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RETURNEES FROM SOUTH AMERICA: JAPAN'S MODEL FOR LEGAL MULTICULTURALISM?

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Abstract: In response to Japan's increasing labor shortage, the Japanese government in 1990 enacted an extensive set of amendments to its restrictive Immigration Control and Refugee Recognition Act to allow for a controlled but broader method of regulating legal entry of foreign workers into Japan. Significant among those amendments are the provisions granting long-term resident status to persons of Japanese descent entering from abroad and the provisions offering additional rights to foreign-born spouses and children of Japanese nationals. These provisions are mainly targeted at descendants of Japanese who emigrated to South America ("*Nikkeijin*"). While most of the existing literature about minority rights in Japan focuses on (1) historic national minorities, (2) Korean and Chinese permanent residents, and (3) legal and illegal workers from Asia who are "newcomers," this Comment discusses a fourth distinct group: the returnees or *Nikkeijin* from South America. This Comment examines and analyzes the way ethnic difference is accommodated within the Japanese legal system at the constitutional level, and focuses on the administrative and social accommodation of returnees as contrasted with the discourse of legal rights that is associated with other legal residents of Japan—for example, the Korean and Ainu populations. This Comment argues that the treatment of the returnees serves as a forum where Japanese policymakers can discuss a framework for multiculturalism that is not found in constitutional rights discourse, and concludes that although the returnees are small in number, they are legally and socially significant because provisions for their integration into Japanese society have become a catalyst for a *de facto* policy of legal multiculturalism in Japan.

I. INTRODUCTION

Since Japan's immigration laws were amended in 1990, increasing numbers of Japanese descendants from South America—known as South American *Nikkeijin*¹—have been immigrating to Japan under new provisions enacted specifically to recruit such individuals.² Contrary to existing

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¹ The term *Nikkeijin* broadly refers to descendants of Japanese who emigrated abroad between 1868 and 1973, but more specifically identifies South American-Japanese descendants up to the third generation and their spouses, primarily those from Brazil or Peru. Yoko Sellek, *The Phenomenon of Return Migration*, in *JAPAN'S MINORITIES: THE ILLUSION OF HOMOGENEITY* 178 (Michael Weiner ed., 1997). As used in this Comment, the term *Nikkeijin* will be used in the latter sense. The terms *Nikkeijin*, South American-Japanese, Japanese-Brazilians, and *Nikkei* Brazilians will be used interchangeably throughout this Comment.

² DEMETRIOS G. PAPADEMETRIOU & KIMBERLY A. HAMILTON, *REINVENTING JAPAN: IMMIGRATION'S ROLE IN SHAPING JAPAN'S FUTURE* 37 (2000).

immigration policy prohibiting the entry of unskilled foreign labor,³ *Nikkeijin* and their families have been able to enter Japan under a newly created residence status without prohibitions on the type of work in which they could engage. Consequently, many *Nikkeijin* have taken advantage of this new legal opening to migrate to Japan mostly as legal unskilled workers.⁴ Thus, the so-called “return” of Japanese descendants from South America has satisfied Japan’s demand for workers under an acceptable government immigration policy. By 2000, South American immigrants to Japan, an overwhelming majority of whom are *Nikkeijin*, accounted for eighteen percent of the registered foreign population, a figure that is expected to continue growing.⁵

Presumably, *Nikkeijin*’s Japanese pedigree would facilitate their integration into Japanese society; however, interestingly, this has not been the case. Because *Nikkeijin* have been socialized as Latin Americans, they are linguistically and culturally non-Japanese. Rather than blending into Japanese society unnoticed, *Nikkeijin* have formed their own ethnic enclaves, creating for themselves a unique place in society where they are neither completely “Japanese,” nor entirely “foreign.” Rejected by mainstream Japanese, *Nikkeijin* are, in fact, an ethnic minority group.

The difficulties in cultural integration encountered by South American Japanese have prompted some municipalities where returnees live and work to create social and legal accommodations in the areas of housing, education, and social services that recognize returnees’ linguistic and cultural differences. The treatment of the returnees by local governments has served as a catalyst for legal change because, in an effort to help them integrate into Japanese society, local governments have promulgated policies that accommodate not only *Nikkeijin*, but also other foreigners. The local accommodation policies, however, are a departure from the more conservative policies of the central government. These policymaking activities at the local level are significant because they expose the tension

³ The Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 1951, amended by Law No. 135 of 1999, art. 19(1), provisional translation (Japan), <http://www.moj.go.jp/ENGLISH/IB/ib-20.html> (last visited Jan. 3, 2002) [hereinafter Immigration Control Act]. The Immigration Control Act regulates the entry and residence of all foreigners in Japan. A foreigner may reside in Japan under one of the twenty-seven categories of status of residence, and is prohibited from engaging in work outside of his/her residence status without special permission. Unskilled manual labor is not included among the types of employment activities in which a foreigner can engage. *Id.*

⁴ *Basic Plan for Immigration Control*, 2d ed., Ministry of Justice, Mar. 2000, provisional translation, pt. II.1(4), at <http://www.moj.go.jp/ENGLISH/IB/IB2000/ib.html> (last visited Nov. 12, 2001) [hereinafter *Basic Plan*].

⁵ *Number of Non-Japanese Residents in Japan by Country, as of 2000*, at <http://jinjapan.org/stat/stats/21MIG22.html> (last visited Apr. 20, 2002).

between the central and local governments: namely, the different set of assumptions about the composition of Japanese society that govern the national immigration law versus those that drive local accommodation policies.

This Comment examines the *Nikkeijin* for whom local government policies are tailored. Part II discusses the factors prompting changes to Japan's immigration law, and Part III examines the resulting amendments. Part IV illustrates the social integration difficulties of returnees. Part V focuses on the social and legal accommodations for returnees being made at the local government level. Part VI analyzes how ethnic difference is accommodated within the Japanese legal system. Part VII highlights the policy tensions between central and local governments. Part VIII concludes that the returnee group is significant because it has become a catalyst for important legal change, and that local governments serve as a forum where Japanese policymakers can begin to discuss legal multiculturalism that recognizes cultural differences in a traditionally ethnically homogenous Japan.

II. FACTORS LEADING TO THE 1990 AMENDMENTS TO THE IMMIGRATION CONTROL AND REFUGEE RECOGNITION ACT

A. *Japan's Labor Shortage*

1. *The "Bubble" Economy's Perverted Effect on the Labor Market*

With the extraordinary economic growth experienced during the 1980s, Japan increased its stature in the world economy.⁶ The economic prosperity of Japan's "bubble economy,"⁷ however, distorted the labor market. The growth in capital investments exceeded the existing labor supply.⁸ In earlier decades, demands in the labor market were met by drawing from the large pool of labor in Japan's primary economic sectors:

⁶ As the value of the yen rose dramatically from 1985 to the mid-1990s, Japanese business investment increased by almost 225%, especially in the manufacturing and construction industries. PAPADEMETRIOU & HAMILTON, *supra* note 2, at 10. Between 1987 and 1991, Japan's gross domestic product was at its highest. *Id.*

⁷ The period of extraordinary economic growth experienced during the 1980s and early 1990s is often referred to as the "Heisei boom" (after the contemporary emperor's reign) or the "bubble economy." *Id.*

⁸ Robert Neff, *Japan: Will It Lose Its Competitive Edge?*, BUS. WK., Apr. 27, 1992, at 51, LEXIS, News Group File.

agriculture, forestry, and fishery.⁹ By the mid-1980s, however, the total number of rural workers remaining in the economy's primary sectors was nearly depleted, yielding only 730,000 of the needed workers.¹⁰ By the late 1980s, Japan faced a serious domestic labor shortage as even alternative sources of labor—such as women, older workers, and the self-employed—were diminishing.¹¹

As the robust economy provided upward mobility for Japanese employees, it also raised the expectations of workers (particularly young Japanese), who increasingly viewed blue-collar work as unattractive and distasteful.¹² Businesses, especially construction, low-technology manufacturing, and value-added service industries, had difficulty attracting employees willing to work long hours doing labor-intensive work for low wages.¹³ The domestic labor shortage was and continues to be particularly threatening to small and medium-sized firms that supply components to larger industries, because their survival depends on keeping wages down and remaining competitive with firms abroad.¹⁴

2. *Domestic Demographic Crisis*

The problem of Japan's domestic labor shortage is expected to worsen into the future due to a declining fertility rate and an increasingly aging population.¹⁵ For decades, Japan's fertility rates have been among the lowest in the world.¹⁶ Proportionately, Japan's aging population continues

⁹ For example, between 1960 and 1973, the industrial sector was able to draw 5.2 million workers from agriculture. See PAPADEMETRIOU & HAMILTON, *supra* note 2, at 10.

¹⁰ *See id.* at 11.

¹¹ *Id.*

¹² As a result, the labor shortage became more acute in the positions that were comparatively lower in status and pay. This is particularly true for the "3D" jobs (or in Japanese the "3K" jobs)—the dirty (*kitanai*), dangerous (*kiken*), and difficult (*kitsui*)—which native workers shun. Myron Weiner, *Opposing Visions: Migration and Citizenship Policies in Japan and the United States*, in TEMPORARY WORKERS OR FUTURE CITIZENS? JAPANESE AND U.S. MIGRATION POLICIES 3, 10 (Myron Weiner & Tadashi Hanami eds., 1998) [hereinafter TEMPORARY WORKERS OR FUTURE CITIZENS?].

¹³ PAPADEMETRIOU & HAMILTON, *supra* note 2, at 11-12. Even when firms offered signing bonuses and other benefits to recruit workers in various lower-wage job categories, interest continued to decline. See C.S. Manegold, *Hang Up the Help Wanted Sign*, NEWSWEEK, July 16, 1990, at 39, LEXIS, News Group File.

¹⁴ Takashi Machimura, *Local Settlement Patterns of Foreign Workers in Greater Tokyo: Growing Diversity and Its Consequences*, in JAPAN AND GLOBAL MIGRATION: FOREIGN WORKERS AND THE ADVENT OF A MULTICULTURAL SOCIETY 176, 186 (Mike Douglass & Glenda S. Roberts eds., 2000) [hereinafter JAPAN AND GLOBAL MIGRATION].

¹⁵ Japan Economic Council, Report of the Globalization Committee, *On Globalization and the World Economy in 2010*, § 5.3 (1998), at <http://www5.cao.go.jp/98/e/19980416e-gurovari-e.html> (last visited Dec. 3, 2001); *Basic Plan*, *supra* note 4, pt. I.

¹⁶ In 1950, Japan's fertility rate (the average number of children a woman will have in her lifetime) stood at 3.65; by 2001, it became the lowest in the world, plummeting to 1.38. See GLOBAL NEWS WIRE,

to increase.¹⁷ According to a United Nations report released in March 2000, Japan would have to accept 17 million foreigners between 1995 and 2050 to maintain its current population level.¹⁸

Given the demographic changes of the past decades, the labor force is estimated to decrease by 1.76 million, or 2.6%, by 2010.¹⁹ The service sector, including care for the aged, and the construction industry, are expected to face labor shortages in the future.²⁰ As the domestic labor pool dries up, employers will continue to seek workers from abroad.²¹ It is estimated that the Japanese economy may need 500,000 additional workers each year after 2000.²² Although the current economic recession has driven wages in Japan down somewhat, wages in the manufacturing sector continue to be much higher than comparable wages in neighboring countries, thereby acting as a continuous "pull" factor for labor migration to Japan.²³

B. Government Ban On the Entry of Unskilled Workers

With the depletion of traditional reservoirs of labor and the unwillingness of young Japanese to do unskilled work, coupled with the

STATESMAN (INDIA), *Times Out of Joint*, May 7, 2001, LEXIS, Asia Pacific Regional Files. Innovative incentives have been offered to either encourage couples to have children or lure families with many children. For example, Higashimura, a small rice farming village 100 miles northeast of Tokyo, offered housing plots at giveaway prices to seven families that move there with young children or proof of a "blossoming pregnancy." See Kathryn Tolbert, *In Japanese Village, a Plot to Lure Newcomers*, WASH. POST, Oct. 29, 1999, at A23, LEXIS, News Group File. The proposal is dramatic, given the high value of land in Japan. *Id.*

¹⁷ Japan has the highest life expectancy in the world: 77 years for men and 84 years for women. See *Times Out of Joint*, *supra* note 16. The National Institute of Population and Social Security Research estimated in 1997 that the Japanese population would start declining after it peaks in 2007. See Kumi Matsumaru & Tom Westin, *Time to Open the Floodgates?: Japan Rethinks Foreign Labor*, DAILY YOMIURI, Oct. 5, 2001, LEXIS, Japan Country Files. However, Japan's fertility rate has been declining faster than initially forecasted, leading some analysts to predict that the population in Japan will peak sooner. A continued population decline could result in a decrease from 125 million in 1997 to 100 million in 2050, and then to 67 million in 2100, which is the same level as in 1933 when Japan was not yet industrialized. *Id.*

¹⁸ See Matsumaru & Westin, *supra* note 17.

¹⁹ See Kazutoshi Koshiro, *Does Japan Need Immigrants?*, in TEMPORARY WORKERS OR FUTURE CITIZENS?, *supra* note 12, at 151, 155.

²⁰ *Id.* at 159.

²¹ Since the onset of the recession in 1991, Japan's unemployment rate has been increasing, reaching 4.5% in 2000. See Doug Struck & Kathryn Tolbert, *Japan Inc. Workers Get Harsh Dose of Economic Reality; High Jobless Rate Gives Rise to Homeless Camps, Suicides*, WASH. POST, Jan. 3, 2000, at A14, LEXIS, News Group File. Although this seems low in comparison to U.S. standards, the official unemployment rate among men aged 24 or younger is 10.7%, but analysts say this is a conservative measurement. *Id.* However, the recession has not significantly affected the sectors with "3D" jobs, which are still plagued with a labor shortage. Koshiro, *supra* note 19, at 153.

²² See Koshiro, *supra* note 19, at 159.

²³ *Id.* at 155.

looming demographic crisis projected to exacerbate the labor shortage, it seemed that importation of foreign labor was the government's best option. The government was constrained from doing so, however, because Japan's Immigration Control and Refugee Recognition Act ("Immigration Control Act"), bans the entry of unskilled foreigners.²⁴

Desperate for survival, small manufacturing and construction industries began to recruit foreign labor illegally, notwithstanding the government prohibition on the employment of unskilled guest workers.²⁵ Employing low-paid illegal migrants was easier for many companies than investing in high-technology equipment,²⁶ and the enforcement provisions of the immigration law at that time had no teeth to act as a significant deterrent to employer noncompliance.²⁷

The influx of male migrant workers fueled a national debate between business, the public, and the government over whether to legalize the entry of unskilled labor.²⁸ At the same time, Japanese Brazilian politicians in Brazil had been lobbying the Japanese government to facilitate the entry of Japanese descendants to Japan.²⁹

C. *Lobbying Efforts by Japanese Brazilian Politicians for Facilitating Immigration of Nikkeijin to Japan*

During the decade prior to the 1990 amendments to the Immigration Control Act, Japanese Brazilian politicians lobbied the Japanese government to create a residency category for Japanese descendants without Japanese citizenship. The idea was perceived as a win-win situation for both countries, as the *Nikkeijins'* increasing desire to find work in Japan coincided nicely with the Japanese employers' need for unskilled laborers.³⁰

²⁴ See Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 1951, amended by Law No. 135 of 1999, art. 19(1), provisional translation (Japan), <http://www.moj.go.jp/ENGLISH/IB/ib-20.html> (last visited Jan. 3, 2002) [hereinafter Immigration Control Act].

²⁵ Weiner, *supra* note 12, at 11.

²⁶ *Id.*

²⁷ As a result, to enforce employer compliance with the prohibition on the employment of unskilled foreign workers, the 1990 amendments to the Immigration Control Act included sanctions and fines. See Immigration Control Act, arts. 5(1), 5(9). The sanctions impose fines of up to two million yen (\$20,000) and/or imprisonment of up to three years. *Id.*

²⁸ Sumi Shin, *Global Migration: The Impact of "Newcomers" on Japanese Immigration and Labor Systems*, 19 BERK. J. INT'L L. 265, 276-77 (2001).

²⁹ Keiko Yamanaka, *Return Migration of Japanese Brazilians to Japan: The Nikkeijin as Ethnic Minority and Political Construct*, 5 DIASPORA 65, 74-76 (1996) [hereinafter Yamanaka, *Return Migration of Japanese Brazilians to Japan*].

³⁰ *Id.*

The practical consequences of emigration from Japan and requirements under Japan's Nationality Law created a situation where second and third generation *Nikkeijin* in South America were left without Japanese nationality. In 1908, 781 Japanese immigrants arrived at the port of Santos, Brazil, marking the commencement of Japanese immigration to Latin America for nearly a century.³¹ It was not until the mid-1980s that Japanese Brazilians began leaving Brazil to avoid the hyper-inflation and unemployment that had plagued Brazil throughout the 1970s and 1980s.³² *Nikkeijin* who immigrated to Japan during the 1980s were mostly middle aged and older individuals who spoke fluent Japanese—*issei* (first generation) and some *nissei* (second generation) immigrants—and who retained Japanese citizenship.³³ Younger Brazilian-born, Portuguese-speaking *nissei* and *sansei* (third generation), however, faced a legal barrier to entry because they did not hold Japanese citizenship.³⁴ As a result, under

³¹ See Keiko Yamanaka, "I Will Go Home, but When?": Labor Migration and Circular Diaspora Formation by Japanese Brazilians in Japan, in JAPAN AND GLOBAL MIGRATION, *supra* note 14, at 123, 128. Prior to the fall of the feudal Tokugawa government in 1868, Japanese were not allowed to emigrate. *Id.* at 127. The first group of Japanese immigrants left for Hawaii in 1885 to work as contract laborers until about 1908, when immigration was diverted to Latin America. *Id.* Brazil was experiencing an acute labor shortage due to its then recent abolition of slavery and rising demand for coffee exports. *Id.* Unlike the Japanese immigrants to North America who were mostly men, immigrants to South America consisted of families. *Id.* at 128. Initially, Japanese immigrated to Brazil with the intention of working as short-term migrant laborers and returning to Japan with money saved. Sellek, *supra* note 1, at 187. However, low wages and exploitative practices by employers postponed return migration, and after Japan's defeat in the Second World War most immigrants decided to settle permanently in Brazil. Yamanaka, at 128-29. Japanese immigration to Peru also took place at the turn of the twentieth century, but took place on a smaller scale than immigration to Brazil. Kathryn Tolbert, *Defiant Fujimori Finds Safe Haven Among Japanese; Peru's Ex-Leader Uses Net as Outlet*, WASH. POST, Sept. 2, 2001, at A17, LEXIS, News Group File; Tony Laszlo, *Japan's Homogenous Diversity*, JAPAN TIMES, Jan. 20, 2002, LEXIS, Japan Country Files.

³² See Yamanaka, *supra* note 31, at 132. Economic decline was not isolated to Brazil; other South American countries had also been experiencing high inflation and large national debts. Sellek, *supra* note 1, at 187.

³³ See Yamanaka, *supra* note 31, at 132.

³⁴ See *id.* Japan's Nationality Law is based on the principle of *jus sanguinis* (law of blood) and requires that a child's birth be recorded in the Japanese registry within fourteen days after birth in order for the child to be granted citizenship. See Nationality Law, No. 147, 1950, amended by Law No. 268, 1952 and Law No. 45, 1984, art. 12 (Japan) [hereinafter Nationality Law]. This is in contrast to nationality laws following the principle of *jus soli* (law of the soil), under which citizenship is granted if the birth took place in the jurisdiction of the country. THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 21 (4th ed. 1998). The United States, for example, follows either principle: citizenship is granted if either the birth takes place in the United States or if one of the parents is an American citizen. *Id.* at 25-27. Prior to World War II, immigrant parents, hoping to return to Japan, registered their children (*nisseis*) in the Japanese government offices that existed in Brazil. Adriana Capuano de Oliveira, Japanese in Brazil or Brazilians in Japan? The Identity Issue Inside of a Migratory Context 9, 12 (paper presented at the Conference Cultural Encounters Between Latin America and the Pacific Rim, Mar. 6-7, 1998), at <http://orpheus.ucsd.edu/las/studies/pdfs/capuano.pdf> (last visited Feb. 21, 2002). Because Brazil's nationality law recognizes dual nationality, these *nissei* were also Brazilian citizens. After Japan's

the Japanese Nationality Law, these *nissei* and *sansei* were defined as foreigners despite their Japanese ancestry.

In 1989, the Japanese government revised its Immigration Control Act, which took effect on June 1, 1990.³⁵ The new law represents the government's attempt to kill two birds with one stone: to satisfy small-scale employers' demand for unskilled labor without compromising official policy against accepting such workers; and to preserve the notion of a monoethnic Japan.³⁶ The government believed that *Nikkeijin*, "as relatives of the Japanese, would be able to assimilate into Japanese society regardless of nationality and language," whereas the country's homogeneity might be spoiled "if Japan admitted many Asians with different cultures and customs than those of Japanese."³⁷ Thus, *Nikkeijin* immigrating to Japan were characterized by the Japanese government as "returning" to their home country, despite the fact that most of the immigrants—second and third generation Japanese descendants—had never before set foot in Japan.

III. JAPANESE DESCENDANTS FROM ABROAD "RETURN" TO JAPAN UNDER THE REVISED IMMIGRATION CONTROL ACT

A. *The 1990 Amendments*

The 1990 revisions to the Immigration Control Act provided for tougher enforcement to crack down on illegal foreign workers, while at the same time creating openings in Japan's immigration system to alleviate some of the country's labor needs. The revised law criminalized an undocumented entrant's residence in Japan, imposing fines or imprisonment and extending the ban on reentry from one to five years.³⁸ The amendments also introduced sanctions against agents who recruit and employers who hire undocumented migrants.³⁹ Despite these amplified enforcement efforts, unauthorized migration has not decreased significantly.⁴⁰ Modest decreases

surrender in 1945, the idea of returning to Japan became less plausible, and consequently many parents no longer registered their children as Japanese citizens. *Id.* at 12.

³⁵ Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 1951, *amended* by Law No. 135 of 1999, provisional translation (Japan), <http://www.moj.go.jp/ENGLISH/IB/ib-20.html> (last visited Jan. 3, 2002) [hereinafter Immigration Control Act].

³⁶ Shin, *supra* note 28, at 279.

³⁷ See Yamanaka, *Return Migration of Japanese Brazilians to Japan*, *supra* note 29, at 76, quoting Toshihiko Mojima.

³⁸ See Immigration Control Act, arts. 5(1), 5(9). For example, the sanctions impose fines of up to two million yen (\$20,000) and/or imprisonment of up to three years. *Id.*

³⁹ See *id.*, art. 73-2.

⁴⁰ SOPEMI, *Trends in International Migration, Annual Report for the Organization for Economic Co-operation and Development* 164 (1999). The number of illegal foreign workers is estimated to be at

in illegal migration have been more than offset by the increase in two sources of legal unskilled migration: trainees and *Nikkeijin*.⁴¹

The revised Immigration Control Act altered and expanded most forms of temporary immigration categories, stretching the "statuses of residence" from sixteen to twenty-seven categories.⁴² In particular, the 1990 amendments created a separate "trainee" status⁴³ for admitting unskilled foreigners who participate in the trainee program.⁴⁴ Commentators have suggested that the trainee system enables the government to establish a controlled, legal mechanism for unskilled labor.⁴⁵ The amendments also lifted some of the employment restrictions for foreign students, who have been another source of unskilled labor.⁴⁶ The policy change that has most significantly affected the labor market, however, is the creation of a new residency category that permits *Nikkeijin* to immigrate to Japan without bars on employment.

least 270,000 as of March 2000, but because of their clandestine nature, the actual figure is expected to be much higher. See *Basic Plan*, *supra* note 4, pt. II.1(1). Employers' demands for unskilled foreign labor continue to exist, and such demands are readily satisfied by criminal organizations that are becoming increasingly sophisticated at falsifying documents and smuggling workers into Japan. Shin, *supra* note 28, at 283. In addition, foreign workers overstaying their visas have become commonplace. *Tokyo District Is Home Away from Home; Asian Immigrants Flock to Area in Shinjuku; Longtime Resident View Influx with Mixed Feelings*, NIKKEI WEEKLY, Sept. 30, 1996, LEXIS, Japan Country Files. Although local governments are required to report visa overstayers to the central government, cooperation with the Immigration Bureau and police has been minimal. *Id.*

⁴¹ PAPADEMETRIOU & HAMILTON, *supra* note 2, at 40.

⁴² See Shin, *supra* note 28, at 279; Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 1951, amended by Law No. 135 of 1999, tbls., provisional translation (Japan), <http://www.moj.go.jp/ENGLISH/IB/ib-20.html> (last visited Jan. 3, 2002) [hereinafter Immigration Control Act].

⁴³ Immigration Control Act, art. 7(1)(2). Previously, the trainee status of residence was under a provision for overseas students, i.e., Immigration Control Act, article 4(1)(6)(2). Shin, *supra* note 28, at 316.

⁴⁴ The government's stated purpose for creating the trainee program was to promote cooperation with developing countries by transferring skills and know-how to unskilled foreign workers from other Asian countries. Katsuko Terasawa, *Labor Law, Civil Law, Immigration Law and the Reality of Immigrants and Their Children*, in JAPAN AND GLOBAL MIGRATION, *supra* note 14, at 219, 227. Under the trainee program, small- and medium-sized Japanese firms without an overseas presence are given permission to bring in unskilled workers as "trainees." PAPADEMETRIOU & HAMILTON, *supra* note 2, at 40. The program requires that at least one-third of the trainee's time is spent receiving classroom instruction, which includes Japanese language education and basic skills training—but these are sometimes never carried out. HIROSHI KOMAI, *MIGRANT WORKERS IN JAPAN* 37 (Jens Wilkinson trans., 1995). Trainees are prohibited from engaging in employment, but they may work in the name of on-the-job training. Shin, *supra* note 28, at 316. Consequently, "many foreign workers have been employed under the guise of trainees in order to compensate for the labor shortage . . . [and have been] force[d] [*sic*] to work as unskilled laborers under the pretext of being in training." Terasawa, at 227. In fact, revisions were made in 1992 that reduced time required in the classroom and increased time spent training on-the-job. Shin, *supra* note 28, at 316.

⁴⁵ PAPADEMETRIOU & HAMILTON, *supra* note 2, at 40.

⁴⁶ KOMAI, *supra* note 44, at 54.

B. *The Creation of a New "Long Term Resident" Status and the Increase in Entrants as "Spouse or Child of Japanese National"*

The new provisions of the 1990 Immigration Control Act were specifically targeted at *Nikkeijin* living in South America.⁴⁷ The amendments created a legal opening permitting second or third generation descendants of Japanese citizens to immigrate to Japan.⁴⁸ Under the new provisions, *Nikkeijin* and their families were granted rights of employment and residence for an initial period of up to three years with extensions thereafter.⁴⁹ The provision creating the new "long term resident" status went hand-in-hand with the provisions granting additional rights to "spouses or children of Japanese nationals."⁵⁰ Although the provisions permit spouses and children of Japanese nationals to stay for up to one year, they can remain longer because an "extension of stay" for these categories is easily obtained.⁵¹ Thus, *Nikkeijin* could immigrate to Japan with their families and remain for extended periods of time. In contrast, immigrants who enter as "trainees" are prohibited from bringing family members with them and must return to their home countries in two or three years.⁵²

Not surprisingly, the number of *Nikkeijin* migrating to Japan increased rapidly after passage of the revised Immigration Control Act.⁵³ In 1991, the number of registered foreigners claiming "long term resident" status reached 96,377, increasing to 211,275 at the end of 1998.⁵⁴ Brazilians and

⁴⁷ See discussion *supra* Part II.C.

⁴⁸ Sellek, *supra* note 1, at 184.

⁴⁹ Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 1951, *amended by* Law No. 135 of 1999, art.21, provisional translation (Japan), <http://www.moj.go.jp/ENGLISH/IB/ib-20.html> (last visited Jan. 3, 2002) [hereinafter Immigration Control Act].

⁵⁰ The number of individuals entering as a "spouse or child of Japanese national" has been increasing. See *Basic Plan*, *supra* note 4, pt. II.1(4). This trend reflects a rise in the number of international marriages, as well as a rise in the number of entries by Japanese descendants. There are also a considerable number of cases in which foreigners, who married Japanese nationals after entry into Japan, changed their status of residence to "spouse or child of Japanese national." By the end of 1998, the number of registered foreign residents under this status stood at 264,844 and accounted for about 17.5% of the total number of registered foreigners. *Id.*

⁵¹ Immigration Control Act, art. 21; Yamanaka, *supra* note 31, at 133.

⁵² *World Migration Report: 2000*, International Organization for Migration, United Nations 65-66 (2000). By prohibiting Asian trainees from immigrating with their families, the design of Japan's immigration policy is to ensure that their stay is temporary. See PAPADEMETRIOU & HAMILTON, *supra* note 2, at 41-42. This illustrates the government's perception of *Nikkeijin* as somehow more "Japanese" by virtue of having Japanese descent; thus expressing preferential treatment over other Asian migrants.

⁵³ See *Basic Plan*, *supra* note 4, pt. II.1(4).

⁵⁴ See *id.* The *Nikkeijin* influx subsided by 1996, after which repeat arrivals circulated between Japan and Latin America. Yamanaka, *supra* note 31, at 134. Nonetheless, on the whole, the *Nikkeijin* population in Japan has grown tremendously in the last decade, and many have decided to settle permanently in Japan where they are better off economically than in Latin America. *Id.* It remains to be seen how many more will decide to immigrate to Japan, given that an additional one million Japanese-

Peruvians, most of whom are of Japanese descent, now constitute the third largest foreign population in Japan after Koreans at 700,000 and Chinese at 220,000.⁵⁵

While South American *Nikkeijin* immigrate to Japan under the new immigration category created by the central government, their integration into Japanese society is facilitated by the local governments, as discussed below in Part V. Consequently, their legal rights are bifurcated. As legal foreign residents, South American *Nikkeijin* enjoy certain rights as local residents in the cities in which they live and work; yet, because most of them are not Japanese nationals, the scope of their constitutional rights is determined by the central government. Because municipal and prefectural governments have considerable delegated autonomy in making regulations, some local governments have established policies and programs that accommodate for aliens' ethnic differences. However, because Japan is a unitary system, the scope of eligibility for local accommodation policies is determined by the central government. These issues are further discussed below in Part VI.

C. *Nikkeijin As Legal Unskilled Laborers*

Once *Nikkeijin* arrive in Japan, they settle in non-metropolitan industrial zones and work as manual laborers. In 1995, almost fifty percent of the registered Brazilians in Japan were concentrated in five non-metropolitan prefectures: Aichi (home of Toyota Motor Corp.), Shizuoka (southwest of Tokyo), Kanagawa (west of Tokyo), Saitama (north of Tokyo), and Gunma (central Japan).⁵⁶ Within these prefectures, *Nikkeijin* live in working-class cities and towns where manufacturing companies are located.⁵⁷ Over two-thirds of *Nikkei* Brazilian men and half of the *Nikkei* Brazilian women work as machine operators assembling automobile and

Brazilians currently live in Brazil, and about 80,000 Japanese-Peruvians in Peru. Mario Osava, *Nikkei Leave Brazil to Meet the Rising Sun*, ASIA TIMES, Mar. 6, 2002, <http://www.atimes.com/japan-econ/DC06Dh01.html> (last visited Apr. 20, 2002); Tolbert, *supra* note 31; Laszlo, *supra* note 31.

⁵⁵ See Yamanaka, *supra* note 31, at 134.

⁵⁶ See Masami Wada, *Japan Learns from Its Latin Links: Immigrants From Peru, Brazil Contribute To "Internationalization"*, NIKKEI WEEKLY, Apr. 25, 1994, at 24, LEXIS, Japan Country Files.

⁵⁷ Sellek, *supra* note 1, at 193.

electric appliance parts in factories.⁵⁸ By 1998, the Japanese government estimated that 234,100 *Nikkeijin* were legally employed in Japan.⁵⁹

For the *Nikkeijin*, working as contract laborers in Japan represented economic advancement but downward social mobility. *Nikkeijin* came from well-educated, middle-class strata of Latin American society and held jobs as engineers, lawyers, dentists, secretaries, sales clerks, and teachers. But in Japan, because of their inability to speak Japanese, *Nikkeijin* engaged in work that required physical strength and on-the-job experience but no complex technical or communication skills.⁶⁰ Despite this demotion in job status, *Nikkeijin* earned more money working as unskilled laborers in Japan than as professionals in Latin America. For example, the daily wage for unskilled labor in Japan was equivalent to a month's salary as a skilled worker or professional in Brazil.⁶¹

In sum, because maintaining a restrictive immigration policy remains a tenet of the central government, the 1990 amendments to the Immigration Control Act did not legalize unskilled foreign labor. The revised law did, however, essentially open a "back door" for importing foreign labor under culturally acceptable and economically feasible methods while preserving the government's ban on admitting unskilled foreign workers. Specifically, the effect of the 1990 amendments was to create a legal opening for the Japanese government to import *Nikkeijin* as unskilled labor under a culturally acceptable national immigration policy.

IV. *NIKKEIJIN* EXPERIENCE DIFFICULTIES INTEGRATING INTO JAPANESE SOCIETY

A. *Despite Their Japanese Ancestry, Returnees are Linguistically and Culturally Non-Japanese*

The Japanese soon realized that most *Nikkeijin* were not the Japanese they expected, but "foreigners" who neither speak Japanese nor adhere to Japanese norms and customs. Spanish or Portuguese is their first language, and many second, third, or fourth-generation *Nikkeijin* cannot speak

⁵⁸ See Yamanaka, *supra* note 31, at 135. For employers, *Nikkeijin* employees are desirable because of their "disposability," or their availability to be "hired and returned to their employment brokers on short notice and without incurring any future obligations, damaging the company's image, or restricting future access to foreign workers." *Id.*

⁵⁹ See SOPEMI, *supra* note 40, at 164.

⁶⁰ Yamanaka, *supra* note 31, at 140.

⁶¹ See *id.* at 141. For example, in 1995 professional *Nikkeijin* in Brazil earned on the average between \$210 and \$350 per month. *Id.* Compare this to over \$100 per day for an unskilled male factory worker in Japan between 1988 and 1991. *Id.*

Japanese.⁶² Added to this linguistic difference, *Nikkeijin* are culturally Latin American.⁶³ Their patterns of behavior and daily habits are in direct contradiction to those of Japanese, who value conformity and discipline.⁶⁴ For example, *Nikkeijin* greet one another by kissing on the cheek, and couples express physical affection in public by holding hands, hugging, and kissing.⁶⁵ Such behavior would be unheard of by most Japanese, who generally behave with caution and reserve. Culinary preferences, one of the most fundamental aspects of ethnic identity and, therefore, one of the most difficult to modify, are also different: Brazilian *Nikkeijin* crave rice, beans, steak, and salad. In addition, although they share physical features similar to Japanese, *Nikkeijin*'s Latin American background can be easily identified through such subtleties as body language and dress.⁶⁶

Nikkeijin experience widespread prejudice and discrimination by Japanese because of their ethnic difference or lack of "Japaneseness."⁶⁷ For example, because of *Nikkeijin*'s Japanese ancestry, Japanese employers tend to expect them to behave and speak like Japanese, but when these expectations are contradicted, the Japanese "often verbally abuse them, calling them stupid, secondary Japanese and uncivilized people from a backward country."⁶⁸

Having grown up as "Japanese" in Brazil, *Nikkeijin*'s self-identity is seriously challenged when they are regarded as "Brazilians" in Japan. In Brazil, second and third generation *Nikkeijin* are considered to be "Japanese" because of their Asian appearance. In Japan, these same *Nikkeijin* are considered to be "Brazilian" or non-Japanese because, despite their physical similarity to Japanese, they speak and behave differently.⁶⁹ The social

⁶² Oliveira, *supra* note 34, at 20. Some second generation *Nikkeijin* learned to speak Japanese from their parents. *Id.* However, contrary to the Japanese language of their parent's generation, Japanese today contains many English expressions that are impossible to identify for those who learned old Japanese. *Id.* Further, most first generation Japanese who immigrated to South America were farmers from rural areas of Japan, where different dialects of Japanese are spoken. *Id.* Thus, even for those *Nikkeijin* who can speak the language, they are culturally alienated nonetheless. *Id.*

⁶³ For example, in the town of Oizumi, where almost 12% of the residents are from Latin America, *Nikkeijin* "parade through town dressed in feathers and G-strings to a pounding samba beat" at the town's annual summer carnival. George Wehrfritz & Hideko Takayama, *The Japan That Can Say Yes*, NEWSWEEK, June 5, 2000, at 38, LEXIS, News Group Files.

⁶⁴ Mikiko Miyakawa & Kakuya Ishida, *Growing Diversity Brings Challenges*, DAILY YOMIURI, Oct. 19, 2001, LEXIS, Japan Country Files.

⁶⁵ Oliveira, *supra* note 34, at 20.

⁶⁶ As one commentator remarks, it is possible to determine that a person is Brazilian, and not Japanese, "from miles distance, without the need to hear the person speaking Portuguese" by noticing his/her clothes, the way he/she walks, or the use of hand gestures as he/she speaks. *Id.* at 21.

⁶⁷ *Id.* at 23.

⁶⁸ See Yamanaka, *supra* note 31, at 141.

⁶⁹ Mario Osava, *Population Brazil: Emigrants Seek Red Sun of Japanese Ancestors*, INTER PRESS SERVICE, Feb. 26, 2002, LEXIS, News Group File.

rejection by the people they thought of as fellow Japanese leaves *Nikkeijin* feeling confused and deeply hurt. Many *Nikkeijin* poignantly expressed their sense of cultural alienation from both Japan and Brazil: "In Brazil, we were called *Japonês*, but in Japan we became *gaijin*⁷⁰ (foreigners) or *Burajiru-jin* (Brazilians). No matter where we go, we *Nikkeijin*, have no home."⁷¹ As a result, they find solace by forming their own ethnic community—in other words, "a community of people who share a common ethnic background and relate to one another through work, family, and friendship."⁷²

Besides providing moral support, these ethnic communities supply *Nikkeijin* with all their material and cultural needs. Most *Nikkeijin* are able to shop for imported Brazilian items, eat at Brazilian restaurants, and enjoy Brazilian entertainment by patronizing small ethnic businesses that have mushroomed since their arrival in 1990.⁷³ To meet the demands of the growing Brazilian population, other kinds of commercial and cultural establishments have also been opening up.⁷⁴

In sum, instead of blending into Japanese society unnoticed, *Nikkeijin* have formed their own ethnic enclaves, creating for themselves a unique place in society where they are neither completely "Japanese" nor entirely "foreign." Rather than integrating into Japanese society as ethnic Japanese, *Nikkeijin* are, in fact, ethnic minorities. Cultural and linguistic differences have made the day-to-day lives of *Nikkeijin* a challenge, particularly when dealing in matters of housing, education, and social services.

⁷⁰ *Gaijin* literally means "outside person." Millie Creighton, *Soto Others and Uchi Others: Imaging Racial Diversity, Imagining Homogeneous Japan*, in JAPAN'S MINORITIES: THE ILLUSION OF HOMOGENEITY, *supra* note 1, at 211-12. The various terms used in reference to a foreigner illustrates Japanese conceptualizations of different "others":

Although the word *gaijin* can be applied to any non-Japanese person it is most commonly only used for white foreigners, who are conceptualized as "pure *gaijin*," or "true *gaijin*." Japanese tend to use the word *gaijin* only for Whites, while the term *gaikokujin* (person from an outside country) is used for Blacks and non-Japanese Asians. Blacks are also called *kokujin*, while other Asians are called *Ajiajin*, or referred to by the country of their origin (e.g., *Chūgokujin* for a Chinese person).

Id.

⁷¹ See Yamanaka, *supra* note 31, at 142.

⁷² See *id.* at 143.

⁷³ These small retail stores are mostly run by *Nikkeijin* entrepreneurs and sell all the comforts of home: "imported Brazilian food, drinks, snacks, clothes, cosmetics, books, magazines, newspapers, videos, tapes and compact discs." *Id.* at 143.

⁷⁴ Such establishments include "discos, banks, travel agents, Japanese language schools, employment services, legal consultation, hobby and sports clubs, catering services, day-care services, and more." *Id.*

B. Linguistic and Cultural Barriers to Social Integration

1. Housing

Finding housing in Japan is the most serious problem for foreigners, including *Nikkeijin*.⁷⁵ In addition to having to pay a large deposit to rent an apartment, the prospective foreign tenant must also find a Japanese guarantor.⁷⁶ Moreover, many Japanese landlords are reluctant to rent to foreigners.⁷⁷ The friction between Japanese and non-Japanese cultures is most apparent in the context of residential life, where rules of behavior and cooperation govern personal interactions. The troubles caused by cultural differences in daily life between Japanese and foreign residents are most apparent in Toyota city's Homi Danchi, a mammoth public housing complex that is home to 11,000 tenants—3,000 of whom are *Nikkeijin*.⁷⁸

The clash of cultures is mitigated through the use of posters and pamphlets in Portuguese setting forth a list of housing rules and other information about the Japanese way of life.⁷⁹ For example, Japanese and *Nikkeijin* residents have had frequent disputes over noise, garbage disposal, bicycle parking, and other daily issues.⁸⁰ Tension mounted to violence in a 1999 incident in which some Japanese residents, who were also members of a right-wing organization, publicly demanded that *Nikkei* Brazilians leave, one day after a *ramen* stall on the premises was smashed by one or more unidentified culprits.⁸¹ The next day a car belonging to one of the right-wingers was set on fire.⁸² This compelled the Toyota city government to establish a multicultural committee two years later.⁸³ Although Homi Danchi represents the worst clash between Japanese residents and

⁷⁵ Takamichi Kajita, *The Challenge of Incorporating Foreigners in Japan: "Ethnic Japanese" and "Sociological Japanese,"* in TEMPORARY WORKERS OR FUTURE CITIZENS?, *supra* note 12, at 120, 129.

⁷⁶ *Id.*

⁷⁷ Tadashi Hanami, *Japanese Policies on the Rights and Benefits Granted to Foreign Workers, Residents, Refugees and Illegals,* in TEMPORARY WORKERS OR FUTURE CITIZENS?, *supra* note 12, at 211, 233.

⁷⁸ See Miyakawa & Ishida, *supra* note 64. Component suppliers for Toyota Motor Corporation and other automobile-related companies rented rooms for non-Japanese workers, mostly *Nikkeijin*, in Homi Danchi as a job benefit. *Id.*

⁷⁹ The residential rules range from "Don't turn up your television or radio early in the morning or late at night" to "Don't barbecue on the balcony." See *id.* Other notices, such as a wide banner placed on both sides of pedestrian bridge, inform of traffic safety in Portuguese and Japanese. *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* The committee was formed to discuss education, social welfare, and medical service issues. *Id.*

newcomers, similar situations have arisen elsewhere in Japan, particularly in localities with large foreign populations.

2. Education

Since the language barrier between *Nikkeijin* and Japanese is the primary obstacle to social integration, education is undoubtedly the biggest concern for both municipalities and *Nikkeijin*.⁸⁴ *Nikkeijin* migration to Japan has predominantly been in the form of family migration, and *Nikkeijin* children attend local Japanese elementary and junior high schools.⁸⁵ As the *Nikkeijin* population has grown over the last decade, providing education to non-Japanese speaking children of *Nikkeijin* has been a major concern for several municipalities.⁸⁶ In 1992, approximately 20,000 *Nikkeijin* children did not know how to speak Japanese.⁸⁷ The Japanese education system was unprepared to deal with non-Japanese speaking students.⁸⁸ Consequently, local governments are devising teaching materials and a guidebook for Japanese language instruction.⁸⁹ In regions without significant numbers of *Nikkeijin*, no specialized curriculum for non-Japanese students has been introduced in those schools.⁹⁰ More importantly, because foreign children are not subject to compulsory elementary and lower secondary-level education, some *Nikkeijin* parents do not send their children to local schools, or children drop out of school if they cannot adjust.⁹¹ Thus, a larger concern is the possibility that some children might turn to juvenile delinquency if they do not attend schools.⁹²

⁸⁴ *Id.*

⁸⁵ Kajita, *supra* note 75, at 129.

⁸⁶ Keiichi Imai, *Schools Learn to Deal with Immigrant Children; Number of Foreign Pupils Expected to Rise Significantly*, NIKKEI WEEKLY, Apr. 4, 1992, at 20, LEXIS, Japan Country Files. This is especially true for Aichi, Gunma, Kanagawa, Saitama, Shizuoka, and Tochigi prefectures, which rely heavily on foreign labor and which therefore have substantial foreign family residents. *Id.*

⁸⁷ See Sellek, *supra* note 1, at 196.

⁸⁸ Imai, *supra* note 86. Teachers did not have any guidelines or materials for teaching non-Japanese speaking children. *Id.*

⁸⁹ *Id.* Consonant with the goal of providing bilingual education, some Japanese commentators also recognized the need to respect and preserve foreigners' ethnic differences. Sakoto Nozawa, *Multicultural, Multilingual Japan: Is It Possible?*, DAILY YOMIURI, Sept. 4, 1995, at 8, LEXIS, Japan Country Files. They urge that a "system should be established in public schools to provide non-Japanese children with the opportunity to learn Japanese as a second language and maintain their native language and cultures." *Id.*

⁹⁰ Kajita, *supra* note 75, at 129.

⁹¹ Miyakawa & Ishida, *supra* note 64.

⁹² *Id.* As one middle-aged *Nikkeijin* resident commented: "Most South Americans who came to Japan immediately after 1990 understood Japanese culture because they often heard about it from their parents. But the numbers of young people who do not know about Japanese culture have gradually increased and many of them have no intention of learning the Japanese language or laws. As a result, they drop out of school or quit working, although most [older *Nikkeijin*] work hard to save money." *Id.*

In addition, as more *Nikkeijin* families migrate and eventually permanently settle in Japan, educational authorities will have to address the problem of limited access to senior high schools and universities, since not all of these schools can accommodate foreign students who do not possess sufficient knowledge of the Japanese language.⁹³ This is a serious problem for older *Nikkeijin* children who, because they have inadequate preparation, cannot successfully compete with Japanese students.⁹⁴ Although private international schools offer classes taught in foreign languages, these institutions have high tuition rates that deter many foreign workers from enrolling their children.⁹⁵ Because one's educational background carries much weight in Japanese society, older *Nikkeijin* children without Japanese higher education follow their parents into unskilled labor.⁹⁶

3. *Social Services*

Municipal governments face two main issues with respect to providing social services: first, how to provide medical services and pensions to non-Japanese residents, many of whom are reluctant to join company health insurance and pension schemes; and second, what to do about those who remain uninsured and ineligible to receive pensions when they retire.⁹⁷ Health insurance is available to all residents of a local community, including foreigners, under the National Health Insurance Law ("NHIL"), provided they submit an application and pay fees at the local community offices.⁹⁸ Employees of private employers with more than five workers are subject to the Health Insurance Law ("HIL"), which confers better benefits than the NHIL.⁹⁹ However, many foreign residents cannot meet the strict qualifications for membership in the plan.¹⁰⁰ While providing medical service to non-Japanese who have not joined company health insurance plans is undoubtedly a problem for municipal governments, a greater issue is the non-membership of illegal foreign workers. Because illegal foreign workers do not join the NHIL plan, and because their

⁹³ Sellek, *supra* note 1, at 197.

⁹⁴ Kajita, *supra* note 75, at 130.

⁹⁵ Imai, *supra* note 86.

⁹⁶ Kajita, *supra* note 75, at 130.

⁹⁷ Miyakawa & Ishida, *supra* note 64.

⁹⁸ Hanami, *supra* note 77, at 226. The NHIL of 1958 was amended in 1986 to eliminate the citizenship requirement, thus making health insurance available to all local residents except foreigners living in Japan less than one year. *Id.*

⁹⁹ *Id.*

¹⁰⁰ Kakuya Ishida, *Giving Foreign Residents a Voice*, DAILY YOMIURI, Jan. 6, 2001, at 7, LEXIS, Japan Country Files.

employers do not pay fees under the HIL, doctors and hospitals are left with large unpaid medical bills incurred by such illegal foreign workers.¹⁰¹

Linguistic barriers between *Nikkeijin* patients and Japanese doctors have caused problems for hospitals. Hospitals do not always have interpreters, and not all interpreters have sufficient medical knowledge. To facilitate communication between doctors and Brazilian patients, a Japanese-Brazilian physician recently compiled a Portuguese-Japanese dictionary that contains over 4,400 medical terms.¹⁰² In addition, to help alleviate stress-related medical problems associated with culture shock, one *Nikkeijin* doctor began counseling *Nikkeijin* over the telephone through the sponsorship of the Brazilian consulate in Nagoya.¹⁰³

With respect to determining the eligibility for receiving pensions, the National Pension Law of 1959 was amended in 1982 to eliminate citizenship as a requirement, thereby extending pension coverage to registered foreigners.¹⁰⁴ Also, employees of companies subject to the Welfare Pension Law of 1947 are covered by the Welfare Pension Scheme.¹⁰⁵ Despite these existing pension opportunities, foreigners were often not entitled to pensions because the plan required twenty-five years of service and foreigners' brief period of membership did not qualify.¹⁰⁶ The law was changed in 1994 making it possible for foreigners to receive a lump-sum payment within two months of their departure from Japan.¹⁰⁷ Notwithstanding this change in the law and the fact that many *Nikkeijin* who migrate to Japan intend to settle there permanently, they are still reluctant to join a pension plan.¹⁰⁸

C. *Different Linguistic and Cultural Backgrounds Pose Challenges to Local Governments in Providing Public Services*

Municipalities with large numbers of *Nikkeijin* are faced with the challenge of incorporating them into local society. Despite the influx of

¹⁰¹ Hanami, *supra* note 77, at 226. A few cities provide assistance for foreigners' unpaid medical expenses. Katherine Tegtmeier Pak, *Foreigners are Local Citizens Too: Local Governments Respond to International Migration in Japan*, in JAPAN AND GLOBAL MIGRATION, *supra* note 14, at 244, 254. For example, in Kawaguchi, the prefecture and city may reimburse the expense equally. *Id.* Kawasaki has a similar program in cooperation with the prefecture. *Id.* at 257.

¹⁰² See *Medical Dictionary for Brazilians Published*, DAILY YOMIURI, Dec. 3, 2001, at 10, LEXIS, Japan Country Files.

¹⁰³ *Brazilian Doctor Offers Phone-Line Counseling*, MANICHI DAILY NEWS, May 10, 2000, at 9, LEXIS, Japan Country Files.

¹⁰⁴ Hanami, *supra* note 77, at 225-26.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 226.

¹⁰⁷ *Id.*

¹⁰⁸ Miyakawa & Ishida, *supra* note 64.

Nikkeijin and continued illegal migration by other foreigners into Japan over the last decade, most local governments are usually reluctant or incomplete in addressing the settlement of foreigners within their jurisdiction.¹⁰⁹ This is partly because oldcomer groups of Korean or Chinese permanent residents desire more self-sufficient, exclusively Korean or Chinese communities, and partly because local governments have been inconsistent in response to future forms of urban communities.¹¹⁰ As long as the foreigners' stay in Japan is temporary, local governments make a good effort to provide a better life for them; but once foreigners settle on a long-term basis and try to establish their own self-sufficient communities, local governments usually isolate them and refuse to face the reality of an increasingly multi-ethnic community.¹¹¹ However, some progressive local governments have taken positive steps to institutionally incorporate *Nikkeijin* and, by extension, other newcomers. While *Nikkeijin* are different from other foreign workers in that their legal status makes them the only group of foreigners officially authorized to take employment in any job, the two groups often share common problems such as discrimination, helplessness, and isolation.¹¹² As such, all newcomers, 'at least to some degree, experience the same difficulties of integrating into Japanese society as those experienced by *Nikkeijin*. Consequently, several local governments have adopted a wide range of policies providing language services in public facilities, job information services, public housing, and other services.

V. ADMINISTRATIVE AND PROCEDURAL ACCOMMODATION OF RETURNEES AND OTHER LEGAL RESIDENTS IN JAPAN

A. *Municipal Government Responses*

1. *Local Accommodation Policies and Programs*

Since cultural differences between Japanese and foreign residents are most apparent in the communities where they live and interact daily, some local governments are addressing the issue by implementing "local accommodation policies and programs"¹¹³—policies and services that

¹⁰⁹ Machimura, *supra* note 14, at 191.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 188-91.

¹¹³ The terminology for international migration-related policies of Japanese local governments varies widely from city to city. For example, in Kawasaki the international migration-related policy is called *gaikokujin jūmin seisaku* (foreign local citizens policy), in Hamamatsu it is *kokusaika shisaku*

accommodate foreign residents' ethnic differences to facilitate their administrative and procedural integration into Japanese society. Local bureaucrats come into direct contact with foreigners by virtue of their duty to enforce the Alien Registration Law, which requires local governments to collect information about every legal foreign resident living in their community for over three months.¹¹⁴ As the number of legal foreign residents dramatically increased in the last two decades, local policymakers have concluded that, in the absence of any national policy for mediating relations between foreigners and Japanese, a new policy was needed at the city level.¹¹⁵ Drawing from the problems of immigration experienced by European cities—such as conflicts between immigrants and citizens over access to jobs, housing, education, and public welfare—local Japanese policymakers wanted to prevent immigration-related social conflict.¹¹⁶ As discussed in the previous section, some issues such as education and health care are directly affecting municipal governments.¹¹⁷ As a result, immigration-related issues are being addressed on the local policymaking agenda through local accommodation policies and programs. Four cities in particular—Kawaguchi, Shinjuku, Kawasaki, and Hamamatsu—are actively working to provide social services to foreign residents and address the reality of an ethnically diverse community.¹¹⁸

a. Extent of initiatives undertaken by municipalities

The scope of local accommodation policies and programs can be measured by several aspects. One aspect is the extent of initiatives undertaken by a given city—that is, “how accessible they are to foreign residents and to what extent the actual needs of the foreign residents are taken into consideration.”¹¹⁹ This usually involves the breadth of

(internationalization policy measures), in Kawaguchi it is *zaijū gaikokujin in taisuru shisaku* (policy measures related to resident foreigners), and in Shinjuku it is *kokusaika/kokusai kōryū jigyo* (internationalization and international exchange activities). Pak, *supra* note 101, at 250. This Comment will refer to all of these terms as “local accommodation policies and/or programs,” because their function is to accommodate foreign residents’ ethnic differences. (It should also be noted that “ethnic,” as used in this Comment, encompasses racial, linguistic, cultural, and religious elements.) Furthermore, these local accommodation policies are targeted only at documented migrants. *Id.*

¹¹⁴ Pak, *supra* note 101, at 248. The data that is collected includes “visa status, nationality, age, occupation, address, household composition, photographs and fingerprints.” *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 247-49.

¹¹⁷ See discussion *supra* Part IV.B; Sellek, *supra* note 1, at 196.

¹¹⁸ Pak, *supra* note 101, 244-70. While the promulgation of local accommodation policies and programs is not limited to these four cities, they are the most sophisticated because of the high concentration of foreigners in these four municipalities. *Id.*

¹¹⁹ See *id.* at 253.

information disseminated to foreign residents about available public resources. Foreign language publications in Chinese, English, German, Korean, Portuguese, Spanish, and Tagalog provide useful information about living in Japan and obtaining access to social services.¹²⁰ In addition, because foreigners are handicapped by a language barrier that prevents them from getting to know their Japanese neighbors or from obtaining necessary public information, local accommodation programs offer Japanese language classes.¹²¹ These classes also tend to function as social clubs where *Nikkeijin* can discuss their problems.¹²² In addition to Japanese language classes and tutorials for foreign children, teachers at local schools use a Portuguese-language conversation textbook compiled by a municipal education committee.¹²³

Local accommodation programs also provide consultation services (as another way to overcome the language barrier) either in person or over the telephone. In Hamamatsu,¹²⁴ for example, a medium-size city home to large automobile manufacturers such as Yamaha Corporation and Suzuki Motor Corporation, as well as hundreds of their subcontractors, the influx of *Nikkeijin* has forced the municipal government to address issues not faced by other municipalities.¹²⁵ The *Hamamatsu Foundation for International Communications and Exchange* educates *Nikkeijin* and other foreigners about local rules and regulations, and offers a telephone interpretation service.¹²⁶

¹²⁰ *Id.* at 252, 254-57. Examples of foreign language publications include: guides on daily life in the community, pamphlets on proper garbage disposal, evacuation procedures and charts in case of natural disaster, health handbooks for mothers, newsletters on family welfare, materials on school life in Japan, information on how to find rental housing, handbooks on simple conversation in Japanese, and more. *Id.*

¹²¹ *Id.* at 252. The City of Kawaguchi's Adult Education Department sponsors two two-hour evening classes that meet weekly and offers supplemental Japanese language classes for foreign children in elementary and junior high school two times a week after school. *Id.* at 254. Similarly, Shinjuku's International Exchange Association provides Japanese language classes for adults, and its Board of Education provides special supplementary Japanese language classes and tutoring at three elementary and junior high schools. *Id.* at 255. In Kawasaki, the Kawasaki International Exchange Association even sponsors an annual Japanese language speech contest for foreigners. *Id.* at 256. And in Hamamatsu, the city's International Exchange Center offers three levels of instruction both in the mornings and evenings and also offers instruction to foreign children in their native languages. *Id.* at 258.

¹²² Wada, *supra* note 56.

¹²³ *Id.* In Hamamatsu, for example, there were about 350 *Nikkeijin* children attending local schools as of 1994. *Id.*

¹²⁴ In 1988, only thirty *Nikkeijin* were living in Hamamatsu. *Id.* After the 1990 amendments to the Immigration Control Act, the population of *Nikkeijin* rose to 4,384. *Id.* Hamamatsu is known to have the largest number of Brazilian residents—11,821 as of the end of April 2001. Miyakawa & Ishida, *supra* note 64.

¹²⁵ Wada, *supra* note 56.

¹²⁶ *Id.* The foundation published a 120-page Japan survival guide in Portuguese in response to complaints from local residents that foreigners did not comply with traffic rules and did not dump garbage in designated places. *Id.* Other publications followed, such as a leaflet in English, Spanish, and Portuguese

b. *Effort devoted to fostering a sense of community*

A second aspect of the scope of local accommodation policies and programs is the amount of effort devoted to fostering a sense of community in the face of changing demographics.¹²⁷ Cities have engaged in cultural exchange activities and efforts to develop accommodation policies and programs that expand across departmental jurisdictions.¹²⁸ For example, several cities host festivals and parties for foreigners and Japanese, as well as lectures for Japanese residents to promote cross-cultural understanding.¹²⁹ Kawasaki facilitates communication between public offices through, among other initiatives, participation in the *Kanagawa Prefecture Consultative Council on the Resident Foreigners Problem*, which includes the prefectural police, Yokohama Immigration Bureau office, prefectural Labor Division, prefectural Employment Security Policy Station, and Yokohama City officials.¹³⁰

c. *Treatment of foreign residents as "local citizens"*

A final aspect of the scope of local accommodation policies and programs is the extent to which a given city recognizes foreign residents as "local citizens"—that is, "whether or not it seeks to ascertain their needs and to actively involve them in the community."¹³¹ For example, Hamamatsu and Kawasaki committed resources to conduct extensive surveys of the needs of their foreign residents.¹³² The Kawasaki municipal government is the front-runner in actively involving foreign residents in community politics. In 1996, Kawasaki also established the "Kawasaki Foreign Residents Assembly" to incorporate foreign residents' opinions in local policies.¹³³ Compared to other cities' foreign assemblies, which all operate

on how to dispose of garbage, pamphlets on fire prevention and earthquake preparation, and an English-language city map. *Id.*

¹²⁷ Pak, *supra* note 101, at 253.

¹²⁸ *Id.*

¹²⁹ Ishida, *supra* note 100; Pak, *supra* note 101, at 254-259.

¹³⁰ Pak, *supra* note 101, at 257.

¹³¹ *See id.* at 253.

¹³² *Id.* at 253. Kawasaki commissioned two surveys in 1992-93 and 1994-95 to determine the needs of resident foreigners and newcomers in the areas of medical care, working conditions, education, etc. *Id.* at 257. Hamamatsu commissioned similar surveys in 1992 and 1995 focusing on education and attitudes of Japanese employers and residents towards foreign residents. *Id.* at 258.

¹³³ *See* Miyakawa & Ishida, *supra* note 64. The assembly consists of twenty-six people representing nineteen countries serving up to two-year terms. Ishida, *supra* note 100. Members must be at least eighteen years of age, registered under the Alien Registration Law, and have lived in the city continuously

as part of guideline proposals, the Kawasaki assembly wields more legal authority because it is the first of its kind that was established based on a local ordinance.¹³⁴ Since the mid-1990s, other local governments have established similar assemblies and advisory bodies in an effort to promote complete integration of foreign residents into Japanese society.¹³⁵ Also in 1996, Kawasaki passed the "Kawasaki Basic Housing Regulation," which was enacted in April 2000 and is hailed as a major step towards eliminating housing discrimination by apartment owners against foreign, elderly, and disabled renters.¹³⁶ Kawasaki also established a "Friendship Hall" or community center, which is dedicated to increasing understanding between Korean permanent residents and Japanese, and where Koreans can promote and teach Korean language and culture.¹³⁷

2. *Collaboration Among Local Governments*

With Kawasaki and Hamamatsu serving as model cities effectively integrating their foreign residents through local accommodation policies and programs, other local governments facing similar issues with large foreign communities are following suit.¹³⁸ Significantly, in May 2001, thirteen cities throughout Japan set up the *Committee for Localities with a Concentrated Foreigner Population*, a joint committee set up to resolve a variety of common problems concerning newcomers.¹³⁹

for more than one year. *Id.* Under the ordinance, the assembly is required to submit a yearly report to the mayor discussing recommendations for issues raised at regular meetings where ordinary foreign residents are encouraged to participate. Miyakawa & Ishida, *supra* note 64. Municipal policymakers then discuss the feasibility of implementing the recommendations into local policies, a number of which have been implemented by the Kawasaki government. Ishida, *supra* note 100.

¹³⁴ Miyakawa & Ishida, *supra* note 64. For example, in their 1997 and 2001 annual reports submitted to the Justice Ministry, the Kawasaki Foreign Residents Assembly included proposals for reforms of administrative immigration laws, which were given serious consideration. *Id.*

¹³⁵ Ishida, *supra* note 100. This includes Osaka, Kyoto, Shizuoka, and Mitaka (western Tokyo). *Id.*

¹³⁶ *See id.* Since it is often difficult for foreigners seeking to rent an apartment to find a guarantor, the ordinance includes an agreement between the city and insurance companies. *Id.* Under the agreement, the potential foreign tenant can secure a two-year indemnity contract from insurance companies at a cost of thirty-five percent of the total cost of one month's rent and maintenance fees, in place of a guarantor. *Id.* The insurance companies guarantee up to seven months' rent and maintenance fees, in addition to three months' rent for restoration costs if the tenant moves out without paying rent. *Id.*

¹³⁷ Pak, *supra* note 101, at 259.

¹³⁸ Wada, *supra* note 56.

¹³⁹ *See* Miyakawa & Ishida, *supra* note 64. The committee was established under a proposal from the government of Hamamatsu. *Id.* The Director of Hamamatsu's International Affairs Office, Hisao Yasui, commented on the upcoming meeting of mayors of thirteen municipalities (Hamamatsu International Symposium):

Local communities and governments have been making various attempts to deal with an increasing number of newcomers. But problems are difficult for a single municipality to settle. So we proposed

B. *Local Organizations Designed to Facilitate Multiculturalism*

In addition to the formal forms of accommodation for foreigners administered by municipal governments, ethnic difference is also accommodated by local organizations designed to facilitate the increasing ethnic diversity in communities. Former members of the Kawasaki Foreign Residents' Assembly started a volunteer group, the Kawasaki Foreign Citizens' Volunteers, which promotes multiculturalism through folk dances, performing arts, and ethnic recipes.¹⁴⁰ In Tokyo, relief efforts to help foreign victims of the Great Hanshin Earthquake of 1995 led to the founding of the Tokyo Ethnic Multilingual-Multicultural Center, which is under an umbrella group called the Ethnic Media Press Center ("EMPC").¹⁴¹ Other organizations take on an advocacy function. United for a Multicultural Japan ("UMJ"), an advocacy group founded in 1996 for spouses of Japanese nationals, is known for battling the Justice Ministry and immigration bureaus over foreigners' rights.¹⁴² The leader of the Rights of Immigrants Network, a volunteer group based in Osaka, declared that the Japanese government should create an independent multicultural organization to protect human rights of foreign residents in Japan.¹⁴³ The Asian People's Friendship Society supports foreign residents in Tokyo's Itabashi Ward.¹⁴⁴ All of these are in addition to city-sponsored groups such as the Kawaguchi International Exchange Corner, the Shinjuku International Exchange Center, the

joining hands with other regional governments facing similar problems to exchange information so as to come up with better solutions. We are planning to call for coexistence (between Japanese and non-Japanese residents) in local communities and to make proposals on such issues as education, social security and administrative procedures.

Id.

¹⁴⁰ Ishida, *supra* note 100.

¹⁴¹ Koichi Oi, *Windows on the World Popping Up for Information-Starved Foreigners*, MAINICHI DAILY NEWS, June 26, 1996, at 9, LEXIS, Japan Country Files. The EMPC emphasizes cultural interaction by matching Chinese, Korean, Tagalog, Portuguese, and Thai speaking residents with Japanese interested in learning those languages, in exchange for Japanese language instruction. *Id.*

¹⁴² Tom Westin, *Standing Up for the Rights of Others*, DAILY YOMIURI, Oct. 5, 2001, at 7, LEXIS, Japan Country Files. The UMJ lobbies for "custody rights for foreign parents divorced from Japanese spouses, a repeal of the reentry permit system, and the extension of [voting rights] for permanent residents." *Id.* The UMJ receives up to 600 calls a week, mostly from permanent residents, with inquiries ranging from salary issues, work-related injuries, tax problems, divorces and marriages. *Id.* The eight-member staff offers referrals, provides legal advice, and litigates the more serious cases in court. *Id.* Membership in the UMJ has reached 800 as of 2001. *Id.*

¹⁴³ *Lawyer Urges Protection of Foreigners*, JAPAN TIMES, June 6, 1999, LEXIS, Japan Country Files.

¹⁴⁴ Hiroshi Munakata, *Tokyo District Is Home Away from Home; Asian Immigrants Flock to Area in Shinjuku; Longtime Resident Views Influx with Mixed Feelings*, NIKKEI WEEKLY, Sept. 30, 1996, at 18, LEXIS, Japan Country Files. For example, the group has an international marriage hotline through which it receives hundreds of inquiries. *Id.*

Kawasaki International Exchange Association, the Committee for the Promotion of Foreign Local Citizens' Policy, the Liaison Consultative Council on Kawasaki's Foreign Local Citizens' Policy, and the Hamamatsu International Exchange Center.¹⁴⁵

There are even several foreign language newspapers published weekly throughout Japan, as well as radio and television stations that broadcast news and entertainment in different languages. Ethnic media in Japan, with the exception of the Korean media, is a rather new phenomenon dating back no farther than the late 1980s.¹⁴⁶ Over 100 publications, with circulations ranging from under 1,000 to over 50,000, cater to "newcomers" from Asia and Latin America in search of employment.¹⁴⁷ In the last several years, the content and medium of Japan's ethnic media has been changing, primarily in response to its audience, who feel a stronger sense of having settled down in Japan for the long term. Print media are shifting to audio-visual modes of communication, such as radio and television.¹⁴⁸ More importantly, the content of ethnic media is changing from a former concern with providing lifestyle information and tips on survival to new goals of broadening its audience to *Nikkeijin* and encouraging contact between foreigners and Japanese.¹⁴⁹ Executives of many of these ethnic media companies recognize the influential role the ethnic media plays as a cultural bridge in the face of increasing diversity and globalization.¹⁵⁰

Apart from these institutionalized groups, foreign and Japanese residents in a few cities are embracing the ethnic diversity of their communities. In Kobe, for example, foreign residents from thirteen countries and Japanese residents opened the Asian Flea Market in 1996 with intentions to build a multicultural shopping and residential area called "Asia Town."¹⁵¹ Similarly, the multiethnic community in Kabukichō continues to develop as a pan-Asian enclave.¹⁵²

¹⁴⁵ Pak, *supra* note 101, at 254-58.

¹⁴⁶ Oi, *supra* note 141.

¹⁴⁷ *See id.* For example, several Portuguese-language newspapers published weekly are distributed throughout Japan, and *Nikkeijin* from Brazil get all their latest news from these sources. *Id.*

¹⁴⁸ *Id.* For example, a multilingual radio station, *Inter-FM*, made its debut in 1996 boasting eight languages: English, Chinese, Korean, Tagalog, Indonesian, Thai, Spanish, and Portuguese. *Id.* In addition, all of the station's on-air personalities are resident foreigners. *Id.*

¹⁴⁹ *Id.* In 1996, *Multilingual TV*—an offspring of *Perfect TV*, Japan's first multi-channel digital satellite broadcaster—set aside two channels for resident foreigners, one broadcasting in Spanish and the other in Portuguese. *Id.* *Multilingual TV* offers 24-hour-a-day programming featuring social issues of interest to the resident foreigner, combined with news and drama broadcasts from Brazil, Peru and other Latin American countries. *Id.* Media like *Inter-FM*, *Multilingual TV*, and others quench foreigners' thirst for information frustrated by the language barrier. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Kahori Sakane, *Kobe's Asian Community Opens Flea Market*, DAILY YOMIURI, July 28, 1996, at 2, LEXIS, Japan Country Files. The impetus for creating the Asian Flea Market came as a result of the

In sum, the difficulties of integrating into Japanese society are not faced by *Nikkeijin* alone, but are shared by other foreign residents (newcomers) as well. As the number of foreign residents continue to increase, problems associated with immigration will only become more widespread. The problem is exacerbated if illegal migrants are included, of which there are many and whose presence in Japan is not likely to diminish. However, despite these problems, the central government has yet to develop a national policy for addressing immigration related issues. Immigration policies remain restrictive, and the central government continues to be unresponsive to local efforts for greater minority rights. The local governments' treatment of *Nikkeijin* and newcomers—namely, to accommodate their ethnic difference both administratively and socially—can be contrasted with how the central government has responded to the reality of ethnic minority groups in Japan.

VI. HOW ETHNIC DIFFERENCE IS ACCOMMODATED IN THE JAPANESE LEGAL SYSTEM

Although constitutional provisions exist that confer equal treatment and respect for individual rights to all persons in Japan, these guarantees exist in the abstract—in the reality of legal and administrative practice, they have provided far fewer protections for individual rights, particularly for ethnic minorities. The scope of constitutional rights has been circumscribed by a conservative central government and a judiciary deferential to executive and legislative branches of government. This was certainly the case for almost forty years after the inception of Japan's Constitution. It was not until the late 1970s and early 1980s, when Japan ratified various international human rights treaties, that the situation improved somewhat. Still, progressive legal change has been incremental due to the institutional inertia of nearly uninterrupted rule by the conservative Liberal Democratic Party ("LDP"). Despite recent events that appear to indicate positive steps toward recognition of the rights of ethnic minorities—such as the Ainu rights case and proposed legislation that would give voting rights to Korean permanent residents—the Japanese government continues to take a cautious and reluctant approach to lawmaking that recognizes ethnic difference.

Great Hanshin Earthquake of 1995, when over 5,000 Koreans and about 500 Vietnamese began to form relationships with Japanese residents as they helped each other rebuild their lives and businesses. *Id.*

¹⁵² Sei Sasaki, *Tokyo Enclave Is Home Away from Home: Kabukichō Offers Migrants Opportunity, Sense of Familiarity*, NIKKEI WEEKLY, Sept. 15, 1997, at 1, LEXIS, Japan Country Files.

A. *Constitutional Guarantees are Not Universal*

The present-day human rights provisions that were ultimately adopted with the inception of the post-war Japanese Constitution¹⁵³ reflect a compromise between the efforts of the Supreme Command of the Allied Powers in the Pacific (“SCAP”)¹⁵⁴ to expand rights, and the constant opposition from the Japanese government to limit the expansion.¹⁵⁵ The final Constitution is a diluted version of the original SCAP draft provisions, which explicitly extended protection of rights to aliens, women, and illegitimate children. Whether the Constitution afforded any protection at all for these groups was an issue that resulted in decades of litigation.¹⁵⁶

The Japanese Constitution contains several declarations of human rights. For example, Article 13 reads:

All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.¹⁵⁷

Similarly, Article 14 proclaims: “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.”¹⁵⁸ Other guarantees include: Article 24, which provides for equal rights for husbands and wives;¹⁵⁹ Article 25, which secures the right to a decent life;¹⁶⁰ and finally, Article 26, which guarantees the right to equal education.¹⁶¹

¹⁵³ After Japan’s defeat in the Second World War, the Meiji Constitution of 1868 was amended under the auspices of the Allied Forces. *See generally*, THEODORE MCNELLY, *THE ORIGINS OF JAPAN’S DEMOCRATIC CONSTITUTION* (2000). The Meiji Constitution, written by Meiji oligarchs who disfavored popular rule and wielded tight control over the country through a centralized system of governance, prioritized the interests of the state (as embodied by the Emperor) over the interests of the individual. Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 423-24 (1999).

¹⁵⁴ General Douglas MacArthur headed the SCAP, which was the administrative organ in charge of implementing the Potsdam Declaration in Japan. *See generally*, MCNELLY, *supra* note 153.

¹⁵⁵ Hamano, *supra* note 153, at 431. The constitution-making process included several Japanese government officials. *Id.* at 426. In addition, numerous non-governmental groups and private individuals produced draft constitutions or proposals, which were dismissed by the conservatives in power. *Id.* at 426-27.

¹⁵⁶ *Id.* at 438.

¹⁵⁷ *See* NĪHONKOKU KENPŌ [Constitution] (1946) art. 13 (Japan).

¹⁵⁸ *See id.* art. 14.

¹⁵⁹ *See id.* art. 24.

¹⁶⁰ *See id.* art. 25.

¹⁶¹ *See id.* art. 26.

However, Japanese constitutional guarantees of human rights—as drafted by the SCAP—were narrowed in three areas by the Japanese government during the drafting process. First, draft provisions guaranteeing individual rights were limited by the introduction of the “public welfare” condition, which the Japanese Supreme Court has subsequently interpreted as meaning that all other rights guaranteed under the Constitution must be “subject to the limits for public welfare included in Articles 12 and 13 of the Constitution.”¹⁶² In other words, when the rights of the individual are pitted against the interest of the public, the public interest prevails.

Second, the Japanese government retracted protections given to aliens, which later had a significantly detrimental impact on ethnic Korean and Taiwanese residents in Japan.¹⁶³ In the course of negotiations between the SCAP and the Japanese government over the draft provisions, the Japanese government prevailed in implementing a seemingly minor change in the language of Article 13.¹⁶⁴ Specifically, “all natural persons” in the SCAP’s draft was replaced with “all of the people” or *kokumin* in Japanese, which literally means “people of the nation” or citizens.¹⁶⁵ In contrast, where the constitution refers to “every person,” “no person,” and “all persons,” the word *nanbito*, which literally means “every person,” is used.¹⁶⁶ Hence, *all persons* do not always constitute *all of the people*.¹⁶⁷ Thus, embedded in constitutional provisions referencing *kokumin* is a notion of citizenship not apparent in the English translation. When the Allied Occupation of Japan ended in 1952, the Japanese government retracted Japanese citizenship of its

¹⁶² Georgina Stevens, *The Ainu and Human Rights: Domestic and International Legal Protections*, 2(2) JAPANESE STUDIES 181, 189 (2001). Article 12 reads: “The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavour of the people, who shall refrain from any abuse of these freedoms and rights and shall *always be responsible for utilizing them for the public welfare*.” (Emphasis added.) See NIHONKOKU KENPO [Constitution] (1946) art. 12 (Japan). Similarly, Article 13 protects individual rights subject to the condition that “it does not interfere with the public welfare.” See *id.* art.13.

¹⁶³ During World War II, Japan forced many Koreans and Taiwanese, whose countries were colonized by Japan at the time, to come to Japan to work as laborers. See Sonia Ryang, *Resident Koreans in Japan*, in KOREANS IN JAPAN: CRITICAL VOICES FROM THE MARGIN 1, 1-4 (Sonia Ryang ed., 2000); Kumi Matsumaru, *Floating Between Cultures*, Daily Yomirui, Jan. 11, 2002, at 7, LEXIS, Japan Country Files. Most came from the Korean peninsula, totaling over two million. See Ryang, at 3. As colonial subjects, they had the status of Japanese citizens. *Id.* at 4.

¹⁶⁴ Hamano, *supra* note 153, at 435-437. In drafting the Constitution, a key issue was whom the Constitution would protect. *Id.* at 435.

¹⁶⁵ *Id.* at 437; Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan’s Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33(2) N.Y.U. J. INT’L L. & POL. 419, 482 (2001).

¹⁶⁶ Levin, *supra* note 165, at 482.

¹⁶⁷ *Id.*

former colonial subjects.¹⁶⁸ Consequently, Korean and Taiwanese residents in Japan became resident aliens.¹⁶⁹

Finally, the drafting process failed to extend full protection to the rights of women and illegitimate children. Again, the article proposed by SCAP that would have extended protection to mothers and children born out of wedlock was not included in the final Constitution.¹⁷⁰

Thus, since the inception of the Constitution, the Japanese government sought to limit legal protections for non-Japanese and other disfavored groups.¹⁷¹ It is no surprise that the scope of constitutionally guaranteed rights was constrained by discriminatory domestic laws and by a cautious judiciary that was generally restrained in judicial review.

B. *Scope of Constitutional Rights Has Been Circumscribed*

For almost forty years after the inception of the Constitution, the central government determined the scope of constitutional rights. Despite the existence of constitutional protections, in the reality of legal and administrative practice, they have been narrowly applied. Prior to Japan's ratification of various international human rights treaties, many domestic laws discriminated against aliens, women, and illegitimate children. In addition, courts have tended to give deference to the legislature and the executive, and have generally been reluctant to strike down as unconstitutional legislation restricting human rights.¹⁷²

¹⁶⁸ Ryang, *supra* note 163, at 4.

¹⁶⁹ This mostly affected the approximately 600,000 Koreans who chose to remain in Japan following the war. *Id.* It was not until 1965 that Japan and South Korea signed a bilateral treaty to award special "permanent resident" status to Koreans who had been stripped of their Japanese citizenship. *Id.* Their descendants are also granted the special status. Matsumaru, *supra* note 163. Thus, the special "permanent resident" status is granted to Koreans and Taiwanese residents in Japan to recognize their unique placement in Japanese history. *Id.*

¹⁷⁰ Hamano, *supra* note 153, at 438. The SCAP's proposed article stated:

In all spheres of life, laws shall be designed for the protection and extension of social welfare; and of freedom, justice and democracy. . . . To this end the Diet shall enact legislation which shall: Protect and aid expectant and nursing mothers, promote infant and child welfare, and establish just rights for illegitimate and adopted children, and for the underprivileged.

Id.

¹⁷¹ *Id.*

¹⁷² The limited role of the Japanese judiciary has been described as follows:

Japan has been in an era of constitutional government in which strong executive powers have been justified on the grounds that such power is necessary to achieve economic success and to catch up to the prosperity of the Western world. Strong executive power often results in suppression of political opposition and limitations on judicial independence as law supports economic development at the expense of civil liberties.

While theoretically, guarantees of fundamental human rights apply to foreigners, this protection is entirely dependent on the discretion of the Minister of Justice, who decides whether or not an alien is permitted to live in Japan.¹⁷³

Even when the conduct of aliens during their stay is in accord with the Constitution and is lawful, if the Minister of Justice determines that the conduct of the alien is undesirable for Japan from the perspective of propriety, or if it is inferred from the said conduct that there is danger in the future that the said alien will behave in a way harmful to Japan's interests, this does not amount to depriving the alien of constitutional protection.¹⁷⁴

Moreover, the Minister of Justice has broad discretion; his decision can only be challenged by a showing that the administrative decision is manifestly devoid of reason, basically shielding it from judicial reversal.¹⁷⁵ Thus, the constitutional guarantee of fundamental human rights to aliens extends only as far as the State permits.

C. *International Human Rights Law*

As a result of Japan's accession to various international human rights treaties beginning in 1979,¹⁷⁶ many social rights have been extended to non-citizens. For example, previously, the Japanese government interpreted Article 25 of the Japanese Constitution—which states that “All *nationals* shall have the right to maintain the standards of wholesome and cultured living”¹⁷⁷ (emphasis added)—as a guarantee of social rights only to Japanese

Percy Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, in JAPANESE CONSTITUTIONAL LAW, at 123, 145.

¹⁷³ Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 1951, amended by Law No. 135 of 1999, art 21, provisional translation (Japan), <http://www.moj.go.jp/ENGLISH/IB/ib-20.html> (last visited Jan. 3, 2002) [hereinafter Immigration Control Act]; Hamano, *supra* note 153, at 465, citing *McLean v. Justice Minister*, translated in LAWRENCE BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 471 (1996).

¹⁷⁴ See Hamano, *supra* note 153, at 465, citing *McLean v. Justice Minister*.

¹⁷⁵ Hamano, *supra* note 153, at 465-66.

¹⁷⁶ Japan ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1979; the Convention Relating to the Status of Refugees in 1982; the Convention on the Elimination of All Forms of Discrimination Against Women in 1985; the Convention on the Rights of the Child in 1994; and the Convention on the Elimination of All Forms of Racial Discrimination in 1995. YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW 2-3 (1998).

¹⁷⁷ See Nihonkoku Kenpō [Constitution] (1946) art. 25 (Japan).

nationals.¹⁷⁸ In light of international human rights law,¹⁷⁹ which guarantees social rights to “everyone,” the Japanese government has acknowledged that “everyone” includes not only nationals but also aliens.¹⁸⁰

International human rights law has been the impetus for a number of important changes to Japan’s domestic laws.¹⁸¹ The nationality requirements in several domestic laws were systematically eliminated, thereby extending protection to aliens.¹⁸² These legal changes have mostly affected Korean permanent residents. Litigants seeking relief from a violation have invoked international human rights law in addition to Japanese constitutional provisions.¹⁸³ Because international human rights law provides more clarity than Japan’s domestic law, courts have used it as an interpretive aid.¹⁸⁴ However, in general, the courts are reluctant to find violations of international human rights law.¹⁸⁵ This is because Japanese courts are unfamiliar with international human rights law, and are generally reluctant to invalidate statutes on constitutional grounds.¹⁸⁶ Consequently, the courts avoid striking down statutes as unconstitutional by invoking the “public welfare” clauses of Articles 12 and 13 of the Constitution.¹⁸⁷ More recently, the courts have justified restrictions of human rights by deferring to the legislature’s discretion and finding a statute unconstitutional “only when it is obvious that the restriction contained in the statute is excessively

¹⁷⁸ IWASAWA, *supra* note 176, at 167.

¹⁷⁹ Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that “[t]he States Parties to the present Covenant recognize the right of *everyone* to social security, including social assistance.” (Emphasis added.) International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976; for Japan, Sept. 21, 1979), *quoted in* IWASAWA, *supra* note 176, at 167.

¹⁸⁰ IWASAWA, *supra* note 176, at 167.

¹⁸¹ *Id.* at 123. The Japanese government acknowledged that signing on to the International Covenants on Human Rights in 1979 would require changes to domestic laws concerning the treatment of resident aliens in Japan. *Id.*

¹⁸² *Id.* at 169-99. For example, due to conflicts with Article 9 of the ICESCR, in 1986 the Ministry of Health and Welfare eliminated the nationality requirement from its previous Order under which aliens were ineligible for the national health insurance scheme. *Id.* at 170. With Japan’s accession to the Refugee Convention in 1982, nationality restrictions were eliminated from the National Pension Law, the Child Dependency Allowance Law, the Special Child Dependency Allowance Law, and the Child Allowance Law. *Id.* at 171, 174. Other laws—such as the Public Housing Law, the Japan Housing Corporation Law, and the Government Housing Loan Corporation Law—that did not have a nationality requirement but were narrowly applied to exclude aliens were also changed. *Id.* at 175.

¹⁸³ Crane Stephen Landis, *Human Rights Violations in Japan: A Contemporary Survey*, 5 DETROIT C.L. J. INT’L L. & PRAC. 53, 72 (1996).

¹⁸⁴ IWASAWA, *supra* note 176, at 299.

¹⁸⁵ *Id.* at 299. This is true with respect to fingerprinting of aliens, national pensions, war compensation to aliens, nationality of children, and treatment of illegitimate children. *Id.*

¹⁸⁶ *Id.* at 303-04; *see generally* HIROSHI ITOH, *THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES* (1989).

¹⁸⁷ Hamano, *supra* note 153, at 462.

unreasonable."¹⁸⁸ This standard is easily satisfied, since even a minimum level of reasonableness is enough.¹⁸⁹ In short, despite some improvements to domestic law as a result of Japan's ratification of various international human rights treaties, full recognition of constitutional human rights in Japan remains hindered by institutional inertia.¹⁹⁰

D. *Institutional Inertia Persists*

The Japanese government has historically dealt with ethnic minorities by subordinating them through policies of assimilation and exclusion. Indeed, the shortcomings of the Japanese legal system are illustrated by the experiences of two other groups of legal residents whose presence in Japan predates that of the recent migrants: the indigenous Ainu¹⁹¹ and permanent resident Koreans. The Ainu, although Japanese nationals, are an indigenous group considered by the Japanese government to be a historical ethnic minority.¹⁹² The Korean permanent residents are Japan's largest ethnic minority, numbering almost 700,000, whose legal status has vacillated between citizen and non-citizen. Both groups have been seeking greater political recognition from the Japanese government. The contentious relationship between each of these groups and the central government illustrates that the Japanese legal system has been ill-equipped to accommodate ethnic difference.

¹⁸⁸ See IWASAWA, *supra* note 176, at 304.

¹⁸⁹ *Id.*

¹⁹⁰ For example, the Japanese government refused to implement the recommendations of the U.N. Human Rights Committee ("Committee") in 1998. Hamano, *supra* note 153, at 480-81. The Committee strongly recommended two institutional changes: (1) an extensive training program for judges, prosecutors and administrative officers educating them about the government's obligations under the ICCPR; and (2) the creation of an independent authority for the investigation of human rights violations with the power to give redress to complainants. See *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee*, Human Rights Committee, 64th Sess., U.N. Doc. CCPR/C/79/Add.102, para. 2.

¹⁹¹ The Ainu, an indigenous people living on Hokkaidō, the northern islands of the Japanese archipelago, are physically, culturally, and religiously distinct from the Japanese majority. Landis, *supra* note 183, at 66-67. For an anthropological and archeological analysis of two prevailing theories concerning the origins of the Ainu and the present-day Japanese people, see Katayama Kazumichi, *The Japanese as an Asia-Pacific Population*, in MULTICULTURAL JAPAN: PALEOLITHIC TO POSTMODERN (Donald Denoon et al. eds., 1996) [hereinafter MULTICULTURAL JAPAN].

¹⁹² The plight of the Ainu in Japan can be compared to the Native American Indians in the United States.

1. *The Ainu Rights Case and Subsequent Legislation*

a. *The Nibutani Dam Decision*

The Ainu rights case, also known as the Nibutani Dam decision, is a landmark decision by a district court recognizing the Ainu as an indigenous people of Japan entitled to the right to exercise their ethnic and cultural identity.¹⁹³ The decision is significant for its “application of Article 13 to members of an ethnic minority group for the right to enjoy ethnic culture associated with the minority group membership.”¹⁹⁴

Still, however progressive the Ainu rights decision may be, its potential weight as legal authority to future cases involving minorities remains dubious for several reasons. First, a feature of the Japanese legal system is its failure to halt projects while they are judicially challenged. Therefore, government entities can continue engaging in the challenged activity notwithstanding the fact that doing so allegedly violates domestic or international law.¹⁹⁵ In addition, courts have not provided adequate redress for grievances against the government because the judiciary has consistently given deference to the legislative and executive branches.¹⁹⁶ Second, the court effectively narrowed its holding to indigenous peoples by suggesting that the ethnic culture of the Ainu warrants preferential treatment over other

¹⁹³ Kayano et al. v. Hokkaidō Expropriation Committee, 1598 HANREI JIHŌ 33, 938 HANREI TIMES 75 (Sapporo Dist. Ct., Mar. 27, 1997) (Japan), reprinted in 38 I.L.M. 394 (Mark A. Levin trans., 1999), <http://www.Hawaii.edu/law/facpubs/nibutani.pdf> (last visited Apr. 20, 2002) [hereinafter Nibutani Dam Decision]. The court held it was illegal for the Japanese government to expropriate Ainu land, particularly religious, cultural, and archeological sites belonging to the Ainu. *Id.*

¹⁹⁴ See Levin, *supra* note 165, at 487. The authority supporting the court’s decision was founded on a broad interpretation of Article 13 of the Japanese Constitution and on Article 27 of the ICCPR. *Id.* The court found that Article 27 imposes “an obligation [*sic*] upon all contracting nations to exercise due care . . . when deciding upon, or executing, national policies which have the risk of adversely affecting a minority’s culture.” Stevens, *supra* note 162, at 190.

¹⁹⁵ Stevens, *supra* note 162, at 193. In the Nibutani Dam case, at the end of the two years of litigation, the court rendered its decision that erecting the dam was illegal, but by then the dam was nearly complete. *Id.* Three of the Ainu cultural sites were already destroyed, and halting or removing the dam structure would have entailed huge monetary costs to the public. *Id.*

¹⁹⁶ Under the former Meiji Constitution, judicial review of governmental actions was not widely practiced. *Id.* When the Japanese Constitution was amended in 1946, it vested the power of judicial review to the Supreme Court, which can delegate its power to the inferior courts. *Id.* The change was merely one of organization, since it moved the function of judicial review from the Ministry of Justice to the independent venue of the Supreme Court. *Id.* No significant change occurred in the composition of the judiciary, which was disproportionately represented by the postwar generation who had “dubious records during the war or opposition to the new Constitution.” Hamano, *supra* note 153, at 443. Deference to the legislative and executive branches began to wane by the late 1960s, when “Japanese judges, including Justices on the Supreme Court, began to rule occasionally against the government.” *Id.* at 446.

minorities living in Japan.¹⁹⁷ Third, since the Nibutani Dam decision was made by a lower court, its precedential impact is uncertain.¹⁹⁸ Finally, it is an isolated decision by one lower court that does not necessarily signify a parallel shift in philosophy within Japanese government.

b. The Ainu Culture Law

Contrary to the Sapporo District Court's progressive approach in the Ainu rights case, the central government offered a cautious and reluctant response through enactment of the 1997 Act for Promotion of Ainu Culture and Dissemination of Knowledge Regarding Ainu Traditions¹⁹⁹ ("Ainu Culture Law"). The Ainu Culture Law repealed the 1899 Hokkaidō Former Aboriginals Protection Act,²⁰⁰ which was a relic of the Meiji era that epitomized the assimilation policies of that period and which defined the relationship between the Ainu and the Japanese government for nearly a century.²⁰¹ Although the Ainu Culture Law has been identified as being "the

¹⁹⁷ Stevens, *supra* note 162, at 192. One commentator has suggested that the Sapporo District Court's interpretation of Article 27 seems to go beyond current international interpretations, such as that made by the United Nations Human Rights Commission (UNHRC). *Id.* That is, rather than suggesting that indigenous groups have *more* protection or *greater* rights under Article 27 than minorities (as the Nibutani court suggests), the UNHRC's interpretation simply recognizes the unique ways in which indigenous culture is expressed. *Id.*

¹⁹⁸ Because Japan follows a code (civil) law system, the primary basis for judicial decisions is grounded in code provisions. Stevens, *supra* note 162, at 188. While Supreme Court decisions are followed by lower courts as authoritative, even binding interpretations of statutes, they are not regarded as a source of law. *Id.*

¹⁹⁹ See Act for the Promotion of Ainu Culture & Dissemination of Knowledge Regarding Ainu Tradition, No. 52, 1997 (Japan), translated in 1 ASIAN-PAC. L. & POL'Y J. 11 (Masako Yoshida Hitchingham trans., 2000), available at <http://www.hawaii.edu/aplpj/pdfs/11-masako.pdf> (last visited Mar. 29, 2002).

²⁰⁰ See Hokkaidō Former Aboriginals Protection Act, No. 27, 1899 (Japan), reprinted in RICHARD SIDDLER, RACE, RESISTANCE AND THE AINU OF JAPAN (1996), app. 1 at 194 (English translation).

²⁰¹ Viewed as "foreign," the Ainu have had a contentious relationship with the Japanese majority. See generally, Richard Siddle, *Ainu: Japan's Indigenous People*, in JAPAN'S MINORITIES: THE ILLUSION OF HOMOGENEITY, *supra* note 1, at 17. The beginning of this relationship can be traced back to the sixteenth and seventeenth centuries, during which a Japan-centric view of the world order by the Japanese was perpetuated by differentiating Ainu and other "foreigners" from "true Japanese." Tessa Morris-Suzuki, *A Descent Into the Past: The Frontier in the Construction of Japanese Identity*, in MULTICULTURAL JAPAN, *supra* note 191, at 81, 84. This conscious effort to differentiate the Ainu from the Japanese was then reversed during the eighteenth century by implementing a policy of "Japanisation" as a means of asserting Japanese control over the Ainu. *Id.* at 85. This policy was carried out by requiring Ainu to change their appearance to that of Japanese farmers by shaving their beards, cutting their hair, wearing straw sandals and raincoats, eating rice, and learning the Japanese language. *Id.* During the Meiji period (1868-1910), assimilationist laws and regulations went beyond appearance, language, and diet to extend to the entire material structures of everyday life, eventually culminating into the passage of the Hokkaidō Former Aboriginals Protection Act ("Protection Act") in 1899. Levin, *supra* note 165, at 436 n.62. "Although framed in welfare terms, Protection Act agriculturalization policies actively imposed unstated policies of

first in Japanese history to recognize the presence of a minority in Japan and to create national duties to act on its behalf,²⁰² the law as passed was stripped of much of its protective aspects from the original draft legislation as proposed by the Ainu people.²⁰³ Significantly, provisions addressing “self-determination, special representation, access to natural resources, economic autonomy, and anti-discrimination”²⁰⁴ were rejected in the final Ainu Culture Law, thereby relegating the law to provisions for cultural promotion about the Ainu. Thus, the historical treatment of the Ainu by the Meiji government—to exclude the Ainu from the class of majority Japanese by distinguishing differences in appearance, manner, and custom—persists to some extent through a law that, while recognizing ethnic difference, does not confer enforceable substantive rights.

2. *Japanese Lawmakers Adhere to a Conservative Stance in Regard to Voting Rights for Permanent Residents*

Another example of the Japanese government’s conservative approach to dealing with minority groups’ demands for greater rights is the issue of voting rights for permanent residents. Following a 1995 Japanese Supreme Court decision announcing, in dicta, that the Japanese legislature could draft law allowing foreign residents in Japan the right to vote in local elections,²⁰⁵ the issue of noncitizen voting rights has been on the national agenda.²⁰⁶ The lobbying efforts for voting rights in local and national elections has been led

segregation, forced assimilation, economic dislocation, and social subordination.” *Id.* at 437 n.65 (citing SIDDLE, *supra* note 200).

²⁰² See Levin, *supra* note 165, at 467.

²⁰³ Hanazaki Kōhei, *Ainu Moshir and Yaponesia: Ainu and Okinawan Identities in Contemporary Japan*, in MULTICULTURAL JAPAN, *supra* note 191, at 117, 126.

²⁰⁴ See Levin, *supra* note 165, at 467.

²⁰⁵ In the Kim Local Suffrage Case, Korean permanent residents were prohibited from being listed on voter regulation rolls and were denied the opportunity to participate in local elections. Atsushi Kondo, *The Constitutional Rights of Non-Citizens: Electoral Rights for “Non-Citizens,”* at <http://www.eur.nl/irg/iac/papers/kondo.html> (last visited Apr. 20, 2002). The Supreme Court rejected the plaintiff’s argument that long-term foreign residents are included in the word “residents” (*jyumin*) in Article 93(2) of the Japanese Constitution, which states that “[t]he chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct residents’ vote within their several communities.” *Id.* (emphasis added.). Instead, the Court held that only Japanese citizens have a constitutional right to vote in such elections, reasoning that the word “people” (*kokumin*) in Article 15 refers to Japanese nationals. *Id.* Article 15 states, “The people have the inalienable right to choose their public officials and to dismiss them.” See Nihonkoku Kenpō [Constitution] (1946) art. 15 (Japan).

²⁰⁶ Christopher B. Johnstone, *Japan’s Foreign Residents and the Quest for Expanded Political Rights*, Japan Economic Institute (JEI) Report, July 19, 1996, Report A, at <http://www.gwjapan.com/ftp/pub/policy/jei/1996/a-series/0719-96a.txt> (last visited Apr. 20, 2002).

primarily by the ethnic Korean permanent residents living in Japan.²⁰⁷ In July 2000, a bill was drafted to grant foreigners with permanent residency status the right to vote in local elections.²⁰⁸ Many Japanese politicians and some commentators welcomed the proposed legislation, arguing that permanent residents, because of their unique history and special residency status in Japan, should be given the right to vote in both local and national elections.²⁰⁹

Despite arguments from supporters of the voting rights bill, the politics of Japanese lawmaking indicate that suffrage for permanent residents is not imminent. For example, politicians did not request input from the Korean permanent residents throughout the yearlong debate on the issue.²¹⁰ More significantly, opponents within the dominant, conservative Liberal Democratic Party ("LDP"), who want to limit voting rights to Japanese nationals, argued that the legislation might be unconstitutional, and that granting suffrage would discourage permanent residents from naturalizing as Japanese citizens.²¹¹ Consequently, the bill has been shelved.²¹² These members of the LDP favor dissolving the voting rights bill in favor of passing a related bill, one that would streamline the naturalization process for Korean permanent residents.²¹³ The logic behind this view is that once Korean permanent residents naturalize as Japanese citizens, they will subsequently have the right to vote in local and national elections. However, passage of the naturalization bill would have a

²⁰⁷ *Moves To Give Voting Rights To Permanent Foreign Residents*, ASAHI SHIMBUN, Jan. 11, 2002, LEXIS, Japan Country Files.

²⁰⁸ *See id.* The bill was introduced by the New Komeito and Hoshuto (New Conservative Party). *Id.*

²⁰⁹ Shigenori Matsui, *Aliens Under the Japanese Constitution*, in FOREIGN WORKERS PROBLEMS: JAPAN AND THE U.S. 85, 93, 101 (Shigenori Matsui & Susumu Noda eds., 1993).

²¹⁰ *Moves to Give Voting Rights to Permanent Foreign Residents*, *supra* note 207.

²¹¹ *Id.*; *LDP Lawmakers Oppose Voting Right for Foreigners*, JAPAN ECON. NEWSWIRE, May 15, 2001, LEXIS, Japan Country Files.

²¹² *Moves to Give Voting Rights to Permanent Foreign Residents*, *supra* note 207.

²¹³ Currently, naturalization in Japan can be characterized as opaque and arbitrary. PAPADEMETRIOU & HAMILTON, *supra* note 2, at 45. Similar to the United States, Japan requires that the applicant has resided in Japan continuously for a period of at least five years, be of "upright conduct," and never have plotted against the overthrow of the Japanese Constitution or government. *See* Nationality Law, No. 147, 1950, *amended by* Law No. 268, 1952 and Law No. 45, 1984, art. 5 (Japan) [hereinafter Nationality Law]. Additional factors, however, include ambiguous and subjective criteria such as whether an applicant's lifestyle is suited to Japanese society. Japanese Editorial Excerpts, *Discuss Suffrage in Proper Context*, DAILY YOMIURI, Jan. 19, 2001, LEXIS, Japan Country Files. Finally, the Justice Minister has the broad discretion to grant or deny naturalization to applicants. *See* Nationality Law, arts. 4-10. Not surprisingly, naturalization in Japan occurs on a lesser scale than in countries with more streamlined naturalization procedures like the United States or Canada. *Moves to Give Voting Rights to Permanent Foreign Residents*, *supra* note 207. The naturalization bill would make it easier for foreigners with special permanent residency status to become Japanese citizens simply by notifying the authorities. *Id.*

comparatively muted effect than the voting rights legislation because most Koreans do not wish to naturalize.²¹⁴

E. Central Government Policies Reinforce Assumptions of Ethnic Homogeneity

As the experiences of the Ainu and Korean permanent residents indicate, the Japanese legal system operates incrementally and selectively when it comes to recognizing ethnic difference. In the Ainu rights case, the court's ruling emphasized the indigenous characteristic of the Ainu as an ethnic group, thereby leaving little room for application of its holding to other ethnic minorities, such as Korean and Chinese permanent residents. With the voting rights issue, the government's preference for streamlining the naturalization process over granting voting rights to permanent residents may indicate that the central government is not yet ready to accept a notion of community membership that is not necessarily defined by citizenship status, contrary to the local governments' treatment of foreign residents as "local citizens." At the same time, the central government has recognized that Korean and Taiwanese residents, because of their unique place in Japanese history, should be given more favorable treatment under a special "permanent resident" status than other aliens. Similarly, the Japanese government's decision to create a new category for *Nikkeijin*, while excluding all other foreign migrants, illustrates the central government's assumption of ethnic homogeneity. Japanese lineage, however remote, serves as the determining factor for Japanese nationality.²¹⁵

In short, the central government carves out portions of its population according to ethnicity and confers different packages of rights accordingly. South American *Nikkeijin* may, in theory, be in a better position relative to other ethnic minorities because they can assert their Japanese ancestry as a reason for greater ethnic accommodation. However, the government's reliance on Japanese ancestry to justify immigration of South American *Nikkeijin* who are far-removed from Japanese language and culture, does not seem to make sense when viewed against the government's reluctance to

²¹⁴ According to a survey conducted by the pro-Seoul Korean Residents Union in Japan (Mindan), one in four Koreans living in Japan hopes to become a Japanese citizen. *One in Four Korean Residents in Japan Wants Japanese Citizenship*, JAPAN ECON. NEWSWIRE, Apr. 24, 2001, LEXIS, Japan Country Files. Compared to first-generation Koreans, more younger generation Koreans seek naturalization, since they have been born and raised in Japan. *Id.* Fifty percent of the respondents oppose naturalization, arguing that relinquishing Korean citizenship is tantamount to forsaking one's Korean identity. *Id.*; *Nationality Bill Divides Koreans in Japan*, JAPAN ECON. NEWSWIRE, Aug. 3, 2001, LEXIS, Japan Country Files.

²¹⁵ Sellek, *supra* note 1, at 202.

grant voting rights to Korean permanent residents, most of whom have been born and raised in Japan. This highlights the relatively conservative ethnocentric stance of the central government—one that stubbornly adheres to a concept of community based strictly on a contrived notion of “Japanese blood,” even if lacking in Japanese language and culture.

VII. MUNICIPAL RESPONSES TO RETURNEES HIGHLIGHT TENSIONS BETWEEN CENTRAL AND LOCAL GOVERNMENTS

A. *Different Sets of Assumptions About the Composition of Japanese Society Govern National and Local Policies*

The differing responses by local and central governments to issues regarding legal foreign residents highlight the political tension between the institutions of local and national governance. By accommodating foreigners’ ethnic difference through policies and programs that facilitate their social and administrative incorporation into Japanese society, local accommodation policies are at odds with the official national immigration policy, which is based on the premise that the entry of foreigners must be limited so as not to threaten national security.²¹⁶

Japan’s racial dynamics are grounded in an ossified belief in the “myth of homogeneity”—a carefully designed and perpetuated conception of a unique Japanese race.²¹⁷ It is the notion that the Japanese people (*minzoku*) possess what are assumed to be unique historical, geographical, and cultural characteristics of the Japanese nation.²¹⁸ Notwithstanding the refutation of Japanese uniqueness by scientists and scholars, the perception

²¹⁶ Pak, *supra* note 101, at 252.

²¹⁷ Levin, *supra* note 165, at 498-99. One scholar describes the development of the illusion of homogeneity as follows:

While the physical and historical evidence of migrations to the Japanese islands could not be ignored, these were deemed to be of such antiquity that they had long since formed a single “race” and culture. Cultural indebtedness to China was also acknowledged, but this too was relegated to the distant past. As represented in school textbooks after 1910, it had become axiomatic that responsibility for the generation of Asia had fallen to the Japanese by virtue of their innately superior qualities.

Michael Weiner, *The Invention of Identity: “Self” and “Other” in Pre-War Japan*, in JAPAN’S MINORITIES: THE ILLUSION OF HOMOGENEITY, *supra* note 1, at 1, 8.

²¹⁸ Weiner, *supra* note 217, at 5. This sense of nation was believed to exist from a common ancestry rather than shared culture. *Id.* The nation was projected as an extended family, the *kazoku kokka* (family state), a notion which was used as a political tool by the Meiji government to unite the people with a sense of homogeneity and community. *Id.* at 1-2, 5. See also John Lie, *The Discourse of Japaneseness*, in JAPAN AND GLOBAL MIGRATION, *supra* note 14, at 70, 84-87.

among Japanese that Japan is a monoracial society is deeply ingrained.²¹⁹ As one scholar remarks, “[t]his social system involves the denial or virtual denial as *de minimus* of the presence of ethnic and racial minorities in Japanese society.”²²⁰ Indeed, the Japanese government has historically dealt with ethnic minorities in its country by subordinating them through policies of assimilation and exclusion.²²¹ Traces of this practice continue to exist today in the form of restrictive immigration and strict naturalization laws premised on the assumption of an ethnically homogeneous nation (with a small space carved out for permanent residents).

The policy-making entities of the central government reflect contradictory views with respect to the composition of Japanese society. Despite the demographic crisis and the economy’s need for outside workers, various branches of the Japanese government have expressed reservations about admitting foreigners. The Ministry of Labour has opposed the importation of foreign workers because of its concern about the political and social ramifications of a more heterogeneous workforce and the inevitable demands for admitting spouses and children were foreign workers permitted to stay in Japan for any extended period.²²² Instead, the Ministry called for increasing automation, extending the mandatory retirement age, encouraging more women to enter the labor force, using labor more efficiently in the service sector, as well as exporting some production facilities to other Asian countries.²²³ Similarly, the Economic Council of Japan, in its report entitled *On Globalization and the World Economy in 2010*, also opposed the importation of immigrant workers, warning of increased costs for social welfare and services needed for “social adjustment, to allow people with

²¹⁹ One commentator notes that national identity or character is illustrated in inherently shared feelings among the Japanese people. Hiromi Sasamoto, *One Man’s Quest for Japanese Identity*, DAILY YOMIURI, Jan. 26, 1999, LEXIS, Japan Country Files. For example, when astronaut Chiaki Mukai went into space, she composed the first half of a *waka* poem (a traditional five-line, 31-syllable poem) and asked the public to complete the second half. *Id.* Her request was met with an enthusiastic 140,000 responses. *Id.* Many Japanese consider it perfectly natural to write a traditional poem, even in such unusual situations. *Id.*; see generally, JOHN LIE, MULTIETHNIC JAPAN (2001).

²²⁰ See Levin, *supra* note 165, at 498. In fact, in its 1980 report to the UN Human Rights Commission, the Japanese government denied the existence of ethnic minorities in Japan, stating: “Every citizen has the right to enjoy his culture, practice his religion, and use his language guaranteed under the Japanese Constitution. However, ethnic minority groups do not exist in Japan.” Stevens, *supra* note 162, at 187 (emphasis added).

²²¹ This was certainly true in regard to the Ainu during the sixteenth through eighteenth centuries, and is still true today in regard to the Ainu, as well as Japan’s other ethnic minority groups: Korean and Taiwanese permanent residents, *Nikkeijin* long-term residents, Burakumin, Okinawans, and migrant workers from Asia-Pacific countries. See Lie, *supra* note 218, at 81-84. The fact remains, however, that Japan is multiethnic.

²²² Weiner, *supra* note 12, at 12.

²²³ *Id.*

different religions and customs to live together."²²⁴ The Ministry of Justice justifies its opposition to admitting foreign workers by pointing to higher crime rates committed by immigrants than Japanese.²²⁵ Consonant with these views, the linchpin of Japan's immigration policy continues to be that of admitting migrants on a temporary basis and assuring their return to their home countries after two or three years.²²⁶

One recent government report seems to recognize the need for a change in policy. In January 2000, the Prime Minister's Commission on Japan's Goals in the 21st Century released a report on governance in the new millennium, and advocated the creation of "a more explicit immigration and permanent residence system so as to encourage foreigners who can be expected to contribute to the development of the Japanese society to move in and possibly take up permanent residence here."²²⁷ Along these lines, the Ministry of Justice will review long-term visa qualification requirements, simplify procedures, and expand the scope of the trainee program.²²⁸ These changes however, are not for labor migrants, but for foreign professionals and skilled workers.²²⁹ Thus, while the report discusses broadening the current immigration structure, it again reflects the central government's carefully designed construction of who is to be included in the composition of Japanese society; that is, immigration by foreigners will be tolerated, but only the desirable immigrants who are skilled, educated professionals who tend to live interspersed throughout the community and who, therefore, are less conspicuous.²³⁰

In sum, these reports demonstrate the central government's conflicting views about foreign migrants, and it has yet to develop a unified, national policy on this issue. Official rhetoric has failed to materialize in the form of concrete policies that embody a realistic vision about the role of immigration in Japan's future.

²²⁴ See Japan Economic Council, *supra* note 15, Section 2.2.2.

²²⁵ Weiner, *supra* note 12, at 12; *Basic Plan*, *supra* note 4, pt. I.

²²⁶ Terasawa, *supra* note 44, at 219.

²²⁷ See *Prime Minister's Commission on Japan's Goals in the 21st Century Delivers Report*, at <http://www.embassyjapanacanada.org/AboutJapan/Politics/pmcomm1.html> (last visited Dec. 3, 2001). The report was called, *The Frontier Within: Individual Empowerment and Better Governance in the New Millennium*. *Id.*

²²⁸ PAPADEMETRIOU & HAMILTON, *supra* note 2, at 50.

²²⁹ *Id.* at 46-52; see also SOPEMI, *supra* note 40, at 166.

²³⁰ In contrast, migrant laborers tend to congregate by forming ethnic communities, which makes their presence in Japanese society not only obvious but also more problematic in terms of coexisting with other Japanese residents. *World Migration Report: 2000*, *supra* note 52, at 64.

B. Local Governments are in a Unique Position to Instigate Legal Change

In contradiction to the underlying premise of national immigration policy, some local governments are fashioning policies of multiculturalism. Because local governments are closer to the day-to-day lives of immigrants than is the central government, the massive influx of foreigners has forced affected municipal governments to develop policies and programs to facilitate the administrative and social integration of foreigners into Japanese society, while at the same time accommodating for their ethnic difference.

Local governments are developing programs that reach out to foreigners, even though the national government has deemed this unnecessary, for several reasons. First, local governments encounter immigration in a different way than does national government.²³¹ Many city government departments have mandated duties that involve providing services to the non-citizens within their jurisdictions. For example, because local governments must enforce the Alien Registration Law, local officials come into direct contact with foreigners, who are required to register themselves in the cities in which they reside.²³² Second, the progressive local citizens' movements during the 1960s and 1970s made independent policy-making at the local level the norm.²³³ Third, "internationalization" has been redefined by local governments to include outreach to foreign residents.²³⁴

Local governments are proactively intervening to prevent the kinds of problems European cities have encountered as a result of immigration. They are concerned that the migrants' problems, if left unresolved, could lead to

²³¹ Pak, *supra* note 101, at 248.

²³² *Id.* at 248.

²³³ See generally PURNENDRA JAIN, LOCAL POLITICS AND POLICYMAKING IN JAPAN (1989); KURT STEINER ED. ET AL., POLITICAL OPPOSITION AND LOCAL POLITICS IN JAPAN (1980); STEVEN R. REED, JAPANESE PREFECTURES AND POLICYMAKING (1986); RICHARD J. SAMUELS, THE POLITICS OF REGIONAL POLICY IN JAPAN: LOCALITIES INCORPORATED? (1983).

²³⁴ Pak, *supra* note 101, at 262. The term "internationalization" (*kokusaika*) was frequently used in government reports during the 1970s and 1980s and is a controversial concept within Japanese politics. Weiner, *supra* note 12, at 10. In general, it refers to greater interaction with the rest of the world through the use of better telecommunication and transportation, and full participation in the global economy and international institutions. Internationalization did not refer to "the incorporation of foreigners into Japanese society and becoming ethnically diverse." *Id.* Local governments, however, began to redefine this term into "an active process of increasing the openness of Japanese politics, assuming greater responsibilities towards the global community and ending discrimination at home." Pak, *supra* note 101, at 249. Many local governments began to pursue cultural exchange programs with their counterparts in other countries (e.g., Sister City Exchange Programs) to develop local accommodation policies and programs to solve the problems associated with newcomers in their communities. *Id.* at 262.

outright conflict between foreigners and Japanese.²³⁵ The most progressive local governments further contradict national immigration rhetoric by defining foreign residents "as local citizens who deserve the right to be in communication with their local government by virtue of their contributions to the community, payment of taxes and, more generally, because of their involvement in everyday life."²³⁶ The elimination of nationality requirements for municipal public service positions by many local governments is another source of tension between central and local governments.²³⁷

C. *Characteristics of Legal Multiculturalism*

The local accommodation policies and programs are significant because their existence, although not formally or legally recognized by any national law or policy, acts as a *de facto* policy of multiculturalism.

Multiculturalism recognizes that individuals are neither abstractions nor are they *sui generis*; they spring from specific and diverse cultures which may be valued by and be of value to them in any number of ways, and which they may therefore cherish and wish to preserve. Multiculturalism asserts that individual well-being is importantly related to cultural integrity, and thus argues that the state has a role in guarding that integrity.²³⁸

The United States, Australia, and Canada provide the best examples of nations that have developed multicultural institutions and policies.²³⁹ In the United States, multiculturalism was an intellectual movement of the civil

²³⁵ Pak, *supra* note 101, at 249.

²³⁶ See *id.* at 252. Local governments justify such treatment of aliens under the Local Government Act, under which local authorities have a duty to ensure the safety, health, and welfare of all local citizens, including non-Japanese. *Id.*; Sellek, *supra* note 1, at 195.

²³⁷ PAPADEMETRIOU & HAMILTON, *supra* note 2, at 33. For example, when Kawasaki voted in 1996 to eliminate nationality as a requirement for city employees, it also passed a second ordinance reserving higher-level positions for Japanese nationals in a concession to the central government. *Id.*

²³⁸ See John Kane, *From Ethnic Exclusion to Ethnic Diversity: The Australian Path to Multiculturalism*, in ETHNICITY AND GROUP RIGHTS 540, 555-56 (Ian Shapiro & Will Kymlicka eds., 1997).

²³⁹ STEPHEN CASTLES & ALASTAIR DAVIDSON, *CITIZENSHIP AND MIGRATION* 159-71 (2000). In addition, European countries such as Scandinavia, the Netherlands, and Britain have begun to implement general multicultural policies, and even countries opposed to the concept in principle, such as Germany and France, have some multicultural dimensions in their social and educational policies. *Id.* at 159.

rights era of the 1960s and 1970s.²⁴⁰ Since then, the United States “has been reconceptualized as a multicultural society, to which people of differing backgrounds can belong as citizens without abandoning their cultural distinctiveness.”²⁴¹

Whereas multiculturalism in the United States is grounded in providing redress for historical wrongs against different groups of minorities in the form of affirmative action programs and anti-discrimination statutes, multiculturalism in Australia, Canada, and Europe is primarily understood as a public policy framework for managing immigration and ethnic difference.²⁴²

While Japanese local government accommodation policies are not quite as sophisticated in substance as those found in other multicultural states, they demonstrate a commitment to multiculturalism. Still, as the experiences of foreigners’ integration into Japanese society show, simply having a local accommodation policy in place does not necessarily inoculate against racism. Even *Nikkeijin*, who are specially admitted into Japan under the government’s ethnocentric belief that they share the same “Japanese blood,” have been isolated by mainstream Japanese society because of their ethnic difference. Thus, beyond policy rhetoric lies a more fundamental issue for Japan—whether Japanese society and government are prepared to discard the “myth of homogeneity” and truly embrace the goals of multiculturalism.

VIII. CONCLUSION: A NEW LEGAL POLICY FRAMEWORK FOR JAPAN?

Increased international migration to Japan over the past decade has had contradictory effects on central and local governments. Despite some government policies (such as the trainee program) that provide foreign workers with a back door into Japan, the central government’s main response to international labor migration has and continues to be restrictive. This official rhetoric is grounded in the historical perpetuation of the “myth of (ethnic) homogeneity”—a national self-image characterized by ethnic homogeneity (cultural, social, linguistic sameness). In contrast to the central government’s reluctance to address issues concerning foreign residents in

²⁴⁰ *Id.* at 160.

²⁴¹ *See id.*

²⁴² *Id.* at 164. For example, the Australian government’s official policy of multiculturalism, the *National Agenda for a Multicultural Australia*, included policies charged with providing “equitable treatment for ethnic individuals,” policies that “generously funded ethnic organizations to enable them to provide services to their members,” and policies addressing “specific problems arising in the state’s dealings with various ethnic groups.” Kane, *supra* note 238, at 551.

Japan, local governments most affected by the presence of foreign residents are filling the policy void left by the central government.

Because the real, day-to-day obstacles foreign residents face—such as cultural conflicts with Japanese residents and access to social welfare benefits—take place in the cities in which they live and work, local governments have implemented policy measures that facilitate the transition from once entirely Japanese communities into now multicultural communities. In some cities, municipal governments have totally digressed from national policy by treating foreigners as local citizens. Moreover, local accommodation policies are being implemented independent of any political demands by minority activist groups, indicating the proactive approach being taken by local policymakers. As such, local governments play an important role in challenging the dominant perception of national identity, in recognizing the rights of foreign residents to assert their ethnic difference, and in instigating the central government to reconsider the future of national immigration policy. In this way, local accommodation policies and programs represent a fundamental premise of liberalism: that every individual must be treated with equal respect. As the population of foreign residents increases and as they are afforded greater rights as local citizens, they and their Japan-born descendants will eventually seek greater rights—in citizenship, employment, politics, etc. Consequently, the central government should take a proactive approach in formulating national policies addressing immigration and immigration-related issues.

Although *Nikkeijin* are small in number, their presence is significant for several reasons. First, in the course of designing administrative and social accommodation policies and programs for *Nikkeijin*, local governments have included other foreign residents. Second, the ironic displacement of *Nikkeijin* as an ethnic minority within Japan raises the question of who Japan defines as “Japanese.” Finally, as the experiences of some cities show, local governments serve as a forum where Japanese policymakers can instigate progressive legal change for the understanding of community membership. Thus, in the absence of any national policy to address immigration-related issues, efforts at the local levels to promote coexistence with foreigners by accommodating their ethnic difference serves as a *de facto* policy of legal multiculturalism in Japan.