doubted whether his fellow Koreans would have trust and faith in him, allegedly the protector of their fundamental rights, if he forsook his own identity to become an attorney. He also wanted to provide an example for many Korean youth who were undergoing identity crises similar to his, encouraging them to take pride in being Korean.[125]

The Supreme Court's ruling was positive, but not helpful in establishing a precedent. In a one-sentence response, the Court stated: "In the case of Mr. Kim, nationality would not be a factor to deny admission to the Judicial Research and Training Institute."[126] As sparse as the statement was, it nevertheless indicated a willingness by the Court to limit its opinion strictly to the facts before it. The President of the Japan Federation of Bar Associations later expressed his view that the Court's opinion carried no precedential weight.[127]

The most recent court case, responsible for focussing increased attention on public employment limitations, is *Chong Hyan Gyun v. Tokyo*

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[123] CHANGSOO LEE & GEORGE DE VOS, *supra* note 34, at 278.

[124] *Id.* at 278-79.

[125] *Id.* at 279.

[126] *Id.* at 280. The U.S. Supreme Court has gone further. In *In re Griffiths*, the Court held unconstitutional the denial of the right to practice law to resident aliens. 413 U.S. 717 (1973). According to the Court, a lawyer was not "so close to the core of the political process as to make him a formulator of government policy." *Id.* at 729.

[127] CHANGSOO LEE & GEORGE DE VOS, *supra* note 34, at 280. No court has thus far had an opportunity to revisit the decision.

*Municipal Government*.[128] Chong, a second-generation permanent Korean resident working as a public health nurse for the Tokyo prefecture,[129] was denied permission to sit for a managerial position exam because she was not a Japanese national. She sued, charging violations of Article 22 and Article 14 of the Constitution, and lost.

The Government, echoing language from the 1953 Ministry of Justice opinion, had argued that it was a "natural," or "self-evident legal principle" that Article 22 did not apply to non-citizens.[130] Rather than addressing this argument directly, the Tokyo District Court based its decision on a "traditional theory" of national sovereignty.[131] Under the theory, "sovereignty" requires that governing operations be carried out by citizens, the holders of sovereign power. Therefore, the Constitution contemplates that civil servants who are involved in governing operations will be recruited from among people with Japanese citizenship.[132]

The Court's opinion divides civil service positions according to the content of the position, thus creating categories of civil service positions which are limited to citizens. First, civil servants who "directly exercise important powers which are recognized as the embodiment of the will of Japanese citizens" must themselves be citizens.[133] Within this initial classification, the Court contemplates positions which exercise the "fundamental governing operations of the state under the Constitution, for example members of both houses of Parliament, the Prime Minister and other Cabinet ministers, and judges . . . ."[134] Under this theory, a statute purporting to allow a non-citizen to hold such an office would be unconstitutional.

Second, civil servants who are "indirectly involved in the state's ruling operations through the exercise of public power or participation in the formation of the public will"[135] (the class described by the 1953 Guideline)

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[128] Chong Hyan Gyun v. Tokyo Municipal Government, 1566 HANREI JIHŌ 23 (Tokyo Dist. Ct., May 16, 1996) (Dwight Van Winkle, trans. 1997) (trans. on file with author).

[129] Chong had become the first foreign public health nurse in Tokyo in 1988. *See* Johnstone, *supra* note 51, at 12 n.28.

[130] *See supra* note 111 and accompanying text.

[131] Katsuhiko Okazaki, *Gaikokujin no kōmu shūninken – 5/16 Tōkyōtō kanrishoku senkō juken soshō isshin hanketsu ni sokushite [The Right of Aliens to Serve as Public Officials – An Analysis of the May 16 Trial Court Decision in the Suit Claiming the Right to Sit for the Tokyo Prefecture Managerial Position Examination]*, No. 1101 JURISTO 35, 43 (Nov. 15, 1996) (Dwight Van Winkle trans., 1997) (trans. on file with author).

[132] *Id.*

[133] Chong Hyun Gyun, 1566 HANREI JIHŌ, at 31.

[134] *Id.*

[135] *Id.*

must also be citizens. The Constitution does not guarantee a right to such civil service positions to non-citizens; however, a statute granting such authority to non-citizens would not be unconstitutional. The Tokyo District Court deferred completely to the legislature and, rather than help develop appropriate standards to determine whether an official is sufficiently "concerned in the exercise of public power or in the formulation of national policy," it seemed to consider permissible extending the bar on non-citizens even to general clerical jobs and other indirect exercises of public power.[136] Thus, in the absence of direct statutory prohibition, a local government may discriminate against non-citizens to the degree it sees fit.

In interpreting provisions of the Local Public Servants Law, the Court indicated that:

> Under a rational understanding of [art. 13 (equal treatment principle) and art. 19 (principle of fair and open opportunity to become a civil servant) of the Local Public Servants Law], aliens living in our country may not become local government civil servants with duties which, either directly or indirectly, constitute ruling operations, through the exercise of public power or participation in the formation of the public will.[137]

By refusing to grapple with the constitutional issues implicated by the facts of the case, a case which directly involved the relationship between individuals and the state, where judicial scrutiny should be most intense,[138] the Tokyo District Court abdicated its authority and its duty. With little analysis, it seemed to agree with the Government that aliens are in principle unfit for *any* civil service position. Since equal protection applies to foreigners, "except for such rights as . . . are by their nature reserved for nationals,"[139] and since Article 22 of the Japanese Constitution guarantees the freedom to choose an occupation consistent with the public welfare, the Court should have addressed the question presented: when is the State's "public welfare interest" in staffing a particular position with a Japanese citizen

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[136] Katsuhiko Okazaki, *supra* note 131, at 43.

[137] *Id.* The Court's statement was the first judicial interpretation of the Local Public Servants Law. *Id.*

[138] In the Japanese Supreme Court's words, "each of the . . . provisions of the Constitution [is aimed] at the vindication of the fundamental freedom and equality of individuals from governmental actions of the state or public entities . . . ." Mitsubishi Jushi v. Takano, 27 MINSHŪ 1536, *translated in* SERIES OF PROMINENT JUDGMENTS OF THE SUPREME COURT UPON QUESTIONS OF CONSTITUTIONALITY, *supra* note 67, at 6.

[139] THE JAPANESE LEGAL SYSTEM, *supra* note 80, at 721.

sufficient to overcome an alien's constitutional rights? The Tokyo District Court's reasoning is not compelling. Its opinion does nothing to clarify central issues, beyond indicating that the Government constitutionally can extend the restriction to any public position it deems to involve the exercise of public power and participation in the formation of the public will.

The articulation of the balancing test in Article 22 of the Japanese Constitution[140] and the failure of the executive or legislative branches to provide local agencies with cogent guidelines[141] that reconcile the constitutional rights of non-citizens with countervailing considerations of the public interest, compel the courts to enter the fray and to invalidate "nationality clauses" and application of the 1953 Guideline to the extent that they are unconstitutional.[142]

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[140] *See supra* note 102 and accompanying text.

[141] Guidance has also been inconsistent. As early as July 1952, "the government bureau that later become the Home Affairs Ministry informed local governments that it had 'no objection in principle' to the appointment of resident Koreans to local public-service posts" *See* Tadahiro Fujikawa, *supra* note 31. In 1973, the Japanese Prime Minister, in a written response to a Diet member's inquiry, stated that "decisions on whether to make citizenship a condition of employment for local public employees . . . should be left to the local self-governing bodies." Japan Civil Liberties Union, *Citizens' Human Rights Report No. 1*, 20 LAW IN JAPAN 30, 30 (1987).

[142] There is precedent for judicial invalidation of a nationality clause. In *Judgment of 20 October 1983*, a Korean national who had paid into the Japanese old-age pension system for sixteen years sued the Social Insurance Agency (SIA) for nonpayment of benefits. 1092 HANREI JIHŌ 32, 33-34 (Tokyo High Ct.), *cited in* Yuji Iwasawa, *supra* note 21, at 168-72. Refusal to pay based on a nationality clause in laws governing pensions, he claimed, violated Articles 14 (equal protection) and 25 (guarantee of minimum standard of living) of the Japanese Constitution, as well as Article 9 of the International Covenant on Economic, Social, and Cultural Rights. Article 9 reads: "The State Parties to the present Covenant recognize the right of everyone to social security, including social insurance." International Covenant on Economic, Social, and Cultural Rights, Dec. 19, 1966, S. Exec. Doc. D, 95-2, at 1 (1978), 993 U.N.T.S. 3. The Tokyo High Court held that "it is not an unavoidable need of public nature to maintain and stick to the nationality requirement in all cases, for one should conclude that the nationality requirement is not an element of the national pension system so basic as to allow no exception . . . ." Judgment of 20 October 1983, 1092 HANREI JIHŌ 32, 33-34, *quoted in* Yuji Iwasawa, *supra* note 21, at 170. *But cf.* Kin Ko Jun v. Tokyo Metropolitan Welfare Department, 1269 HANJI 71 (Tokyo Dist. Ct., Feb. 25, 1988), *cited in* Matsumoto-Power, *supra* note 72, at 93 (Korean born in Japan denied the benefit of the National Annuity, despite having made payments for 16 years, because resident aliens born before 1925 were not eligible under the National Annuity Law; though apparently not argued at trial, the decision has been criticized as violating Article 25 of the Constitution). The Court's 1983 decision may have been influenced by the fact that "a canvasser had persuaded him to join the national pension plan, knowing that he was a Korean." Yuji Iwasawa, *supra* note 21, at 169 (suggesting fraud by an agent of the Social Insurance Agency). It was certainly influenced by changes in domestic law which made Koreans eligible for pensions. Importantly, however, the Court found the nationality clause to be not an essential element of the pension system and thus open to Koreans; this is different than a simple retroactive application of changes in the law.

## V. A MODEL FOR JUDICIAL ANALYSIS

A Japanese model for judicial analysis of public employment discrimination claims must find hold within the Japanese Constitution and Japanese constitutional jurisprudence and must operate in the unique historical context of Koreans in Japan. Nevertheless, reference to the relatively large body of U.S. case law dealing with nationality discrimination will help define an appropriate model for Japan. Despite the obvious differences in the treatment of and attitudes toward immigrants in the U.S. and Japan,[143] the factors which have motivated the U.S. Supreme Court to scrutinize public employment restrictions are the same in Japan. Furthermore, U.S. Supreme Court deliberations have resulted in a test similar to the one the Japanese Supreme Court announced in *K.K. Sumiyoshi*. Though *K.K. Sumiyoshi* announced a standard of review for testing Article 22 claims, the Tokyo District Court deciding *Chong* declined to apply that test to public employment discrimination cases. More than anything, then, a review of U.S. law suggests why the Tokyo District Court's analysis was incorrect.

### *A. U.S. Constitutional Protection of Aliens' Public Employment Rights*

U.S. and Japanese courts agree that aliens are protected by the tenets of their respective constitutions.[144] In the U.S., the general rule is that a state cannot deny a resident alien equal protection or the right to work in a "useful occupation."[145] Although latitude was given to states when exclusions were from public posts, courts gradually restricted the activities from which states were free to exclude aliens.[146] A series of cases spanning several decades had carved out a general exception to the rule when public benefits or public resources were involved;[147] however, attempts to justify discrimination in

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[143] *See generally* Foote, *supra* note 54.

[144] *Compare* Choudhry v. Jenkins, 559 F.2d 1085, 1087 n.1 (1977) (citing Graham v. Richardson, 403 U.S. 365, 371 (1971)) ("A lawfully admitted resident alien, of course, is a person within the meaning of the Fourteenth Amendment....[and] [t]herefore, he enjoys the protection of those amendments in the Bill of Rights . . . at least in matters wholly unrelated to immigration and naturalization.") *with* Judgment of 28 December 1950, 4 MINSHŪ 683 (Sup. Ct.), *quoted in* THE JAPANESE LEGAL SYSTEM, *supra* note 80, at 721.

[145] Yick Wo v. Hopkins, 118 U.S. 356 (1886) (Municipal ordinance struck down because applied to prevent Chinese residents from running laundries in violation of due process and equal protection); Truax v. Raich, 239 U.S. 33, 41 (1915) (Law requiring 80% of employees in certain businesses be citizens held unconstitutional infringement of alien's "right to work for a living in the common occupations of the community").

[146] Ambach v. Norwick, 441 U.S. 68, 72-73 (1979).

[147] *See* John Richards, *Public Employment Rights of Aliens*, 34 BAYLOR L. REV. 371, 371 (1982).

public employment based on such a special-public-interest doctrine ended with the Supreme Court's decision in *Sugarman v. Dougall*,[148] which disapproved blanket bans on alien employment in "indiscriminate" state civil service jobs. Though recognizing that states have legitimate interests in excluding aliens from positions "where citizenship bears some rational relationship to the special demands of the particular position,"[149] when a state seeks to achieve its ends through discrimination against aliens, "the means the State employs must be precisely drawn in light of the acknowledged purpose."[150] At the same time, the Court noted that citizenship might be an important requirement for "elective or important nonelective...officers who participate directly in the formulation, execution, or review of broad public policy," since these activities "go to the heart of representative government."[151]

Three years after the *Sugarman* decision, the Court extended protection to aliens seeking federal civil service in *Hampton v. Wong*.[152] The *Wong* Court held that a general bar on aliens in the Federal Civil Service constituted a deprivation of liberty without due process of law in violation of the Fifth Amendment. *Wong* was not simply an extension of the requirement that states show a compelling interest in excluding aliens from civil service positions,[153] but was taken in the context of "the paramount federal power over immigration and naturalization."[154] The Court thus recognized that "overriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State."[155] Nevertheless, the Court's Fifth Amendment analysis was similar to its Fourteenth Amendment analysis in *Sugarman*.[156] The interests proffered by the Civil Service Commission in *Wong* (facilitating treaty negotiation by enabling the President to offer employment opportunities to citizens of a given foreign country in exchange for reciprocal concessions; encouraging aliens to become naturalized and thereby participate more

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[148] Sugarman v. Dougall, 413 U.S. 634 (1973).

[149] *Id.* at 647 (quoting Sugarman v. Dougall, 339 F.Supp. 906, 911 (S.D.N.Y., 1971) (Lumbard, J., concurring) (district court resolution of instant case)).

[150] *Id.* at 643.

[151] *Id.* at 647.

[152] Hampton v. Wong, 426 U.S. 88 (1976).

[153] *See Sugarman*, 413 U.S. 634.

[154] *Wong*, 426 U.S. at 100.

[155] *Id.* at 101.

[156] The Fifth Amendment protects individuals from federal government action. Due process and equal protection guarantees were extended to protect individuals against state governmental action through the Fourteenth Amendment.

effectively in society)[157] were adjudged to be too far beyond the scope of the Commission's regular duties to provide a "legitimate basis for presuming that the rule was actually intended to serve [those] interest[s]."[158] Furthermore, the exclusion was not expressly sanctioned by the President or Congress.[159]

The Court noted that aliens in the United States were already disadvantaged in that they were not allowed to vote and were unfamiliar with U.S. language and customs.[160] The rule prohibiting non-citizens from participating in such a broad sector of the economy was "of sufficient significance to be characterized as a deprivation of an interest in liberty,"[161] which mandated judicial scrutiny under the due process clause of the Fifth Amendment.[162]

Generally, employment classifications based on alienage are considered "inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired."[163] However, a string of decisions following *Wong* announced a "political exception" to the general strict scrutiny rule and limited aliens' right to public employment in a variety of circumstances where the activity in question "fulfills a most fundamental obligation of government to its constituency,"[164] and where the position requires "a high degree of judgment and discretion."[165] In such instances, a state need only show "some rational relationship between the interest sought to be protected and the limiting classification."[166] Thus,

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[157] *Wong*, 426 U.S. at 104.

[158] *Id.* at 103.

[159] *Id.* at 105-14. The *Wong* majority hinted that had the Civil Service been acting within its authority, its decision might have been upheld. *Id.* at 113 n.46. This interpretation comports with the 7th Circuit's analysis in *Campos v. FCC*, which distinguished federal and state regulation of aliens based on the fact that "the federal power [to regulate immigration and aliens] is of a political nature necessarily subject to narrow judicial review." 650 F.2d 890, 894 (7th Cir. 1981).

[160] *Wong*, 426 U.S. at 102.

[161] *Id.* After the *Wong* decision, President Ford issued Executive Order 11935, barring non-citizens, with limited exceptions, from employment in the federal civil service. 5 C.F.R. Part 7, §7.4 (1997). The Supreme Court has not addressed the constitutionality of the order, though the D.C. Appellate Court deciding *Jalil v. Campbell*, apparently found that even if the Civil Service Commission had exceeded its authority in *Wong*, the President had such power. 590 F.2d 1120, 1122 (D.C. Cir., 1978).

[162] *Wong*, 426 U.S. at 102.

[163] Graham v. Richardson, 403 U.S. 365, 376 (1971). In *Graham*, the Court consolidated two cases involving denial of welfare benefits on the basis of residency. In striking down Arizona and Pennsylvania statutes, the Court held that "a State's 'special pubic interest' in favoring its own citizens over aliens in the distribution of limited resources such as welfare benefits" was not a compelling justification which would permit discrimination. *Id* at 372.

[164] Foley v. Connelie, 435 U.S. 291, 297 (1978).

[165] *Id.* at 298.

[166] *Id.* at 295. "It would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny,' because to do so would 'obliterate all the distinctions between citizens

resident aliens may lawfully be denied employment as policemen,[167] as probation officers,[168] and as school teachers.[169]

### B. *Motivations for Judicial Review in Japan*

The factors which have motivated U.S. courts to review public employment restrictions are even more pronounced in Japan. U.S. courts typically review state actions under its most probing (strict scrutiny) standard when the state exercises power (1) solely over a suspect class; or (2) to infringe a fundamental right.

In U.S. judicial terminology, classifications based on citizenship are "inherently suspect and are therefore subject to strict judicial scrutiny . . . ."[170] Korean residents are a discrete and insular minority in Japan and are routinely discriminated against in Japanese society.[171] The distinction between citizens and non-citizens is even more pronounced in Japan than in the U.S., however,

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and aliens, and thus depreciate the historic values of citizenship.'" *Id.* (citing Nyquist v. Mauclet, 432 U.S. 1, 14 (1977) (Burger, C.J., dissenting)).

[167] *Id.* at 300.

> [T]he exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals . . . . It is not surprising, therefore, that most States expressly confine the employment of police officers to citizens, whom the State may reasonably presume to be more familiar with and sympathetic to American traditions.

*Id.* at 298-99.

[168] Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

[169] Ambach v. Norwick, 441 U.S. 68 (1979). Exclusion of Koreans from teaching positions in Japan is particularly controversial. *See, e.g., Summary, Citizens' Human Rights Report No. 1*, 20 LAW IN JAPAN 30 (1987) (arguing nationality restrictions should not be imposed on public school teachers). In *Ambach*, the U.S. Supreme Court allowed barring non-nationals because "teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society." 441 U.S. at 78. Even if one accepts this rationalization, however, it should be noted that the majority justified its ruling in part on the fact that "[a]ppellees, and aliens similarly situated, in effect have chosen to classify themselves . . . . They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country." *Id.* at 80-81. In Japan, for reasons internal to both the Japanese and permanent resident Koreans, such an "open invitation" does not exist for Koreans. *See supra* notes 51-61 and accompanying text.

[170] *See* Graham v. Richardson, 403 U.S., 365, 376 (1971).

[171] In addition to employment discrimination, Koreans face discriminatory treatment in seeking public benefits and in housing, and reportedly face police harassment. U.S. DEP'T OF STATE, *supra* note 4, at 686. Discrimination also takes more mundane forms. For example, "Korean school-children [presumably at Korean schools in Japan] do not get discounted rail passes like other students, and are banned from competing against Japanese students in school sports competitions." Ben Hills, *Japan: The Ugly Secret of the Treatment Japan Metes Out to a Minority*, THE AGE (Melb.), July 5, 1994, *available in* LEXIS, Asiapc Library, Japan File.

since citizenship and ethnicity are practically and (from the Japanese point of view) ideologically equivalent concepts.[172]

The nature of the right being infringed should also mandate judicial review in Japan. Article 22 of the Japanese Constitution protects the freedom to choose an occupation; the Japanese Supreme Court has subjected legislative decisions implicating Article 22 to heightened review in other contexts.[173] Barring permanent residents from a substantial part of the national economy is a substantial infringement of their constitutionally protected economic rights.[174]

Finally, that the 1953 restrictions are "administrative guidance," rather than statutory or regulatory mandates, should compel Japanese courts to probe more deeply into a local government's reasoning in barring aliens. It is perhaps a truism that "[i]n a democracy, if any right is to be restricted, it should be passed by a legislative body that represents the people."[175]

### *C. An Appropriate Model for Japan*

#### *1. Differentiating Between Classes of Non-Citizens*

In assessing the situation in Japan, one must initially consider to what extent traditional justifications for excluding aliens from public service apply to Korean permanent residents of Japan. "Resident aliens" is not a monolithic group. Even if public employment restrictions on recent immigrants might be appropriate, it is questionable whether restricting "peace treaty Koreans"[176] is justified or justifiable, given the history of this group in Japan and their exclusion from mainstream Japanese society. If the goal of restrictions generally is to uphold the state's obligation to preserve the basic conception of a political community (as the Tokyo District Court seemed to

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[172] *See supra* note 51 and accompanying text.

[173] *See* K.K. Sumiyoshi v. Governor of Hiroshima Prefecture, SAIBANSHO JIHŌ (No. 665) 1; JURITSO (No. 592) 60 (Sup. Ct., Apr. 30, 1975).

[174] The U.S. Supreme Court has characterized such a broad bar to public service "of sufficient significance to be characterized as a deprivation of an interest in liberty" requiring due process and therefore constitutionally mandated judicial scrutiny. Hampton v. Wong, 426 U.S. at 102.

[175] Tadahiro Fujikawa, *supra* note 31.

[176] "Peace treaty Koreans," by far the largest group of Korean permanent residents in Japan, were granted permanent residency status through the Japan-South Korea Peace Treaty. *See supra* notes 45-49 and accompanying text. Local governments face no practical difficulties in differentiating among resident classes. It might be reasonable, for example, to exclude pro-Pyongyang Koreans ("Special Permanent Residents") from some public posts, but include Peace Treaty Korean Residents ("Agreement Permanent Residents").

indicate),[177] it is unclear how filling public positions with permanent resident Koreans, the majority of whom know no other government than that of Japan,[178] would defeat this goal. Judicial analysis of public employment restrictions should recognize the special circumstances of Koreans.

### 2. *Judicial Review and Political Exceptions*

Rather than requiring a statute specifically allowing non-citizens to hold particular positions (as the Tokyo District Court held in *Chong Hyan Gyun*), the assumption should be that non-citizens are allowed to hold positions unless a government entity can show a reason why they should be barred. Of course, deference to a governmental entity can be greater or lesser depending on the authority with which the entity has been entrusted.[179] It is possible in Japan, as in the U.S., that an overriding national interest may justify a specific ban issued by the central government, even though an identical requirement could not be exercised by a municipal government.[180]

While it may make little sense to attempt to incorporate U.S. legal standards like "strict scrutiny" and "compelling state interest" into the Japanese legal context, Japan's courts must apply some level of judicial scrutiny to governmental exclusions of resident Koreans. The most appropriate approach in Japan is to apply the *K.K. Sumiyoshi* "necessary and reasonable" test to cases of public employment discrimination. This would at least begin to focus attention on the permissible limits of exclusion. Again, courts should differentiate between groups of aliens in considering whether exclusion of a particular group from a particular post is a rational means of achieving a particular goal. For example, in *Foley v. Connelie*, New York had justified its exclusion of non-citizens from the police force because it could "reasonably presume [citizens] to be more familiar with and sympathetic to American traditions."[181] In Japan, however, it is not as clear whether second, third, and fourth generation Koreans are less familiar with Japanese traditions than their Japanese counterparts.

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[177] *See supra* notes 131-32 and accompanying text.

[178] The majority of young Koreans in Japan are much more familiar with Japanese culture than Korean culture, and often speak no more Korean then their Japanese friends. *See* Kikuyo Matsumoto-Power, *supra* note 72, at 93. Koreans are loyal to their local community (which typically comprises concentrations of Koreans) if not to "the State."

[179] *See* Hampton v. Wong, 426 U.S. at 113 (Civil Service acting ultra vires).

[180] *Id.* at 101.

[181] 435 U.S. 291, 299-300.

This is not to say, of course, that every prohibition would be subject to heightened judicial scrutiny, but rather that each public position must necessarily be examined to determine whether it involves discretionary decision-making or execution of policy which substantially affects members of the political community.[182] A court might still determine that a particular post is of such political consequence that it falls within the governmental function exception to the necessary and reasonable test, but a prohibition which "sweeps indiscriminately" cannot be tolerated.[183] Only such an initial inquiry into the nature of the position and its importance in the relationship between citizens and a sovereign state preserves the constitutional rights of non-citizens in the face of State power.

## VI. CONCLUSION

The Tokyo District Court's consideration of the issue in *Chong Hyan Gyun*, and its near total abdication of authority to local political bodies, was a misjudgment in both law and policy. Japanese courts are compelled by the Constitution, Articles 22 and 14, to address the permissible limits of public employment discrimination against Koreans. This is particularly important since governmental bodies have been inconsistent and vague in issuing guidelines to local governments, and have wholly failed to present cogent standards by which local governments can gauge their policies.

Because the civil service employment restriction is a highly visible form of discrimination, opening up civil service jobs to Koreans is an important symbol of increasing legal protections for them.[184] The majority of Koreans in Japan are sufficiently acquainted with Japanese culture and society to serve as public officials in most positions. Many second, third, and fourth generation Koreans in Japan are wholly Japanese by every standard but blood and the technicalities of naturalization. In many instances, rationales for exclusion from public posts do not apply and are legally untenable.

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[182] *Id.* at 296.

[183] Sugarman v. Dougall, 413 U.S. 634, 643. The Tokyo District Court, in *Chong Hyun Gyun*, allowed the U.S. "political exception" to swallow what should have been the rule. Any exercise of state power justified exclusion. *See* Katsuhiko Okazaki, *supra* note 135 and accompanying text.

[184] *See* Tadahiro Fujikawa, *supra* note 31.