

THE STATUS QUO OF RACIAL DISCRIMINATION IN  
JAPAN AND THE REPUBLIC OF KOREA AND THE  
NEED TO PROVIDE FOR ANTI-DISCRIMINATION  
LAWS

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*Japan and the Republic of Korea, two neighboring nations situated in East Asia, have homogenous demographics. Both societies face large influxes of foreigners—from immigration and tourism alike—due to various factors ranging from rapidly aging populations, low birth rates, and globalization. Despite this, neither country has sufficient legal means of halting racially discriminatory practices that occur within them. This Note illustrates the rampant nature of racial discrimination in Japan and the Republic of Korea, analyzes the current state of their anti-discrimination laws, argues that the existing legal protections for foreigners against racial discrimination are inadequate at best, and finally, urges that the two governments adopt available means to improve upon the situation.*

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## I. INTRODUCTION

Japan and the Republic of Korea (“Korea”) are renowned for their extremely homogenous populations. The two nations now face a similar challenge. Both nations have

rapidly aging populations and low birth rates, resulting in population decline.<sup>1</sup> Some have suggested that these nations should admit more foreigners to counteract their population decline.<sup>2</sup> While it is unclear whether the two nations will ultimately choose immigration as a solution to the declining population problem, if the countries wish to do so, it is crucial that they evaluate their existing laws and provide for adequate protection against racial discrimination to foreigners.

This Note will first describe the status quo of the two nations' racial discrimination laws, and explain the idiosyncrasies present in societies with homogenous populations that contribute to the development of such laws. The issue is twofold: (1) both Japan and Korea have highly restrictive immigration policies based on the principle of *jus sanguinis*, a principle by which a child's citizenship is

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<sup>1</sup> See Misato Adachi, Ryo Ishida, & Genki Oka, *Japan: Lessons from a hyperaging society*, MCKINSEY & COMPANY (Mar. 2015), <http://www.mckinsey.com/global-themes/asia-pacific/japan-lessons-from-a-hyperaging-society> [<https://perma.cc/R8ZN-AWJM>] (discussing Japan's aging population and falling birth rate); Yoon Ja-young, *Korea faces rapidly aging population*, THE KOREA TIMES (Mar. 24, 2016), [http://www.koreatimes.co.kr/www/news/biz/2016/03/123\\_201016.html](http://www.koreatimes.co.kr/www/news/biz/2016/03/123_201016.html) [<https://perma.cc/6SEN-598C>] (discussing Korea's aging population and present birth rate); Olga Garnova, *Japan and its birth rate: the beginning of the end or just a new beginning?*, THE JAPAN TIMES (Feb. 10, 2016), <http://www.japantimes.co.jp/community/2016/02/10/voices/japan-birth-rate-beginning-end-just-new-beginning/#.WMGEiTvys54> [<https://perma.cc/V4HD-4EN9>] (discussing Japan's declining birth rate); *Declining Birth Rates Raising Concerns in Asia*, THE EAST-WEST CENTER, <http://www.eastwestcenter.org/news-center/east-west-wire/declining-birth-rates-raising-concerns-in-asia> [<https://perma.cc/P2XT-9NT3>] (discussing aging populations and declining birth rates in several Asian nations).

<sup>2</sup> Hugh Cortazzi, *Japan's population problem*, THE JAPAN TIMES (Nov. 19, 2015), <http://www.japantimes.co.jp/opinion/2015/11/19/commentary/japan-commentary/japans-population-problem/#.WMGFgTvys54> [<https://perma.cc/3TVV-373S>]; Kwanwoo Jun, *South Korea May Need Up to 15 Million Immigrants, Study Says*, THE WALL STREET JOURNAL (Dec. 15, 2014), <http://blogs.wsj.com/korearealtime/2014/12/15/immigration-needed-to-bolster-workforce-study-says/> [<https://perma.cc/5PEG-XNZ8>].

determined by the parents' nationality, and rarely grant citizenship to those who are not ethnically Japanese or Korean; and (2) in a broad sense, the two nations limit the scope of protection against racial discrimination only to citizens and provide inadequate protection for foreigners, whether they are temporary visitors or permanent residents. The combination of these two problems makes it nearly impossible for foreigners in either nation to receive protection from racial discrimination.

This Note evaluates the two nations' approach to anti-discrimination in contrast to the approach of the United States. This Note further suggests ways in which Japan and Korea can improve by adopting some of the tools used by the United States. Part II describes the history of anti-discrimination laws in Japan and Korea. It also explains the current state of these laws and compares them with the laws of the United States. Part III elucidates how ineffective the current laws are by looking at the discrimination faced by various ethnic and/or racial groups similarly situated in Japan. Similarly, Part IV looks at the same issues with regards to Korea. Part V of this Note compares and contrasts the two regimes with that of the United States. Specifically, the judicial systems ought to employ heightened scrutiny in cases involving discrimination based on race or nationality and the government should take efforts to evolve social perception of outsiders through education and recognition of the values of a diverse population.

## II. THE HISTORIC AND LEGAL FOUNDATIONS OF DISCRIMINATION IN JAPAN AND KOREA

Studies suggest that the statutes, laws, and constitutions of Japan and Korea fail to provide sufficient protection against discrimination for racial minorities within their jurisdictions.<sup>3</sup> This is especially problematic, given

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<sup>3</sup> Doudou Diène (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance),

that the population decline in both societies renders it unlikely the nations will be able to continue on with their restrictive immigration policies.<sup>4</sup> The combination of globalization and internal population decline makes it very likely an increasing number of migrants will immigrate to the two nations.

### A. Roots of Racial Prejudice in Japan and Korea

Both Japan and Korea are known for their homogenous racial composition, low-birth rates, and aging

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*Mission to Japan*, ¶ 11, U.N. Doc. E/CN.4/2006/16/Add.2 (Jan. 24, 2006) [hereinafter Special Rapporteur Mission to Japan]; Doudou Diène (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance), *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, ¶ 37, U.N. Doc A/HRC/5/10 (May 25, 2007) ("In Japan, except for the anti-discrimination provision contained in article 14 of the Constitution, there are no other instruments that enforce the general principle of equality or sanction discriminatory acts committed by citizens, businesses or non-governmental organizations (NGOs). Hate speech is not a criminal offense, but rather a minor civil violation that may result in monetary compensation; yet only when it has been judged as defamation of individuals, but not of certain groups of people or minorities in general. Besides, the country does not have specific hate crime laws."); Yuji Iwasawa, *Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law*, 8 HUM. RTS. Q. 131, 160–178 (1986); Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Republic of Korea*, ¶¶ 6–19, U.N. Doc. CERD/C/KOR/CO/15-16 (Aug. 31, 2012) [hereinafter CERD 2012 Report on Korea].

<sup>4</sup> With limited exceptions, Japan restricts entry only to foreign workers with requisite skills and only for set periods of time. Carmel A. Morgan, *Demographic Crisis in Japan: Why Japan Might Open Its Doors to Foreign Home Health-Care Aides*, 10 PAC. RIM L. & POL'Y J. 749, 765 (2001). South Korea has only in the last fifteen years begun to accept unskilled migrant labor and only on a limited basis through three national programs. Young-bum Park, *South Korea: Balancing Labor Demand with Strict Controls*, MIGRATION POLICY INSTITUTE (Dec. 1, 2004), <http://www.migrationpolicy.org/article/south-korea-balancing-labor-demand-strict-controls> [<https://perma.cc/DL8N-KBBH>].

populations.<sup>5</sup> While taking in immigrants may mitigate the declining population issue, there are cultural obstacles to such a solution. In Japan, the “Japanese national identity[,] built around the notion of racial purity and cultural integrity[,] developed in part because of Japan’s geographical isolation as an island nation and in part because of conscious political efforts to create a mythology of a ‘pure’ ethnic nation,” may make integration of immigrants challenging.<sup>6</sup> Similarly, an immigration-centered solution will be difficult to implement in Korea. Gi-Wook Shin, a professor of Sociology, explains:

Koreans have developed a sense of nation based on shared blood and ancestry. The Korean nation was ‘racialized’ through a belief in a common prehistoric origin, producing an intense sense of collective oneness . . . [R]ace served as a marker that strengthened ethnic identity, which in turn was instrumental in defining the nation.

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<sup>5</sup> Cortazzi, *supra* note 2 (discussing Japan’s demographic challenges with regards to the working age population and birthrate); Hwangbo Yon & Hyun-woong Noh, *Already OECD lowest, South Korea’s birthrate getting worse*, THE HANKYOREH (Aug. 28, 2016), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/758664.html](http://english.hani.co.kr/arti/english_edition/e_national/758664.html) [https://perma.cc/4WPY-42PR] (discussing Korea’s declining birthrate). More detailed information on the birthrate and age statistics can be found on the World Bank’s online database. *See generally, Fertility Rate - Japan*, WORLD BANK, <http://data.worldbank.org/indicator/SP.DYN.TFRT.IN?locations=JP> [https://perma.cc/75YD-H5MR]; *Population Ages 65 and Above - Japan*, WORLD BANK, <http://data.worldbank.org/indicator/SP.POP.65UP.TO.ZS?locations=JP> [https://perma.cc/P36L-VGKF]; *Fertility rate, total (births per woman) - Korea*, WORLD BANK, [http://data.worldbank.org/indicator/SP.DYN.TFRT.IN?end=2014&location\\_s=KR&start=1960&view=chart](http://data.worldbank.org/indicator/SP.DYN.TFRT.IN?end=2014&location_s=KR&start=1960&view=chart) [https://perma.cc/P6WS-2KSS]; *Population Ages 65 and Above - Korea*, WORLD BANK, <http://data.worldbank.org/indicator/SP.POP.65UP.TO.ZS?locations=KR> [https://perma.cc/9H8L-TANR].

<sup>6</sup> BETSY BRODY, *OPENING THE DOOR: IMMIGRATION, ETHNICITY, AND GLOBALIZATION IN JAPAN* 31 (2002) (citations omitted).

Koreans thus believe that they all belong to a 'unitary nation' (danil minjok), one that is ethnically homogeneous and racially distinctive . . . The Korean nationality law is still based on *jus sanguinis* and legitimizes, consciously or unconsciously, ethnic discrimination against foreign migrant workers.<sup>7</sup>

While the notion of exclusion itself is arguably discriminatory in nature, the difficulty of integrating migrants is compounded by the fact that there is little legal protection to ensure equal treatment of foreign visitors and permanent residents in either Japan or Korea. The accelerating effects of globalization make the lack of anti-racial-discrimination laws in both Japan and Korea an urgent challenge that deserves immediate attention.

### 1. Roots of Racial Discrimination in Japan

Roughly, only two percent of Japan's population is not ethnically Japanese.<sup>8</sup> This figure includes large numbers

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<sup>7</sup> Gi-Wook Shin, *Korea's ethnic nationalism is a source of both pride and prejudice, according to Gi-Wook Shin*, KOREA HERALD (Aug. 2, 2006),

[http://aparc.fsi.stanford.edu/news/koreas\\_ethnic\\_nationalism\\_is\\_a\\_source\\_of\\_both\\_pride\\_and\\_prejudice\\_according\\_to\\_giwook\\_shin\\_20060802](http://aparc.fsi.stanford.edu/news/koreas_ethnic_nationalism_is_a_source_of_both_pride_and_prejudice_according_to_giwook_shin_20060802) [<https://perma.cc/6UQA-VSV8>]. See also Gi-Wook Shin, ETHNIC NATIONALISM IN KOREA: GENEALOGY, POLITICS, AND LEGACY 49 (2006).

<sup>8</sup> Ethnic composition of Japan is as follows: Japanese 98.5%, Koreans 0.5%, Chinese 0.4%, other 0.6%; note that, up to 230,000 Brazilians of Japanese origin migrated to Japan in the 1990s to work in industries; some have returned to Brazil. *The World Factbook: Japan*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html> [<https://perma.cc/MHJ8-6V98>]. Moreover, currently there is only a 3:1 ratio of workers to retirees; by 2025 the number of workers supporting each retiree could fall to only two. Chikako Usui, *Japan's Demographic Future and the Challenge of Foreign Workers*, in LOCAL CITIZENSHIP IN RECENT COUNTRIES OF IMMIGRATION: JAPAN IN COMPARATIVE PERSPECTIVE 37, 40–41 (Takeyuki Tsuda ed., 2006).

of permanent residents—mostly Korean and Chinese—who have lived in Japan for generations but have been unable to obtain citizenship.<sup>9</sup> While some Japanese officials have suggested taking in additional immigrants to cope with the population decline issue,<sup>10</sup> it is “approached as a last resort.”<sup>11</sup>

“At the heart of the country’s strict laws is the cherished ‘myth of homogeneity’ that firmly believes in the value of a one-size-fits-all culture, language, and ethnicity . . . This myth of homogeneity has had profound influences on Japan’s immigration policy and foreign worker populations over the years.”<sup>12</sup> Japan’s immigration policy has “traditionally been based on *jus sanguinis*, the principle that one’s nationality at birth is the same as that of one’s biological parents.”<sup>13</sup> “These boundaries of nationality and

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<sup>9</sup> Allison Hight, *The Myth of Homogeneity in Japanese Race Relations, Demographic Momentum, and Projected Economic Role*, WORLD REPORT NEWS (Jun. 21, 2012), <http://www.worldreportnews.com/far-and-south-east-asia/australia-archived/the-myth-of-homogeneity-in-japanese-race-relations-demographic-momentum-and-projected-economic-role> [<https://perma.cc/2WWS-3MRN>].

<sup>10</sup> The Japanese government is considering admitting 200,000 immigrants every year to cope with the decline in the economically active population—due to extremely low birth rate and the aging population. Right now immigration is limited to those with “advanced expertise and skills.” See Maitoshi 20 Man’in-No Imin Ukeire Seifu Ga Honkaku Kentō Kaishi, KEISAI NEWS (2014), <http://www.sankei.com/politics/news/140313/pl1403130006-n1.html> [<https://perma.cc/U29B-WHCY>].

<sup>11</sup> D.M., *The Incredible Shrinking Country*, THE ECONOMIST (Mar. 25, 2014), <http://www.economist.com/blogs/banyan/2014/03/japans-demography> [<https://perma.cc/46WJ-C826>] (“Immigration is being approached as a last resort. Even so the prime minister faces tough choices. The United Nations estimates that without raising its fertility rate, Japan would need to attract about 650,000 immigrants a year. There is no precedent for that level of immigration in this country, which is still a largely homogenous society.”).

<sup>12</sup> Hight, *supra* note 9.

<sup>13</sup> Deborah Hinderliter Ortloff & Christopher J. Frey, *Blood Relatives Language, Immigration, and Education of Ethnic Returnees in*



citizenship close the door to many long-term, non-national residents' including not only the Korean population but also those of Chinese descent who also began their residency prior to WWII and in some cases, the small population of mixed ethnic descent."<sup>14</sup>

Although occupants of many different countries have had difficulty integrating into Japanese culture both culturally and lawfully, . . . groups of Koreans . . . have been particularly affected because of their relatively large numbers . . . By 1940, the number of Koreans living in Japan exceeded 1.2 million. When the country had its independence restored in 1952, however, Japan denied this ethnic group citizenship status, even for those who had at this point resided in the country for decades as a result of the country's colonial legacy . . . . [T]he Korean minority in Japan[] are discouraged, through restrictive policies on naturalization, from becoming citizens. They are, regardless of the length of their stay and intentions to remain in the country, always 'foreigners' since they are 'unassimilable.' It is ethnicity rather than language, culture, or even religion that bars these residents from full inclusion in society.<sup>15</sup>

In contrast to the treatment of migrants who are not ethnically Japanese, the attitude toward returning *nikkeijin* (people of Japanese descent that permanently emigrated

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*Germany and Japan of Ethnic Returnees in Germany and Japan*, 51 COMP. EDUC. REV. 447, 447 (2007).

<sup>14</sup> Hight, *supra* note 9 (quoting Ortloff & Frey, *supra* note 13, at 447).

<sup>15</sup> *Id.* (citations omitted).

from Japan to another country),<sup>16</sup> illustrates how the “Japanese identity is largely influenced by the ideology of homogeneity which is constructed by putting emphasis of Japanese shared bloodline, language, and culture.”<sup>17</sup> Due to their ethnicity as Japanese, *nikkeijin* are treated differently from other migrant groups, such as receiving visa preferences and the “exceptional privilege of being allowed to reside and engage in work without any restrictions.”<sup>18</sup> This demonstrates that “the criteria to be ‘Japanese’ can only be fulfilled by someone who has Japanese shared bloodline, culture and language. If one lacks only one of the three elements, he or she will not totally be recognized as ‘Japanese.’”<sup>19</sup>

## 2. Roots of Racial Discrimination in Korea

The Central Intelligence Agency World Factbook describes Korea’s ethnic composition as “homogeneous (except for about 20,000 Chinese).”<sup>20</sup> There are 1,741,919 foreigners residing in Korea, with 457,806 of whom living in the capital city—Seoul.<sup>21</sup> As of August 2015, Korea has twelve “multicultural cities” (*damunhwa dosi*) in which foreign residents comprise more than five percent of the population.<sup>22</sup>

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<sup>16</sup> Yuki Sugiyama, *What does it mean to be Japanese? The cases of nikkeijin*, JAPANSOCIOLOGY (Jan. 18, 2012), <https://japansociology.com/2012/01/18/what-does-it-mean-to-be-japanese-the-cases-of-nikkeijin/> [<https://perma.cc/ZV7M-8VZG>].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *The World Factbook: Korea*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html> [<https://perma.cc/4J6J-EDHR>].

<sup>21</sup> Kanghan Kim & Jungmi Nam, *Oegugin Jumini 5% Neomneun ‘Damunhwa Dosi’ Jeonguk 12 Got*, CHOSUN NEWS (Aug. 28, 2015), [http://news.chosun.com/site/data/html\\_dir/2015/08/28/2015082800276.html?dep0=twitter](http://news.chosun.com/site/data/html_dir/2015/08/28/2015082800276.html?dep0=twitter) [<https://perma.cc/5ANN-8S9T>].

<sup>22</sup> *Id.*

Like Japan, Korea is also facing a low birth rate and an aging population.<sup>23</sup> Long-term immigration policy has been suggested as a possible solution.<sup>24</sup> However, to make long-term residency possible for new immigrants, laws addressing irrational social prejudices against foreigners should come before implementation of policies to incentivize foreigners to immigrate to Korea. This is exceptionally challenging given the Korean concept of *tanil minjok* (pure race), the idea that Koreans have maintained their “Korean-ness” by repelling foreign invaders since the nation’s formation.<sup>25</sup> Moreover, the Korean counterpart to the Japanese notion of racial purity—racial nationalism<sup>26</sup>—is in tension with potential laws that will ensure equal treatment of different races residing in Korea.

In Korea, racism is a “complex product of the country’s colonial history, postwar American influence and military presence, rapid economic development as well as patriotism that takes a special pride in its ‘ethnic homogeneity.’”<sup>27</sup> Professor Kim Hyun-mee from Yonsei University explains that, “Unlike racism in the West, Korean racism is mostly targeted against those from other Asian nations.”<sup>28</sup> The country’s rapid economic development after World War II (“WWII”) has had a side-effect, in which people “hierarchize foreign nations according to their economic

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<sup>23</sup> Ja-young, *supra* note 1.

<sup>24</sup> Andrew Eungi Kim, *Democracy, Migration and Multiculturalism in South Korea*, THE ASIA-PAC. J.: JAPAN FOCUS (Jan. 29, 2009), <http://apjff.org/-Andrew-Eungi-Kim/3035/article.html> [https://perma.cc/XKY5-4AFF].

<sup>25</sup> HYUNG IL PAI, CONSTRUCTING “KOREAN” ORIGINS: A CRITICAL REVIEW OF ARCHAEOLOGY, HISTORIOGRAPHY, AND RACIAL MYTH IN KOREAN STATE-FORMATION THEORIES 256 (2000).

<sup>26</sup> GI-WOOK SHIN, ETHNIC NATIONALISM IN KOREA: GENEALOGY, POLITICS, AND LEGACY 223 (2006).

<sup>27</sup> Claire Lee, *Defining racism in Korea*, THE KOREA HERALD (Sep. 4, 2014), <http://www.koreaherald.com/view.php?ud=20140904001088> [https://perma.cc/CFC4-TG6L].

<sup>28</sup> *Id.*

status.”<sup>29</sup> Koreans perceive certain developed nations such as the United States and the United Kingdom as “their superiors whom they should learn from . . . while perceiv[ing] economically developing countries as their inferiors with no specific grounds.”<sup>30</sup> Today, the government’s Employment Permit System (“EPS”) facilitates the import of cheap labor from neighboring countries, and this combined with Koreans’ prejudice against neighboring nations is leading Korean employers to exploit workers “by severely restricting migrant workers’ ability to change jobs and challenge abusive practices by employers.”<sup>31</sup>

## B. The Ineffective Legal Protections against Racial Discrimination

The laws of both Japan and Korea are ineffective at protecting individuals from racial discrimination by both state and private actors. Unlike the United States Constitution, which limits the power of the federal and state governments to discriminate through the Fifth and Fourteenth Amendments,<sup>32</sup> Japan and Korea’s respective constitutions fail to appropriately confine the governmental power to discriminate. In effect, their constitutions fail to safeguard non-citizens—and sometimes even citizens who are not ethnically Japanese or Korean—from racial discrimination by state actors. With regards to private sector racial discrimination, neither Japan nor Korea has a domestic law equivalent to the United States’ Civil Rights

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> AMNESTY INT’L, BITTER HARVEST: EXPLOITATION AND FORCED LABOUR OF MIGRANT AGRICULTURAL WORKERS IN SOUTH KOREA 5 (2014), [http://www.amnestyusa.org/sites/default/files/asa\\_250042014.pdf](http://www.amnestyusa.org/sites/default/files/asa_250042014.pdf) [<https://perma.cc/TS32-FPKN>].

<sup>32</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that policies which prejudice “discrete and insular minorities” may require a “more searching judicial inquiry.”).

Act of 1964.<sup>33</sup> While the United Nations (“U.N.”) has urged both nations to implement domestic laws that prohibit discrimination based on race,<sup>34</sup> neither country has complied with the recommendation to date.

### 1. Legal and Social Obstacles for Foreigners in Japan

The Japanese Constitution today is based off the MacArthur draft, which was proposed post-WWII after the Potsdam Declaration.<sup>35</sup> The MacArthur draft originally presented to the Japanese government in February 1946 included the following language:

All natural persons are equal before the law. No discrimination shall be authorized or tolerated in political, economic or social relations on account of race, creed, sex, social status, caste or national origin.<sup>36</sup>

In addition, there was another article present in the original MacArthur draft—Article XVI—which provided equal

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<sup>33</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

<sup>34</sup> *Committee on the Elimination of Racial Discrimination Considers Report of Japan*, UNITED NATIONS HUMAN RIGHTS OFFICE OF HIGH COMMISSIONER (Aug. 21, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14957> [<https://perma.cc/V8VN-WC86>] (“[U]nder the Convention State parties were required to enact legislation specifically to combat racial discrimination . . . [c]omprehensive anti-discrimination legislation was therefore needed.”); *U.N. Expert on Racism Urges the Republic of Korea to Adopt a Comprehensive Anti-Discrimination Law*, UNITED NATIONS HUMAN RIGHTS OFFICE OF HIGH COMMISSIONER (Oct. 9, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15147&LangID=E> [<https://perma.cc/2MNH-E5JF>].

<sup>35</sup> KYOKO INOUE, *MACARTHUR’S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING* 16, 301 (1991).

<sup>36</sup> *Id.* at 305.

protection to non-Japanese people in Japan (“Aliens shall be entitled to the equal protection of law”).<sup>37</sup> However, the Japanese government removed this provision during the drafting process.<sup>38</sup>

The current, official English version of Article XIV of the Japanese Constitution instead reads:

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.<sup>39</sup>

There is a critical difference between the first draft of the post-WWII Japanese Constitution and the current text of Article XIV—the scope of individuals who benefit from the protection of the anti-discrimination clause. The original draft tried to cover everyone, regardless of citizenship (“all natural persons”), whereas the final draft—and the law today—limits protection to “[a]ll of the *people* are equal under the law.”<sup>40</sup> In Japanese, this is read, “All (*kokumin*) are equal under the law”<sup>41</sup> *Kokumin* are only those who are Japanese citizens or of Japanese nationality.<sup>42</sup> As a result,

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<sup>37</sup> *Id.* at 306.

<sup>38</sup> Compare Appendix Two: The American Draft of the Constitution (The MacArthur Constitution) with NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 14 (Japan), translated in THE CONSTITUTION OF JAPAN, japan.kantei.go.jp/constitution\_and\_government\_of\_japan/constitution\_e.html [https://perma.cc/K948-VMF9].

<sup>39</sup> NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 14 (Japan), translated in THE CONSTITUTION OF JAPAN, japan.kantei.go.jp/constitution\_and\_government\_of\_japan/constitution\_e.html [https://perma.cc/K948-VMF9].

<sup>40</sup> *Id.* (emphasis added).

<sup>41</sup> Satoko Kogure, *Japan's New Security Regime and the Rights of Foreigners*, ZCOMMUNICATIONS-ZNET (Aug. 2, 2004), <https://zcomm.org/znetarticle/japans-new-security-regime-and-the-rights-of-foreigners-by-satoko-kogure/> [https://perma.cc/JT5P-99GJ] (emphasis added).

<sup>42</sup> *Id.*

“the Constitution provides no legal basis for the protection of foreigners against discrimination.”<sup>43</sup>

According to Professor Hamano of Ryukoku University, “Although there have been attempts to understand such changes in the negotiations as cultural misunderstandings or failures of linguistic ability, such an interpretation is unconvincing. Rather, from the very outset the Japanese government strove to limit legal protections for the basic human rights of non-Japanese.”<sup>44</sup> To add to the gravity of the situation, the provision is “not considered by courts to be self-executing.”<sup>45</sup> Non-*kokumin* are excluded from the scope of protection even today. Not only does Japan lack a statute that effectively prohibits racial discrimination,<sup>46</sup> but the Japanese government limits the scope of protection to Japanese citizens or nationals.<sup>47</sup>

The lack of protection to non-citizens is compounded by the fact that there are high barriers to naturalization. As Japan is a *jus sanguinis* state, in which nationality is determined by blood, not by location of birth, a baby born in Japan with at least one parent who is a Japanese national receives Japanese citizenship.<sup>48</sup> However, a child born in

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<sup>43</sup> *Id.*

<sup>44</sup> Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: the Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 438 (1999) (citations omitted).

<sup>45</sup> Special Rapporteur Mission to Japan, *supra* note 3, ¶ 11.

<sup>46</sup> ORG. FOR ECON. CO-OPERATION AND DEV., THE PRICE OF PREJUDICE: LABOUR MARKET DISCRIMINATION ON THE GROUNDS OF GENDER AND ETHNICITY, LEGAL AND INSTITUTIONAL FRAMEWORK IN FORCE IN 2007 129, <https://www.oecd.org/els/emp/40881200.pdf> [<https://perma.cc/CQ9N-XH9J>].

<sup>47</sup> Kogure, *supra* note 41 (“However . . . the Japanese government . . . phrased the subject of the Constitution as ‘kokumin’, that is Japanese citizens, or those of Japanese nationality.”).

<sup>48</sup> Nationality Law, No. 147 of 1950, (as amended by Law No. 268 of 1952, Law No. 45 of 1984, and Law No. 89 of 1993), *translated in* Japan Ministry of Justice, The Nationality Law, <http://www.moj.go.jp/ENGLISH/information/tnl-01.html> [<https://perma.cc/PLC7-KLBZ>]. See also *Japanese Citizenship How to*

Japan but neither of whose parents is a Japanese national must apply for citizenship separately.<sup>49</sup> Those who wish to become naturalized citizens in Japan must reside in Japan for at least five consecutive years (unless they are married to a Japanese national), demonstrate good conduct, have never plotted against the Japanese government, be financially stable, and renounce their previous citizenship.<sup>50</sup> The citizenship status of children born out of wedlock where one of the parents is non-Japanese presents a complicated situation for the child and is discussed in Part III of this Note. Even in cases where an immigrant has managed to acquire Japanese citizenship, and therefore is clearly within the scope of protection against racial discrimination, there is no guarantee that the court and the government in Japan will provide such protection to the individual.<sup>51</sup>

There are also exclusionary social structures in Japan that distinguish between citizens and non-citizens including:

Registry systems exclude noncitizen residents from equal legal and social standing with their citizen counterparts; important laws, including those governing primary education for children in Japan, are only applicable to 'citizens,' fostering a noncitizen underclass; 'Nationality clauses' exclude noncitizens from employment opportunities far beyond the most sensitive government jobs that require security clearance; taxpayer-funded sports leagues . . .

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*become Japanese,* JUST LANDED - JAPAN GUIDE, <https://www.justlanded.com/english/Japan/Japan-Guide/Visas-Permits/Japanese-citizenship> [<https://perma.cc/4GFK-H3VQ>].

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Debito Arudou, Olaf Karthaus, & Ken Sutherland, THE OTARU LAWSUIT INFORMATION SITE, <http://www.debito.org/otarulawsuit.html> [<https://perma.cc/W9G9-JWK9>]. For a more complete discussion of this case, see Part III *infra*.



overtly refuse or restrict 'foreign' participants;  
Japan's visa regimes . . . systematically deny  
noncitizens equal constitutional protections.<sup>52</sup>

In 2006, the United Nations Special Rapporteur published a report on "contemporary forms of racism, racial discrimination, xenophobia and related intolerance" in Japan.<sup>53</sup> In the report, the U.N. Special Rapporteur explained "there is racial discrimination and xenophobia in Japan, and that it affects three circles of discriminated groups: the national minorities[;] . . . descendants of former Japanese colonies . . . and Chinese; foreigners and migrants from other Asian countries and from the rest of the world."<sup>54</sup> He further noted "with concern that . . . there is no national legislation that outlaws racial discrimination and provides a judicial remedy for the victims."<sup>55</sup> Japan's failure to implement its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") by enacting domestic laws prohibiting racial discrimination is also concerning.<sup>56</sup>

## 2. Legal and Social Obstacles for Foreigners in Korea

Promulgated in 1948, one year after the Japanese post-WWII Constitution was enacted, the first draft of the Korean Constitution was written based on the Weimar

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<sup>52</sup> Debito Arudou, *Tackle Embedded Racism Before It Chokes Japan*, JAPAN TIMES (Nov. 1, 2015), <http://www.japantimes.co.jp/community/2015/11/01/issues/tackle-embedded-racism-chokes-japan/> [<https://perma.cc/5YXR-R7VL>].

<sup>53</sup> Special Rapporteur Mission to Japan, *supra* note 3, at 2.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See generally Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of Japan*, U.N. DOC. CERD/C/JPN/CO/7-9 (Sep. 26, 2014).

System and pre-WWII Japanese Constitution.<sup>57</sup> Even today, after the last amendment of the Constitution in 1987,<sup>58</sup> there is no section in the Korean Constitution that specifically deals with racial discrimination. The one section that deals with discrimination generally is Article 11 [Equality], which reads:

All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social, or cultural life on account of sex, religion, or social status.<sup>59</sup>

Similar to Japan's *kokumin*, the Korean text of Article 11 explicitly provides protection for *kukmin*, which can be translated as Korean citizens or individuals of Korean nationality.<sup>60</sup>

While Korea has some domestic laws that make it illegal to discriminate on the basis of race, “there is no specific law beyond the [National Human Rights Commission Act] that aims at securing human rights in general.”<sup>61</sup> The National Human Rights Commission Act (“NHRCA”),

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<sup>57</sup> *Hunbeopjejeong*, NAVER, <http://terms.naver.com/entry.nhn?docId=920160&cid=42958&categoryId=42958> [<https://perma.cc/TZG6-SGTU>].

<sup>58</sup> *Id.* The most recent constitutional amendment, the Ninth Amendment, took place in October 29, 1987. See DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 11 (S. Kor.) *translated in* CONSTITUTION OF THE REPUBLIC OF KOREA, Oct. 29, 1987, [http://korea.assembly.go.kr/res/low\\_01\\_read.jsp?boardid=1000000035](http://korea.assembly.go.kr/res/low_01_read.jsp?boardid=1000000035) [<https://perma.cc/DXF5-YHFE>] (dating the present version as valid as of Oct. 29, 1987).

<sup>59</sup> DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 11 (S. Kor.) *translated in* CONSTITUTION OF THE REPUBLIC OF KOREA, Oct. 29, 1987, [http://korea.assembly.go.kr/res/low\\_01\\_read.jsp?boardid=1000000035](http://korea.assembly.go.kr/res/low_01_read.jsp?boardid=1000000035) [<https://perma.cc/DXF5-YHFE>].

<sup>60</sup> See CHAIHARK HAM & SUNG HO KIM, MAKING WE THE PEOPLE: DEMOCRATIC CONSTITUTIONAL FOUNDING IN POSTWAR JAPAN AND SOUTH KOREA 267–68 (2015) (defining *kukmin*).

<sup>61</sup> ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 46, at 142.

enacted on May 24, 2001,<sup>62</sup> defines the phrase “discriminatory act violating the right to equality” as acts committed “without reasonable grounds, on the grounds of sex, religion, disability, age, social status, region of origin . . . state of origin, ethnic origin, physical condition such as features, marital status . . . race, skin color, ideology or political opinion, record of crime whose effect of punishment has been extinguished, sexual orientation, academic career, medical history, etc.”<sup>63</sup> and covers both Korean citizens and foreign residents within Korea.<sup>64</sup> The Act established the National Human Rights Commission of Korea (“NHRCK”), an independent organization looking over all human rights related issues arising out of Korea.<sup>65</sup>

Despite the Act, the U.N. Special Rapporteur in October 2014 “urged the Republic of Korea to enact a wide-ranging anti-discrimination law to build on the progress made in addressing the issue of racism and xenophobia, in view of the country’s history of ethnic and cultural homogeneity.”<sup>66</sup> He further pointed out that there have been

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<sup>62</sup> National Human Rights Commission Act, Act No. 6481, May 24, 2001, *amended by* Act. No. 11413, Mar. 21, 2012, ch. 1 art. 2, (S. Kor.) *translated in* Korean Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG) [<https://perma.cc/MYT9-LZB9>].

<sup>63</sup> *Id.*

<sup>64</sup> National Human Rights Commission Act, Act No. 6481, May 24, 2001, *amended by* Act. No. 11413, Mar. 21, 2012, ch. 1 art. 4, (S. Kor.) *translated in* Korean Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG) [<https://perma.cc/MYT9-LZB9>].

<sup>65</sup> National Human Rights Commission Act, Act No. 6481, May 24, 2001, *amended by* Act. No. 11413, Mar. 21, 2012, ch. 1 art. 3, (S. Kor.) *translated in* Korean Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=37724&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=37724&lang=ENG) [<https://perma.cc/MYT9-LZB9>].

<sup>66</sup> *UN expert on racism urges the Republic of Korea to adopt a comprehensive anti-discrimination law*, UNITED NATIONS HUM. RTS OFF. OF HIGH COMMISSIONER (Oct. 9, 2014), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15147&L> [<https://perma.cc/46BF-G5CD>]. *See also* Choe Sang-Hun, *South Koreans Struggle with Race*, NY TIMES (Nov. 1, 2009),

“isolated incidents of private acts of racism, racial discrimination and xenophobia,” ranging from a case in which “a naturalized Korean woman was refused access to a public bath, as well as cases of taxi drivers turning in to the police customers who do not look Korean, and of shop attendants expressing derogatory attitudes to foreign customers.”<sup>67</sup> Racial discrimination is prevalent throughout the nation, and hence measures should be taken to safeguard foreign population in Korea from such acts.

Constitutional protections are limited to *kukmin*, making naturalization a barrier to receiving constitutional protection against racial discrimination. There are three ways through which foreigners may acquire Korean citizenship—namely, general, simple, and special naturalization.<sup>68</sup> While each naturalization process has different requirements an applicant has to meet, all applicants are required to possess a basic understanding of the Korean language.<sup>69</sup> Similar to Japan, the principle of *jus sanguinis* governs, and having some kind of a connection to the Korean bloodline, by having an ethnic Korean parent, is a huge plus, if not a *de facto* requirement, to obtaining a Korean citizenship.<sup>70</sup>

### III. CONTEMPORARY CASES OF RACIAL DISCRIMINATION IN JAPAN

Both Japan and Korea lack effective anti-discrimination laws to adequately protect racial minorities

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[http://www.nytimes.com/2009/11/02/world/asia/02race.html?\\_r=0](http://www.nytimes.com/2009/11/02/world/asia/02race.html?_r=0)  
[<https://perma.cc/MJR6-HHF4>].

<sup>67</sup> *Id.*

<sup>68</sup> Nationality Act, Act. No. 8892, Mar. 14, 2008, amended by Act. No. 12421, Mar. 18, 2014, art. 5, (S. Kor.), translated in Korean Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=32444&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=32444&lang=ENG) [https://perma.cc/2DWU-2AYL].

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

regardless of citizenship. In Japan, the few legal protections in place are frequently inadequately applied. Not only are non-citizens without protective laws they can rely on when they are discriminated against based on race, but those who are citizens are also discriminated against, despite the presence of the anti-discriminatory provision within the Constitution.

Part III of this Note describes several incidents of racially discriminatory practices in Japan to demonstrate the consequences of lacking adequate anti-discrimination laws. The first two subsections summarize two landmark cases in Japan. The third subsection identifies some of the ethnic and racial groups in Japan who are subjected to discriminatory practices and explains in what manner each group is discriminated by the majority of the Japanese population.

#### A. The Nationality Act of 1984 and Citizenship Grant Issue

In June 2008, a Japanese Supreme Court decision under Article XIV of the Japanese Constitution granted plaintiffs the right to citizenship even though they were the children of mixed races born out of wedlock.<sup>71</sup> The plaintiffs, a group of mixed-raced children to a Japanese father and Filipina mother, claimed the Nationality Act of 1984, promulgated by the Japanese Diet, violated Article XIV of the Constitution.<sup>72</sup> The Act provided that “among children acknowledged after birth, legitimated children are allowed to acquire Japanese nationality by making a notification whereas non-legitimated children are required to follow the

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<sup>71</sup> Saikō Saibansho [Sup. Ct.] Jun. 4, 2008, 2006 (Gyo-Tsu) no. 135, 62 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 6, ¶ 4 (Japan), *translated in* Supreme Court of Japan’s website, [http://www.courts.go.jp/app/hanrei\\_en/detail?id=955](http://www.courts.go.jp/app/hanrei_en/detail?id=955) [<https://perma.cc/GQY7-V4ZT>].

<sup>72</sup> *Id.* at ¶¶ 1, 3.

naturalization procedure.”<sup>73</sup> The court observed, “Article 3, para.1 of the Nationality Act does not allow a child born out of wedlock to a Japanese father and a non-Japanese mother to acquire Japanese nationality just by satisfying the requirement of being acknowledged by the father after birth, but it allows acquisition of Japanese nationality only when legitimation has taken place.”<sup>74</sup> The plaintiffs argued that this provision created two distinct classes of individuals based on the marital status of one’s parents, and this was the type of equal protection violation barred by the Constitution.<sup>75</sup>

While on the surface the case seems to be a victory for plaintiffs, the reasoning the Japanese Supreme Court provided in ruling for plaintiffs is worrisome and may have adverse consequences to future equal protection claims against the Diet. The standard of review used by the Supreme Court to evaluate the legislative branches was that of “reasonable relevance.”<sup>76</sup> Despite the fact that the case involved a distinction based on race, the standard used by the Japanese Supreme Court is less exacting than the standards of “heightened” or “strict” scrutiny used by courts in the United States adjudicating the constitutionality of laws making similar distinctions. The Supreme Court ruled that the Nationality Act of 1984 was no longer constitutional because, while at the time when the legislation was enacted, the Diet had a reasonable basis for requiring parents of mixed-race children to be married in order for the child to acquire citizenship, the rationale justifying the distinction was no longer valid.<sup>77</sup>

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<sup>73</sup> *Id.* (Yookoo, J., Tsuno, J., and Furuta, J., dissenting).

<sup>74</sup> *Id.* at ¶ 4. Legitimation refers to marriage of the parents.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See Saikō Saibansho [Sup. Ct.] Jun. 4, 2008, 2006 (Gyo-Tsu) no. 135, 62 SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHU] no. 6, ¶ 4 (Japan), translated in Supreme Court of Japan’s website, [http://www.courts.go.jp/app/hanrei\\_en/detail?id=955](http://www.courts.go.jp/app/hanrei_en/detail?id=955) [<https://perma.cc/GQY7-V4ZT>].

The principle announced in the case weakens the power of judicial review because it is too easy for the government to provide a reasonable basis supporting various forms of discrimination.<sup>78</sup> While it is true that the United States also recognizes that the constitutional rights of individuals are not absolute, the Supreme Court of the United States requires the government to cite a "compelling state interest,"<sup>79</sup> a difficult standard for the government to meet, when the rights of a suspect class are threatened by

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In relevant part, the court stated:

In light of the aforementioned trends in the nationality law systems enforced in foreign states at the time of introduction of the provision of said paragraph, a certain reasonable relevance can be found between the provision that requires legitimation in addition to acknowledgment for granting Japanese nationality, and the legislative purpose mentioned above. (c) However, since then, *along with the changes in social and economic circumstances in Japan*, the views regarding family lifestyles, including the desirable way of living together for husband and wife, as well as those regarding parent-child relationships have also varied, and today, the realities of family life and parent-child relationships have changed and become diverse, as seen by the fact that the percentage of children born out of wedlock in the total number of newborn children has been increasing. In combination with these changes in the socially accepted views and social circumstances, as Japan has recently become more international and international exchange has been enhanced, the number of children born to Japanese fathers and non-Japanese mothers has been increasing.

*Id.* (emphasis added).

<sup>78</sup> David Waters, Cases in Constitutional Law, Waseda University (Fall 2013).

<sup>79</sup> Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 300 (1978).

legislative action.<sup>80</sup> In its opinion, the Japanese Supreme Court did not include any references to American constitutional law cases, despite referring to many European cases and the abundance of American case law on point.

## B. The Case of Arudou Debito

The case of Arudou Debito, also known as the Otaru Hotsprings case, addressed the rare situation of a Japanese citizen, clearly within the scope of protection of Article XIV of the Japanese Constitution, who was not ethnically Japanese.<sup>81</sup>

A Japanese hot spring (*onsen*) in the city of Otaru, Hokkaido, put up signs saying “JAPANESE ONLY” and refused entry to all foreigners in 1993.<sup>82</sup> While people complained, the Otaru city government “ignored the situation, [maintaining that although] this activity was discrimination, [the city government] had no power to stop it.”<sup>83</sup> Other local *onsens*, as well as “other businesses,

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<sup>80</sup> David Waters, Cases in Constitutional Law, Waseda University (Fall 2013).

<sup>81</sup> Arudou v. Earth Cure, 3 (Sapporo H. Ct., Sept. 16, 2004), translated in Timothy Webster, *Arudou v. Earth Cure: Judgment of November 11, 2002, Sapporo District Court*, 9 ASIAN-PAC. L. & POL'Y J. 297 (2008). The case is not officially published, however the plaintiff has made a copy of the decision available online in the original Japanese at <http://www.debito.org/kousaihanketsu.html> [https://perma.cc/E4JM-QYGC]. For more information on the case, see also Arudou Debito, Olaf Karthaus, & Ken Sutherland, *Overall Information in Brief, THE OTARU LAWSUIT INFORMATION SITE*, <http://www.debito.org/otarulawsuit.html#overall> [https://perma.cc/5WQV-R2DY]; Arudou Debito, *JAPANESE ONLY: The Otaru Hotsprings Case and Discrimination Against “Foreigners” in Japan*, THE ASIA-PAC. J.: JAPAN FOCUS (Nov. 18, 2004), <http://apjjf.org/-Arudou-Debito/1743/article.html> [https://perma.cc/DWC3-ERQK].

<sup>82</sup> Arudou Debito, *JAPANESE ONLY: The Otaru Hotsprings Case and Discrimination Against “Foreigners” in Japan*, THE ASIA-PAC. J.: JAPAN FOCUS (Nov. 18, 2004), <http://apjjf.org/-Arudou-Debito/1743/article.html> [https://perma.cc/DWC3-ERQK].

<sup>83</sup> *Id.*



including bars, restaurants, ramen shacks, even a barber and a sports shop, in other towns” also started putting up “Japanese Only” signs.<sup>84</sup>

In 1999, Caucasian individuals of several multinational families were refused entry to the Otaru *onsen* by one of the managers of the bathhouse.<sup>85</sup> Among those denied entry was a human rights activist named David C. Aldwinckle, who would later become a naturalized Japanese citizen and adopt the name Arudou Debito.<sup>86</sup> Despite the fact that all the Caucasians in the group had Japanese spouses, managers prevented them from entering the *onsen* because they were “‘foreign’ by appearance.”<sup>87</sup>

The rationale for denying them entry was that Russian sailors would disobey their bathing rules and drive away Japanese customers.<sup>88</sup> Even though the group informed the manager that none of them were Russian, the manager replied that refusing only Russians would be blatant discrimination, so instead they refuse service to all foreigners “equally.”<sup>89</sup> When the group asked about their mixed-raced children, the manager of the *onsen* responded that “[a]sian-looking kids can come in. But we will have to refuse foreign-looking ones.”<sup>90</sup> The *onsen* managers also initially allowed a Chinese person in the group to enter the *onsen*, because they were deciding who is foreign by individual’s appearances—by how “Japanese” they looked. The *onsen* managers were allowing entry to “foreigners who

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<sup>84</sup> *Id.*; see also Arudou Debito, *THE ROGUE’S GALLERY*, DEBITO.ORG, <http://www.debito.org/roguesgallery.html> [https://perma.cc/63RK-CAZQ ] (displaying a collection of photographs of places in Japan which exclude or restrict non-Japanese customers).

<sup>85</sup> Arudou, *supra* note 82.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

look[ed] Japanese, but bar[ring] Japanese who look[ed] foreign.”<sup>91</sup>

In 2000, when David Aldwinckle returned to Otaru as Arudou Debito with proof of naturalization, one *onsen* named Yunohana still refused him entry because he “still [did not] look Japanese.”<sup>92</sup> After this incident, he sued the *onsen* and the Otaru City Government, but received mixed results. The Sapporo District Court held Yunohana *onsen* culpable, and ordered that the *onsen* pay ¥1,000,000 (almost \$10,000) to each of the three plaintiffs.<sup>93</sup> The court did acknowledge that barring certain individuals from entering the facility due to their “race, skin color, descent, ethnic origin or racial origin,” constituted “acts of racial discrimination that ought to be eliminated.”<sup>94</sup>

However, rather than ruling that racial discrimination itself is wrong and should be banned, the court held that the actions by Yunohana *onsen* were illegal because the *onsen*’s discriminatory practice “transcended the boundaries of socially-acceptable rational discrimination.”<sup>95</sup> This approach by the court is concerning, since rather than outright holding that racial discrimination is illegal, court instead noted that there may be a category of racial discrimination that may be within “the boundaries of socially-acceptable rational discrimination”<sup>96</sup> and therefore permissible. The Sapporo High Court affirmed the District Court’s holding and the Japanese Supreme Court similarly

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<sup>91</sup> Arudou, *supra* note 82.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* See also Mark Magnier, *Japanese Court Ruling Favors Foreigners*, L.A. TIMES (Nov. 12, 2002), <http://articles.latimes.com/2002/nov/12/world/fg-bubbles12> [<https://perma.cc/Z9UH-WM8J>].

<sup>94</sup> Arudou v. Earth Cure, 3 (Sapporo H. Ct., Sept. 16, 2004), translated in Timothy Webster, *Arudou v. Earth Cure: Judgment of November 11, 2002, Sapporo District Court*, 9 ASIAN-PAC. L. & POL’Y J. 297, 318–19 (2008) (quoting Webster’s translation).

<sup>95</sup> Arudou, *supra* note 82.

<sup>96</sup> *Id.*

affirmed the lower courts' rulings.<sup>97</sup> Although “[s]imilar cases exist throughout Japan . . . in no case have the public authorities prosecuted the owners of the establishments concerned.”<sup>98</sup>

### C. Treatment of Other Ethnic Groups in Japan

The U.N. Special Rapporteur Report on racism in Japan identified the following groups as victims of racial discrimination and xenophobia in Japan: the Buraku, the Ainu, the Koreans, and other foreigners, including migrant workers.<sup>99</sup>

#### 1. The Buraku

Buraku refers to a class of individuals who were placed at the bottom of the caste-like system that was in place in the late nineteenth century.<sup>100</sup> While the Diet adopted a law in 1969 aimed at improving the living environment of Buraku people, the law was terminated in 2002 as the government determined the situation had improved.<sup>101</sup> Yet, the discriminatory mentality against Buraku people persists. Even today, private detectives are known to sell what are called “Buraku lists,” which include information on Buraku community locations, names of households, etc., to companies and potential marriage partners.<sup>102</sup> Upon receiving the list, companies and potential marriage partners use it for discriminatory purposes.<sup>103</sup> The government is trying to fight discrimination against Buraku through “human rights education policies promoted by the

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<sup>97</sup> Timothy Webster, *Arudou v. Earth Cure: Judgment of November 11, 2002, Sapporo District Court*, 9 ASIAN-PAC. L. & POL'Y J. 297, 299 n.13 (2008).

<sup>98</sup> Special Rapporteur Mission to Japan, *supra* note 3, at ¶ 64.

<sup>99</sup> *Id.* ¶ 14.

<sup>100</sup> *Id.* ¶ 7.

<sup>101</sup> *Id.* ¶ 10.

<sup>102</sup> *Id.* ¶ 18.

<sup>103</sup> *Id.* ¶ 18.

Ministry of Education, which include[] the teaching of human rights at school and the training of teachers.”<sup>104</sup>

## 2. The Ainu

The Ainu are native occupants of Hokkaido, the northernmost island of the Japanese archipelago. While there are reportedly 24,000 Ainu in Japan according to a 2007 census, the U.N. Special Rapporteur report suspects there are many more, as most Ainu are said to conceal their identity to avoid discrimination.<sup>105</sup> After 1867, the Japanese government exploited the Ainu and Hokkaido, and adopted “an official policy of assimilation of the Ainu and expropriated their land, so that Ainu society and culture was fatally damaged.”<sup>106</sup> Some statistics demonstrate the pattern of discrimination against the Ainu. For example, only “16.1 percent of Ainu who finish high school continue into higher education, as opposed to the general average of 34.5 percent in the area.”<sup>107</sup>

In 1997, the Japanese Diet enacted a law for the promotion of the Ainu culture.<sup>108</sup> The law was criticized by the Special Rapporteur as failing to promote the human rights of the Ainu people, as the law failed to recognize the Ainu population as indigenous people and solely focused on the promotion of the Ainu culture.<sup>109</sup> Moreover, even with regards to culture itself, the Ainu are severely restricted in

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<sup>104</sup> Special Rapporteur Mission to Japan, *supra* note 3, ¶ 16.

<sup>105</sup> *Id.* ¶ 22.

<sup>106</sup> *Id.* ¶ 5.

<sup>107</sup> *Id.* ¶ 24.

<sup>108</sup> Aini Shinpou[Act for the Promotion of Ainu Culture & Dissemination of Knowledge Regarding Ainu Tradition] Law No. 52 of 1997 (Japan), *translated in* Masako Yoshida Hitchingham, *Act for the Promotion of Ainu Culture & Dissemination of Knowledge Regarding Ainu Tradition*, 1 ASIAN-PAC. L. & POL'Y J. 11 (2000), [http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ\\_01.1\\_hitchingham\\_masa ko.pdf](http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ_01.1_hitchingham_masa ko.pdf) [<https://perma.cc/5XGL-E4YZ>].

<sup>109</sup> Special Rapporteur Mission to Japan, *supra* note 3, ¶ 49.

what they can and cannot do. As of 2007, only ten percent of the Ainu live on their ancestral land, and they are “greatly limited in their freedom to fish salmon, their ancestral traditional food: they can only fish for a very limited amount of salmon and only in designated areas where the salmon is of poor quality.”<sup>110</sup>

### 3. The Koreans

Among roughly four to six million Koreans were drafted to Japan as slave laborers during World War II.<sup>111</sup> A majority were repatriated, and “a little less than 650,000” were left in Japan in 1946.<sup>112</sup> Among such Koreans left behind in Japan are the Koreans in the Utoro district of Japan, who were drafted there during World War II to build a military airport.<sup>113</sup> When the war ended and the Japanese government abandoned the airport project, the population was also forgotten and abandoned.<sup>114</sup> The “sanitary conditions of Utoro are deplorable: a considerable number of families have no running water, and the district has no channels to evacuate water, which often provokes floods . . . The poor existing basic infrastructures were built by the inhabitants: public authorities never came to this area.”<sup>115</sup> Korean inhabitants of Utoro are also subject to “constant threat of expulsion,” as the Kyoto District Court and the Osaka High Court sided with the real estate agent who purchased the land from the wartime airport contractor without providing notice to dwellers who have lived in the

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<sup>110</sup>*Id.* ¶ 45.

<sup>111</sup> John Haberstroh, *In re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts*, 10 *ASIAN AM. L. J.* 253, 255 (citing Donald Macintyre, *WWII: Imperial Japan on Trial*, *ASIAWEEK*, Nov. 15, 1996, at 36).

<sup>112</sup> Sonia Ryang, *The North Korean homeland of Koreans in Japan*, in *KOREANS IN JAPAN: CRITICAL VOICES FROM THE MARGIN* 32, 33 (Sonia Ryang ed., 2000).

<sup>113</sup> Special Rapporteur Mission to Japan, *supra* note 3, ¶ 54.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

area for over sixty years.<sup>116</sup> The courts failed to “recognize any right of the Utoro people on the land where they were brought by the Japanese authorities,” and they further failed to “indicate any date for the expulsion.”<sup>117</sup>

The biggest problem for descendants of ethnic Koreans drafted to Utoro during WWII, as well as other Koreans also forcefully brought to Japan during that period, is that their citizenship status today remains unclear. Many of them have been living in Japan for over sixty years, but do not have Japanese citizenship. An excerpt from the U.N. Special Rapporteur report illustrates this point well:

Another problem of the Korean minority in general is the lack of access to pension rights. Koreans of the first generation who came to Japan have worked for years as Japanese citizens, having acquired the Japanese nationality under the colonial rule. In 1952, the Japanese nationality was withdrawn from those Koreans. In 1959, the social security system was established and Japanese nationality was required for joining it, thereby excluding Koreans who had worked for years as Japanese. The Government of Japan removed this nationality clause only in 1982, after having ratified the [International Covenant on Civil and Political Rights] and [International Covenant on Economic, Social and Cultural Rights]. Despite the fact that compensatory measures have been taken to integrate in the system those who were discovered not to be entitled not due to their fault – as for the Okinawa residents after 1972 or the returned Japanese children left behind when Japan withdrew from China

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<sup>116</sup> *Id.* ¶ 55.

<sup>117</sup> *Id.*

after the end of the Second World War – no comparable measures have been taken for Koreans who had lived in Japan under the colonial rule. An estimated 50,000 Koreans who are now more than 70 years old and in their working years were prevented from joining the system because of the nationality clause are excluded from any pension benefit. Many of them are obliged to work to survive.<sup>118</sup>

The Japanese nationality requirement to “become civil servants in the public administration, including at the municipal level” is also a hindrance to promoting fairness, as the requirement prevents many foreigners, “especially Koreans who were born in Japan,” from assuming government positions.<sup>119</sup>

#### 4. Other Foreign and Migrant Workers

Making matters worse for foreigners and Japanese nationals who are not of the Japanese race, such as Arudou, are public authorities who “do not take appropriate measures to fight against xenophobia and discrimination against foreigners. On the contrary, they play a role in encouraging such discrimination.”<sup>120</sup> Examples of discriminatory practices committed by public authorities in

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<sup>118</sup> *Id.* ¶ 56. There are other serious discriminatory practices as well, ranging from Korean students having no automatic eligibility to take the university entrance examination, the government failing to provide financial support to Korean schools, to Korean children suffering insults and getting their national dresses ripped or cut in public during daytime “simply because they are Koreans.” *Id.* ¶ 58.

<sup>119</sup> Special Rapporteur Mission to Japan, *supra* note 3, ¶ 66. According to the U.N. Special Rapporteur’s report, “certain local governments, such as Osaka and Kawasaki and quite a number of municipalities have suppressed this nationality clause, even if obstacles remain for foreigners concerning promotion to higher positions.” *Id.* ¶ 66.

<sup>119</sup> *Id.* ¶ 60.

<sup>120</sup> *Id.*

Japan include: making discriminatory statements against foreigners, disseminating posters and flyers in which foreigners are compared to thieves, tolerating posters calling for the expulsion of foreigners, and exaggerating the role of foreigners in criminal offences in press releases by the National Police Agency, thereby creating the wrong impression that foreigners hold much responsibility for the country's security problems.<sup>121</sup> In reality, "in 2003 the proportion of criminal offences committed by foreigners was only 2.3 per cent."<sup>122</sup>

Additionally, several policies designed by the government reinforce negative stereotypes against foreigners. For instance, in 2004, the Immigration Bureau of Japan "created an e-mail reporting system on its website inviting citizens to anonymously inform on any 'suspected illegal migrant,'" without providing a guideline as to what constitutes such a migrant.<sup>123</sup> The only way citizens could suspect if a person was an illegal migrant or not was by "their 'foreign appearance'" (on the basis of racial or linguistic characteristics).<sup>124</sup> The U.N. report referred to this e-mail reporting system as a "direct incitement to racial profiling and xenophobia."<sup>125</sup> Laws must be better tailored and implemented more thoughtfully to avoid reinforcing a discriminatory mentality. These examples demonstrate that the current approach taken by the Japanese government to tackle discrimination is inadequate. Public officials and the government themselves are reinforcing the discrimination through action and policy without considering the consequences of such policies.<sup>126</sup>

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<sup>121</sup> *Id.*, ¶¶ 60–61.

<sup>122</sup> *Id.*, ¶ 60.

<sup>123</sup> *Id.*, ¶ 61.

<sup>124</sup> Special Rapporteur Mission to Japan, *supra* note 3, ¶ 61.

<sup>125</sup> *Id.*, ¶ 62.

<sup>126</sup> *Id.*



#### IV. CONTEMPORARY CASES OF RACIAL DISCRIMINATION IN KOREA

This section focuses on contemporary examples of discrimination in Korea. First, this section looks at stories of well-known individuals who have been treated unfairly due to their ethnicity. Then this section shifts focus and identifies different ethnic and societal groups subject to prejudice and discrimination.

##### A. The Story of Bonojit Hussain

Not only does Korea lack anti-discrimination laws which hold private perpetrators of racial discrimination accountable, but Korea also fails to provide people with laws to protect themselves from racial discrimination by state actors. Korea does provide certain liberty and privacy rights to non-citizens; these rights, however, are limited in scope, and will only be guaranteed if the court deems the violation by the government entity lacked rational basis and was arbitrary.<sup>127</sup> This is vastly different from the situation in the United States where the combination of the Civil Rights Act of 1964 and Fifth and Fourteenth Amendments of the Constitution work together to outlaw racial discrimination by both private and state actors.<sup>128</sup> Courts also review equal protection cases where distinctions are made based on race with strict scrutiny, the most exacting standard of review utilized by the courts.<sup>129</sup> The story of Bonojit Hussain

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<sup>127</sup> See generally *infra* Part V.

<sup>128</sup> See generally Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.); U.S. CONST. amends V, XIV.

<sup>129</sup> See also *Bakke*, 438 U.S. at 357 (“Unquestionably we have held that a government practice or statute which restricts ‘fundamental rights’ or which contains ‘suspect classifications’ is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”).

“highlight[s] the lack of a specific laws [sic] covering racial discrimination.”<sup>130</sup>

In the summer of 2009, Bonojit Hussain, an Indian research professor at Sungkonghoe University in Seoul, Korea, reported that a “neatly dressed Korean man” who sat behind him, told him the following: “What a disgusting odor! You’re dirty!”<sup>131</sup> When Hussain asked the man why he was treating him this way, the perpetrator allegedly said, “You Arab, you Arab.”<sup>132</sup> Hussain also claimed the man also insulted his Korean friend by asking her, “Are you Korean? Are you happy to date a Black man?”<sup>133</sup>

When they went to the police station, the police officer in charge of the incident asked the Korean man, “Why did you, such a gentleman in a nice suit, treat poorly a man who is already having a hard time making a living?” and then he asked Hussain with apparent distrust, “How can someone born in 1982 be a professor already? What do you really do?”<sup>134</sup> Moreover, other police officers in the station used formal Korean while speaking to the Korean perpetrator, while using informal, “talk-down” Korean to address Hussain.<sup>135</sup>

The National Human Rights Commission of Korea explained that the police officer failed to fulfill his duty to

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<sup>130</sup> Bryan Kay, *South Korea’s Racism Debate*, THE DIPLOMAT (Aug. 8, 2011), <http://thediplomat.com/2011/08/south-koreas-racism-debate/> [https://perma.cc/GD4L-KK77].

<sup>131</sup> Si-soo Park, *Indian Accuses Korean of Racial Discrimination*, THE KOREA TIMES (Aug. 3, 2009), [http://www.koreatimes.co.kr/www/news/nation/2009/08/117\\_49537.html](http://www.koreatimes.co.kr/www/news/nation/2009/08/117_49537.html) [https://perma.cc/8GXV-KUWL].

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Jihun Lee, *Ingwonwi, Injongchabyeol Sagweone Cheot Gwongojochi*, YEONHAP NEWS Agency (Jul. 14, 2010), <http://www.yonhapnews.co.kr/society/2010/07/14/0701000000AKR20100714084500004.HTML?source=rss> [https://perma.cc/QD9Z-S426].

<sup>135</sup> *Id.*

treat everyone equally regardless of race, and therefore violated the victim's right to equal protection.<sup>136</sup> Despite this, the Commission merely gave the officer a warning, reasoning that the officer's actions were not intentional.<sup>137</sup> Rather, the Commission explained, the officer's actions were customary in that they arose from racial and cultural prejudices prevalent in the society, and hence were not the fault of the individual officer.<sup>138</sup> The explanation provided by the Commission excuses individual wrongdoing because the entire society is also committing the wrongful act.

Although Hussain's incident was the first of its kind to be reported to the police, and he successfully filed a complaint of racial discrimination after the incident,<sup>139</sup> the rapid increase in the number of foreign residents in Korea<sup>140</sup> makes it worrisome that similar incidents may take place in the future.

## B. Treatment of Other Racial Groups

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Park, *supra* note 131. See also Kay, *supra* note 130. This success was not without obstacles, however; when Hussain tried to file a complaint against Park, the police officers initially discouraged him from doing so, and "asked the two sides to apologize to each other." Park, *supra* note 131. Hussain later revealed in an interview that he did not apologize because he did nothing wrong. Park, *supra* note 131.

<sup>140</sup> See Kay, *supra* note 130 (noting that there are roughly 1.2 million foreign residents in Korea).

### 1. Mixed-Race Children, Interracial Marriage, and the Need for Diversity Education<sup>141</sup>

In December 2015, a Korean Congressperson told an African international student in Korea that the student's skin color is the same as the color of a briquette.<sup>142</sup> He later apologized through Facebook, but the story went viral.

In 2009 a survey was conducted which showed how necessary and important it is to educate Koreans of the idea of multiculturalism and diversity.

In the survey that questioned 1,725 elementary and middle school students in Seoul and Gyeonggi Province, only 40 percent of them perceived children born out of international marriages as Koreans. Almost half of the students said they have difficulties in maintaining friendships with students from multicultural backgrounds. Of them, 24.2 percent cited the difference in skin color as the reason for their problem with getting close to biracial children. It was followed by a fear of becoming an outcast among their fellow

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<sup>141</sup> In North Korean prison camps, mixed-race babies between North Korean women, who escaped from North Korea and conceived with Chinese men, are killed after they are sent back to North Korea by the Chinese government. Babies are "killed by abandonment or being smothered with plastic sheets. Two defectors later described burying dead babies, and two said they were mothers who saw their newborns put to death." James Brooke, *N. Koreans Talk of Baby Killings*, NY TIMES (Jun. 10, 2002), <http://www.nytimes.com/2002/06/10/world/n-koreans-talk-of-baby-killings.html?pagewanted=all> [<https://perma.cc/2QWN-ZQCG>].

<sup>142</sup> *Rep. Kim Moo-sung sorry for skin-color joke*, KOREA TIMES (Dec. 18, 2015), [http://www.koreatimes.co.kr/www/news/nation/2015/12/116\\_193519.html](http://www.koreatimes.co.kr/www/news/nation/2015/12/116_193519.html) [<https://perma.cc/XE85-V5YK>].

students with 16.8 percent and a feeling of embarrassment with 15.5 percent.<sup>143</sup>

A Korean-American, married to Greek-American wife, wrote about the racism her daughter was facing in a Korean school:

My 8-year-old daughter, who was born and raised in Korea . . . and has never herself even left Seoul metropolitan area, had in elementary school last month here in Korea. Her teacher told her to “go back to your own country” and accused her of being “Western scum,” after she was (with some “pure” Korean girlfriends) caught whispering in class. My daughter knows no other country but Korea, and she is a loyal Korean citizen. She sings the Korean national anthem every morning in class with all the other students, and . . . is passionately loyal and patriotic to Korea. She is culturally and in every other way emotionally Korean. She (regrettably) knows no English nor speaks any other language but Korean. So her teacher’s comments were incredibly bigoted, racist, and ignorant, especially in view of the fact that the other girls who committed the same infraction were not even reprimanded. I know from first-hand knowledge that my daughter’s experience is by a small fraction of the institutional racism and bigotry that mixed-blood, native-born children (and adults) such as herself experience here in Korea.<sup>144</sup>

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<sup>143</sup> Ji-hyun Cho, *Biracial children shunned by classmates*, THE KOREA HERALD (Mar. 30, 2010), <http://www.koreaherald.com/view.php?ud=20090124000033>.

<sup>144</sup> Zoltan Paul Jambor, *Sexism, Ageism and Racism Prevalent Throughout the South Korean System of Education*, EDUCATION RESOURCES INFORMATION CENTER (Aug. 19, 2009), <http://eric.ed.gov/?id=ed506242> [<https://perma.cc/FLH8-HW37>] (quotation omitted).

These are but a few examples of the racial discrimination faced by people living in Korea. Some scholars have attributed blatant acts of racial discrimination, such as these, to the Confucian culture of Korea. While the Korean society “has such deep roots in Confucianism,” which became the “longstanding moral code of conduct,” the ideology “has no devised conduct for the treatment of foreigners.”<sup>145</sup> Since Koreans act accordingly to the rules set by the Confucius teachings, they lack guidance on how to treat foreigners, and in effect “foreigners are treated according to a set of different standards” than ethnic Koreans.<sup>146</sup>

Whether or not the insight about Confucian ideology’s influence on Korean society is true, the racially discriminatory views against Korean women dating American men can be found in recent Korean history.<sup>147</sup> Many Korean women lived near the United States Army camps and worked as prostitutes—Koreans would call them disparaging names such as “Western Princess,” partly to hide the feeling of loss of masculinity associated with men losing their sisters to other men.<sup>148</sup>

Two other reasons are proposed to explain why derogatory terms were used to describe Korean women dating American soldiers. First, those women were “the material representation of the collapse of boundaries between ‘us’ and ‘them.’ Derogatory terms such as ‘Western princess’ (*yanggongju*), ‘Western sexy girl’ (*yangseksi*), and ‘Western whore’ (*yanggalbo*) highlight [those] women’s sexual liaisons with foreign men . . . and mark these women as outside the Korean nation.”<sup>149</sup> Second, these women’s

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Jong-hyun Park & Byeong-wuk Min, *Scapegoats of Divided Korea – Korea Photos’ View of Korean Women in the Military Camp Town*, 12 J. OF BASIC DESIGN & ART 152–53 (2011).

<sup>148</sup> *Id.*

<sup>149</sup> SEALING CHENG, ON THE MOVE FOR LOVE: MIGRANT ENTERTAINERS AND THE U.S. MILITARY IN SOUTH KOREA 63 (2010).

sexual relationships with foreigners “threaten[ed] the reproduction of the ‘pure’ Korean nation for the future.”<sup>150</sup>

The latter rationale reflects how the children of Korean women and American soldiers are viewed by other Koreans to this day. The children are called “‘bastards of the Western princess’ (*yanggongju-ssaekki*) and ‘darkies’ or ‘[n\*\*\*\*\*]’ (*kkamdungi*)”<sup>151</sup> and are “teased and discriminated against in school and have few job prospects other than in the entertainment industry or in sports.”<sup>152</sup> Children were often “abandoned as the [United States] soldiers left for their home country” and the “first multicultural children of Korea were dubbed half-breeds.”<sup>153</sup>

In 2012, a major television broadcasting station aired a controversial show featuring a five-minute segment, titled “The Shocking Reality about Relationships with Foreigners.”<sup>154</sup> The show, featured the case of American, Chris Golightly—who was sentenced to one year in prison and two years on probation for fraud against his former Korean girlfriend<sup>155</sup>—and another couple, a White man and Korean woman, displaying affection in public; the scene is narrated with the question “Is their physical contact based

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> So-young Sung, *The actual reality of interracial relationships*, KOREA JOONGANG DAILY (Jun. 3, 2012), <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=2954295> [https://perma.cc/P462-BTE8].

<sup>154</sup> *Id.* An upload of the video with English subtitles can be found here: Noe’s Korea Unedited, *MBC Shocking Truth About Relationships with foreigners (Reupload)*, YOUTUBE (Jul. 25, 2012), <https://www.youtube.com/watch?v=B09FXOZVw4g> [https://perma.cc/CU2A-LPV3].

<sup>155</sup> Kyung-min Kim, *Keuliseu, Jeon Yeochin Sagi Mit Hyeobbag-Eulo Jing-Yeog Inyeon Jibhaeng-Yuye 2nyeon Seongo*, MYDAILY (May 31, 2013), [http://www.mydaily.co.kr/new\\_yk/html/read.php?newsid=201305311102171118](http://www.mydaily.co.kr/new_yk/html/read.php?newsid=201305311102171118) [https://perma.cc/2P3H-26N4].

on trust?”<sup>156</sup> The show, although “devoid of any relevant figures and facts,” purports to show that “an increasing number of Korean women fall victim to English-speaking [W]hite men who say they ‘have no trouble meeting women in Korea.’”<sup>157</sup>

What is more bewildering than the show itself, however, is the response provided by the deputy chief of the show. In responding to the infuriated reactions to the feature he commented, “I don’t understand what makes [the viewers of the show] angry . . . I watched the show several times and . . . we said ‘some’ foreigners make trouble. But why are all these foreigners making a fuss over it? Maybe [it is] because they have a guilty conscience.”<sup>158</sup>

Educating the Korean population on racial diversity and respect for multiculturalism, while weaker than providing legal protection that would prohibit such conduct altogether, is seemingly a necessary first step in tackling the racial discrimination issue. The Support For Multicultural Families Act,<sup>159</sup> enacted in 2011, provides legal basis for making available such education. Article 5, entitled “Enhancement of Understanding of Multi-Cultural Families” provides, “The State and local governments shall take measures, such as education and advocacy activities for understanding diverse cultures, as necessary for preventing

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<sup>156</sup> Sung, *supra* note 153. (“During the segment, an anonymous Korean woman says she was abandoned by her foreign boyfriend after she became pregnant. Then another anonymous interviewee, a Korean man who claims to run an online community called ‘Make friends with foreigners,’ says one of his female friends turned out HIV positive after dating a Caucasian man. The show ends by saying ‘It is now time that we form proper and wholesome relationships with the opposite sex.’”).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Support for Multicultural Families Act, Act No. 8937, Mar. 21, 2008 (as amended by Act No. 9932, Jan. 18, 2010), *translated in* Ministry of Government Legislation, Korean Laws in English, <http://www.moleg.go.kr/english/korLawEng?pstSeq=58481> [<https://perma.cc/W7DQ-ULZH>].



social discrimination and prejudice against multi-cultural families and for encouraging members of society to acknowledge and respect the cultural diversity.”<sup>160</sup>

However, the Act fails for a similar reason as the Korean constitution, because it limits the scope of its application. The law only covers families, rather than individuals. Additionally, it troublingly leaves the provision of multi-cultural education to the discretion of the state and local governments. As a result, the law is far too limited both in scope and impact to adequately address issues of racial discrimination in labor or business settings.

### C. Racial Discrimination against Immigrants

Migrant workers and women—mostly from China and Southeast Asia—who come to marry Korean men are the nation’s main sources of immigration.<sup>161</sup> Both groups of individuals are victims of racial discrimination. The U.N. Special Rapporteur Mutuma Ruteere visited Korea in 2014 and highlighted the “plight of migrant workers in the agriculture and fishing sectors, who suffer tough working and living conditions, and generally work longer hours for less pay than their Korean counterparts.”<sup>162</sup> He told the press that, “as well as being denied their entitled share of the catch, non-Korean fishermen are “often subjected to racist and xenophobic verbal and physical abuse by ship owners and captains.”<sup>163</sup> The current regulations in Korea

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<sup>160</sup> *Id.*

<sup>161</sup> *South Korea has serious problem with racism, U.N. envoy says*, THE JAPAN TIMES (Oct. 6, 2014), <http://www.japantimes.co.jp/news/2014/10/06/asia-pacific/social-issues-asia-pacific/south-korea-serious-problem-racism-u-n-envoy-says/#.vpirypmlrd8> [<https://perma.cc/T4T2-BL8D>].

<sup>162</sup> *U.N. racism envoy details ‘serious’ problems in South Korea*, THE STRAITS TIMES (Oct. 6, 2014) <http://www.straitstimes.com/asia/east-asia/un-racism-envoy-details-serious-problems-in-south-korea> [<https://perma.cc/JL4B-5L5V>].

<sup>163</sup> *Id.*

and, in particular the Employment Permit System, which allows foreign workers to access employment opportunities in Korea, makes it difficult for migrant workers to change employment.<sup>164</sup>

Marriage migrants also lack adequate protection against their husbands when they are to file for separation or divorce. The U.N. Special Rapporteur pointed that the women are “in a particularly vulnerable situation, as many are afraid to report domestic violence for fear of losing their residence permit.”<sup>165</sup>

#### D. Racial Discrimination among Businesses

One of the most serious problems with racial discrimination in the business context is the lack of anti-discrimination laws that criminalize discriminatory acts. Two examples illustrate the dire consequences of having no legal protections against racial discrimination from businesses.

In 2011, a naturalized Korean, formerly from Uzbekistan, was denied entry to a public bath house in Korea.<sup>166</sup> The bathhouse explained that they had implemented a policy because local Koreans disliked taking bath with non-Koreans, and denied entry despite the fact

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* Marriage migrants incidentally forged a significant demographic change. The number of “multi-ethnic” children born to mixed marriages rose from just over 44,000 in 2007, to nearly 200,000 by 2013. *Id.* Moreover, in rural areas, where most mixed marriages take place, some projections suggest forty-nine percent of all children will be multi-ethnic by 2020. *Id.*

<sup>166</sup> Ah-young Chang, ‘*Pibusaeg Daleumyeon Chul-Ibgeumji*’...*Mog-Yogtang Injongchabyeol*, YTN (Oct. 14, 2011), [http://www.ytn.co.kr/\\_ln/0115\\_201110140925511496](http://www.ytn.co.kr/_ln/0115_201110140925511496) [<https://perma.cc/V8FJ-B42X>].

that she was a Korean citizen. A bathhouse that did allow for entry to foreigners lost all its ethnic Korean customers.<sup>167</sup>

In 2014, a pub in Seoul put up a sign saying “We apologize But, Due to Ebola Virus we are not accepting Africans at the moment. [sic]”<sup>168</sup> When a Caucasian told the workers at the pub that he was South African, however, they allowed him to enter.<sup>169</sup> The pub was not at all clear as to “how [it] planned to judge whether a person was African.”<sup>170</sup> After a photograph of the signs went viral on social media, the pub took down the signs.<sup>171</sup>

In these situations, the victims of such racially discriminatory and offensive acts have no legal recourse. The police officer called to the scene at the bathhouse merely told the woman to look for another bathhouse that allowed entry to foreigners, and there was no legal basis to prosecute the owner of the bathhouse.<sup>172</sup>

These examples of racial discrimination in Korea highlight the need for more robust anti-discrimination laws and legal barriers to discrimination. The United States not only employs civil statutes to combat private acts of discrimination, but also has a high standard of review for governmental acts of discrimination used by courts. As

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<sup>167</sup> *Id.*

<sup>168</sup> Tae-hoon Lee, *JR Pub says apology not enough over racist ban on ‘Africans’*, THE KOREA OBSERVER (Aug. 9, 2014), <http://www.koreaobserver.com/jr-pub-says-apology-not-enough-over-racist-ban-on-africans-23154> [<https://perma.cc/4FNM-B56C>].

<sup>169</sup> David Boroff, *Signs outside S. Korean pub ban Africans over Ebola*, NY DAILY NEWS (Aug. 18, 2014), <http://www.nydailynews.com/life-style/signs-s-korean-pub-bans-africans-article-1.1907500> [<https://perma.cc/XM5Y-CJUJ>].

<sup>170</sup> Dong-chan Jhoo, *Itaewon pub rejects black customers over Ebola*, KOREA TIMES (Aug. 17, 2014), [http://www.koreatimes.co.kr/www/news/world/2014/08/182\\_163037.html](http://www.koreatimes.co.kr/www/news/world/2014/08/182_163037.html) [<https://perma.cc/5PM6-49ZU>].

<sup>171</sup> *Id.*

<sup>172</sup> Chang, *supra* note 166.

discussed later in this Note, Korea can benefit from emulating some of the United States' policies on anti-discrimination.

## V. COMPARING THE LEGAL SYSTEMS OF THE UNITED STATES, JAPAN, AND KOREA

Part V of this Note compares the legal approach of the United States to anti-discrimination policy, with those of Japan and Korea. Such a comparison is especially appropriate given how the United States' Constitution heavily influenced the formulation of the Japanese Constitution, which in turn helped shape the Constitution of Korea. This Part illustrates the commonalities between the legal systems of Japan and Korea, whilst also analyzing the similarities and differences of those systems with that of the United States.

The fact that neither Korea nor Japan has effective anti-discrimination laws has far reaching effects. One consequence of having no effective anti-discrimination laws is that law enforcement and government officials are able to justify potentially discriminatory conduct. Both countries' public officials excuse themselves of failing to prosecute perpetrators of discrimination by responding that there is no law they can rely upon to prosecute. The Otaru *onsen* case and the bathhouse incident in Korea are examples of such cases.

This response is especially problematic when one considers that government officials are themselves often the perpetrators of racial discrimination—these individuals can simply excuse their own discriminatory actions by pointing to lack of legislation that forbids them.<sup>173</sup> Here is an excerpt

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<sup>173</sup> Doudou Diène (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance), *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, ¶ 37, U.N. Doc A/HRC/5/10 (May 25,

from the U.N. Special Rapporteur Report on Japan that best illustrates the situation:

Most worryingly, elected public officials make xenophobic and racial statements against foreigners in total impunity, and affected groups cannot denounce such statements. For example, the Governor of Tokyo declared in 2000 that in Tokyo “foreigners are repeating very vicious crimes ... in case of a serious disaster, even a big riot could be expected”, and in 2001 that the “very pragmatic DNA of Chinese ... [makes them] steal without hesitation in order to satisfy their desire.” The national Government did not react to such statements. . . . Apart from a personal unwillingness to do so, the reason is their inability to prosecute those responsible of such acts on the basis of national law. However, it is important to note that the Assembly members of a number of municipalities concerned, including the Otaru Assembly, despite having been requested by interested groups to draft and adopt ordinances which would allow the authorities under the local jurisdiction to prosecute such offences, and despite having the competence to do it, have not done so, referring to the

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2007) (“In Japan, except for the anti-discrimination provision contained in article 14 of the Constitution, there are no other instruments that enforce the general principle of equality or sanction discriminatory acts committed by citizens, businesses or non-governmental organizations (NGOs). Hate speech is not a criminal offense, but rather a minor civil violation that may result in monetary compensation; yet only when it has been judged as defamation of individuals, but not of certain groups of people or minorities in general. Besides, the country does not have specific hate crime laws.”).

difficulty to do it in the absence of a national law which contemplates such offences.<sup>174</sup>

The situation in Korea is similar, as shown in Part IV, in the context of consideration of racial discrimination among businesses. Police frequently refer to the fact that there are no legal statutes that victims of racial discrimination can rely upon in order to prosecute the perpetrators, in explaining why they cannot help the victims.<sup>175</sup> The fact that the Korean court system, as well as the Japanese court system do not apply a particularly heightened standard of review in cases concerning racial and/or nationality-based distinctions as is done in the courts of the United States, shows the differing attitudes of these legal systems. It would be a strong first step toward strengthening the opposition to discrimination if the legal systems of Korea and Japan started reviewing these cases with heightened scrutiny. That would send a message to the people that these discriminatory practices are serious violations of human rights that should be stopped.

#### A. Japan's Case Law: Application to Private Actors and Effects of the Convention on the Elimination of All Forms of Racial Discrimination

In 1981, a Japanese court ruled that Article XIV of the Japanese Constitution applies only to government bodies.<sup>176</sup> In *Plaintiff v. Hachioji Country Club*, the Japanese court decided that the golf club could deny membership to a naturalized Japanese citizen of Korean ethnicity, solely based on the plaintiff's ethnicity, because the said Article of the Japanese Constitution ensuring equal protection to all citizens "only applies to government bodies

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<sup>174</sup> Special Rapporteur Mission to Japan, ¶ 62–64 (citations omitted).

<sup>175</sup> Chang, *supra* note 166.

<sup>176</sup> *Plaintiff v. Hachioji Country Club*, [Tokyo Dist. Ct.] Sept. 9, 1981, Shō 54 (wa) no.10407, 1043 HANREI JIHŌ 74.

[and] private entities such as golf courses are presumably immune.”<sup>177</sup> Private entities are “presumably immune”-rather than simply “immune” in that, while private entities are default immune from Article XIV, they may still be (and sometimes were) found to violate Japanese *tort law* which makes it illegal to infringe someone’s human rights.<sup>178</sup> There is no domestic law that “covers private acts of racial discrimination,” and so some Japanese courts have “indirectly” applied international treaties such as Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) to find human rights as a right of an individual and used the tort law to fill in the gap.<sup>179</sup>

Even after Japan ratified CERD, however, Japanese courts’ approaches were not in unison. Indeed, there was a case very favorable to a foreigner, *Bortz v. Suzuki*,<sup>180</sup> in which the court held a Japanese jewelry store owner committed tort of infringing upon Brazilian customer’s rights, namely the plaintiff’s “right to ‘dignity and honor.’”<sup>181</sup> In holding for the plaintiff, the court noted that “if an act of racial discrimination violated a provision of CERD, and the state . . . did not take the measures that it should have, then one could, in accordance with Article 6 of CERD, at the very least seek compensation for damages, or other measures for relief, against the state . . . due to the omission. Thus . . . in a case involving a compensation claim against an individual for an illegal act, the text of CERD should be used as the

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<sup>177</sup> Timothy Webster, *Reconstructing Japanese Law: International Norms and Domestic Litigation*, 30 MICH. J. INT’L L. 211, 230 (2008). See also Plaintiff v. Hachiōji Country Club, [Tokyo Dist. Ct.] Sept. 9, 1981, Shō 54 (wa) no.10407, 1043 HANREI JIHŌ 74.

<sup>178</sup> *Id.* at 219 (noting the result of a case where a private entity was required to pay damages for a tort of racial discrimination).

<sup>179</sup> *Id.* at 217.

<sup>180</sup> *Bortz v. Suzuki*, [Shizuoka Dist. Ct.], Oct. 12, 1999, 1045 HANREI TAIMUZU 216, translated in Timothy Webster, *Bortz v. Suzuki*, Judgment of October 12, 1999, *Hamamatsu Branch, Shizuoka District Court*, 16 PAC. RIM L. & POL’Y J. 631 (2007) [hereinafter Webster, *Bortz v. Suzuki*].

<sup>181</sup> Webster, *supra* note 177, at 219.

interpretive standard” in determining what kind of behavior is illegal.<sup>182</sup>

However, in a subsequent case, *Hyon Yong Ok v. Chiba Country Club*, as a commentator explains, the Tokyo District Court dismissed plaintiff’s CERD claim for two reasons: (1) that CERD only applies to governmental bodies, and so it did not apply to relations between private actors, which is what is at dispute in *Hyon* case; (2) Japan had included a reservation clause when it ratified CERD, which preserved the “freedom of assembly, association, and expression” for Japanese citizens.<sup>183</sup> Such conflicting application of CERD’s domestic legal effect must have puzzled the CERD Committee as well, as the Committee requested a clarification of the matter—to which a Japanese delegate responded that “international treaties did not establish the rights of individuals directly but laid down obligations which were binding on the States that had ratified them.”<sup>184</sup>

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<sup>182</sup> Webster, *Boritz v. Suzuki*, *supra* note 180, at 652.

<sup>183</sup> Webster, *supra* note 177, at 233 (quotation omitted). *See also* *Hyon v. Chiba Country Club* [Tokyo H. Ct] Jan 31, 2002, Hei 7 (wa) no. 19336, Hei 8 (wa) no. 6833, 1773 HANREI JIHŌ 34, 36.

<sup>184</sup> *Id.* at 243 (quotation omitted).

Webster noted further,

This, of course, is the classic view of international law: a set of obligations that binds States, but does not empower individuals to sue in the absence of additional implementing legislation. But, without implementing legislation, individuals have no legal recourse to counter acts of racial discrimination. This lacuna was not lost on the CERD Committee members, one of whom noted that “the Convention’s provisions were not self-executing in Japanese law. Since national legislation had to be adopted to implement the Convention, it was all the more necessary to enact appropriate legislation to criminalize all acts of racial discrimination.” Nevertheless, the suggestion was unmistakable: Japan should



After dismissing the CERD claim, the court instead decided that a golf club could deny membership to foreign plaintiffs because “the government could intervene in interpersonal relations only in the exceptionally rare situation in which the infringement of a person’s rights exceeded social norms in light of a particular constitutional provision.”<sup>185</sup> In doing so, the court noted that “[a]s a preliminary matter . . . constitutional protections did, except in special circumstances, extend to foreigners.”<sup>186</sup> According to the Japanese Supreme Court that *Hyon* court cites to, this is not to say that the word *kokumin* encompasses both non-citizens and citizens; rather, they are, at least technically, expanding the protection that was originally granted to Japanese citizens only to non-citizens, in light of “(i) the principle of equality under the law as one of the basic political principles in the constitutions of modern democratic countries . . . and (ii) Article 7 of the U.N. Universal Declaration of Human Rights which states that everyone should be equal under law.”<sup>187</sup>

But both the *Hyon* court and the Japanese Supreme Court emphasize that, “while Article 14 of the Constitution recognizes the principle of equality under the law, to each person exists economic, social, and other factual differences—hence, in legislation of law or application thereof, it is almost impossible to prevent inequality arises due to factual differences from existing among each person, and if such differences are deemed necessary and *based on*

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domesticate this critical principle of international law by enacting some kind of implementing legislation.

*Id.* (citations omitted).

<sup>185</sup> Webster, *supra* note 177, at 232.

<sup>186</sup> *Id.*

<sup>187</sup> Supreme Court of Japan, Nov. 18, 1964, Shō 37 (a) no. 927, 579. The quotation is a direct translation of the case by the author of this Note.

*reasonable grounds in light of general social norms*, such inequality cannot constitute a violation of the Article 14 of [Japanese] Constitution.”<sup>188</sup>

The court, in short, ruled that when it comes to a dispute between two private actors, the court could *rarely* intervene, and, as a consequence, essentially left it to the private actor’s discretion whether to discriminate or not.<sup>189</sup> The court’s decision is especially surprising, given how the golf club “rationalized its regulation on the theories that foreign members (1) placed large bets on their golf games; (2) argued while on the green and generally behaved badly; and (3) played only with other foreigners, and avoided playing with the Japanese. To minimize such nuisances, the club’s executive council had passed a resolution to limit foreign membership.”<sup>190</sup> The *Hyon* court essentially ruled that all these rationales that the golf club provided, amounting to the club’s freedom of association, were reasonable in light of social norms, and the club’s ability to manage its own affairs trumped the plaintiff’s individual right.<sup>191</sup> This is vastly different from how racially discriminatory practices, whether perpetuated by private or state actors, are severely regulated, if not entirely banned, in the United States.

## B. The Lack of Anti-Racial Discrimination Laws and Cases in Korea

In 2007, the U.N. Committee on the Elimination of Racial Discrimination (the “Committee”) noted that it finds concerning the “emphasis placed on the ethnic homogeneity of [Korea]” since such emphasis may become an “obstacle to the promotion of understanding, tolerance and friendship among the different ethnic and national groups living on its

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<sup>188</sup> *Id.* The quotation is a direct translation of the case by the author of this Note.

<sup>189</sup> Webster, *supra* note 177, at 232–33.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 232.

territory.”<sup>192</sup> The Committee also pointed out that the “references to concepts such as ‘pure blood’ and ‘mixed-bloods’” by the Korean delegation, and the widespread use of the terms in Korean society, was alarming since it may entail “the idea of racial superiority.”<sup>193</sup>

The situation did not seem to get better, however, as in 2012, the same Committee wrote in an updated report that recommends Korea include in its legislation a “definition of racial discrimination which . . . guarantees equal rights to citizens *and non-citizens*.”<sup>194</sup> In particular, the Committee found the “[l]ack of relevant data and virtual absence of court cases on racial discrimination” in Korea alarming, since it deemed “the very low number of complaints of acts of racial discrimination . . . may be the consequence particularly of lack of legislation prohibiting racial discrimination, or lack of confidence or awareness of possibilities for redress by victims.”<sup>195</sup>

Given all the instances of racial discrimination in Korea, the Committee’s understanding of circumstances is more plausible than the explanation provided by the government that there is almost no racial discrimination in Korea.<sup>196</sup> The Committee recommended that the Korean government “undertake an in-depth analysis on the low number of complaints . . . and [record] data and statistics on the number of cases of racial discrimination reported to the relevant authorities.”<sup>197</sup> The report did note the existence of a draft of one anti-discrimination bill, namely the

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<sup>192</sup> Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Republic of Korea*, ¶ 12, U.N. DOC. CERD/C/KOR/CO/14 (Aug. 17, 2007).

<sup>193</sup> *Id.*

<sup>194</sup> CERD 2012 Report on Korea, *supra* note 3, ¶ 9 (emphasis added).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

Discrimination Prohibition Act, which was discarded in 2008, and recommended that Korea continue to pursue this Act and amend the draft so that it would “provide for the criminal punishment of discriminatory acts” as the “existing legislation [lacks] criminal sanctions for incitement to racial discrimination and acts of racially motivated violence.”<sup>198</sup>

A number of other problems Korea faces that the Committee pointed out were as follows: widespread racial hate speech directed against non-citizens, discrimination against migrant workers, lack of grant of equal rights to foreign women in cases of divorce or separation from Korean citizens, and a restricted definition of multicultural families such that multicultural families composed of two foreign partners, rather than one Korean citizen and a foreigner, would not be excluded from benefits of Multicultural Families Support Act.<sup>199</sup>

Although there are few cases on racial discrimination brought before the courts in Korea, there is one case which provides some insight into how the courts will adjudicate cases involving equal protection rights for Koreans and foreigners. In 2011, a case was brought in front of the Constitutional Court of Korea regarding the constitutionality of certain requirements posed to foreigners working in Korea by the Immigration Office. The complainant, a United States citizen who was teaching English in a Korean university on an E-2 teaching visa, submitted a visa extension request to an immigration office when his visa was about to expire.<sup>200</sup> The office responded through mail that he needed to submit a health certificate containing information regarding any history of drug use and HIV test results.<sup>201</sup> The complainant refused to submit the document, arguing

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<sup>198</sup> *Id.* ¶ 8.

<sup>199</sup> *Id.* ¶¶ 10, 11, 14, 17.

<sup>200</sup> Constitutional Court [Const. Ct.], 2009Hun-Ma358, Sep. 29, 2011, (volume 23, page 677, at 681) (S. Kor.).

<sup>201</sup> *Id.* at 682.

the requirement constituted an irrational discrimination, invasion of privacy, and violation of human dignity.<sup>202</sup> The Immigration Office requested that the complainant report to the office “to discuss certain matters regarding the visa extension” twice, but he failed to show up both times.<sup>203</sup>

The court determined that the Immigration Office’s health certificate requirement for visa extensions that included private information constituted “irrational discrimination that violates the complainant’s rights to equality.”<sup>204</sup> However, the court ultimately found in favor of the Immigration Office because the office, rather than requiring the complaint to submit the health certificate, merely required him to be present at the office to discuss the matter further.<sup>205</sup> Since requiring presence alone was not the same as requiring the complainant to submit health documents, the court ultimately held for the Immigration Office.<sup>206</sup>

While the court’s opinion regarding the discriminatory requirement that only applies to foreign teachers rather than all teachers in Korea—as only foreign teachers need to apply for visa extensions—is ultimately dicta, the court’s acknowledgement of a foreigner’s right to equality<sup>207</sup> is praiseworthy. Once again however, in its adjudication, the court applied a standard comparable to the United States’ rational basis standard, rather than a form of heightened scrutiny, despite the fact that the distinction drawn was based on race or nationality.<sup>208</sup>

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.* The quotation is a direct translation of the case by the author of this Note.

<sup>204</sup> *Id.* at 686. The quotation is a direct translation of the case by the author of this Note.

<sup>205</sup> *Id.* at 687.

<sup>206</sup> Constitutional Court [Const. Ct.], 2009Hun-Ma358, Sep. 29, 2011, (volume 23, page 677, at 687) (S. Kor.).

<sup>207</sup> *Id.* at 686.

<sup>208</sup> *Id.*

The application of a relaxed standard of review, despite the fact pattern involving government entity's discriminatory treatment of individuals based on their citizenship status, is similar—and hence similarly troublesome—to how the Japanese court ruled in the Nationality Act of 1984 case. This case reveals how the standard to be used in evaluating some policies that make distinctions based on race, national origin, or citizenship status is unclear and undeveloped. In 1997, Professor Kyong-Whan Ahn, observed that while the Korean Constitution ought to provide legal protection from discrimination; the standard used by Korean courts in such cases was “seriously under developed.”<sup>209</sup>

### C. Recommendations for Japan and Korea in Light of the United States' Approach

Under the Fifth and Fourteenth Amendments to the United States Constitution, state actors cannot discriminate on account of race, unless a compelling governmental interest justifies the state's action and the state narrowly tailors a law or regulation to accomplishing the compelling interest.<sup>210</sup> This framework signals to the public that racial discrimination is a serious violation. Furthermore, discriminatory practices by private actors, ranging from motels<sup>211</sup> to restaurants,<sup>212</sup> are prohibited by the Civil Rights Act of 1964.<sup>213</sup>

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<sup>209</sup> Benjamin Wagner, *It's High Time for South Korean Courts to Recognize the Multiethnic Character of Contemporary Korean Society*, MEDIUM (May 20, 2015), <https://medium.com/@benkwagner/it-s-high-time-that-south-korean-courts-recognize-the-multiethnic-character-of-contemporary-korean-bf6ff142a49e> [<https://perma.cc/B4N2-8XCW>].

<sup>210</sup> *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003).

<sup>211</sup> *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

<sup>212</sup> *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>213</sup> Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of

In stark contrast, outside of tort liability, Japan's domestic laws lack anti-discrimination measures victims can use to hold private actors liable. Japanese courts will only find liability if the discriminatory act is an "irrational act" in light of social norms, an unclear standard that the courts are in conflict with regards to the adjudication. Moreover, even when the perpetrator of racial discrimination is a state actor, as seen in III-A of this Note regarding the Nationality Act of 1984 promulgated by the legislature, the Japanese court applies a lower standard of review and allows the government to discriminate so long as there is a rational basis to the discrimination. Similarly, the Constitutional Court of Korea uses a lower standard of review, despite the case involving differential treatment based on nationality.

While discrimination by any actor should be banned in order to fully protect minorities, discrimination carried out by state actors is particularly problematic in that it legitimizes private actors' discriminatory practices.<sup>214</sup> Considering how, even in the United States, the ban on racial discrimination by private actors—with some limited exceptions—was introduced later than the ban on acts by state actors, it may be a good idea for Japan and Korea to implement anti-discrimination law in a gradual basis. Perhaps the two countries could start by subjecting the state actors to a higher, stricter standard of scrutiny, thereby pronouncing to the public that racial discrimination is a serious matter and that the government will take grave

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any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”).

<sup>214</sup> The Supreme Court of the United States alluded to the possibility that state imposed segregation could shape social habits and cultures of individuals. *Cf. Green v. New Kent County*, 391 U.S. 430, 437–38 (1968) (“School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”)

measures to tackle it. This may help the public perception to change—that racial discrimination is *really* not okay. Changed social norms may be particularly important in Japan because the Japanese court in *Hyon* analyzed in the acts of discrimination against the backdrop of what were acceptable social norms.

In Korea, clarifying what what standard of scrutiny applies will help clarify the government's opposition to discrimination based on race and/or nationality. Like Japan, Korean courts could apply heightened standard of review in discrimination cases, and in doing so signal to the public that the government deems discriminatory practices serious violations of human rights that should be halted altogether. Japan and Korea should strive to increase public awareness of the benefits of a diverse society.

Besides a new approach in the courts, racial discrimination can be combated through education. A critical factor contributing to differences between the culture of the United States' and those of Japan and Korea is the amount of racial diversity in the United States.<sup>215</sup> Despite globalization and increase in foreign travel, Japan and

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<sup>215</sup> United States demographics by race: 79.96% White, 12.85% Black, 4.43% Asian, 0.97% Amerindian and Alaska native, 0.18% native Hawaiian and other Pacific islander, 1.61% two or more races; note that "Hispanic is not included because United States Census Bureau considers Hispanic to mean persons of Spanish/Hispanic/Latino origin including those of Mexican, Cuban, Puerto Rican, Dominican Republic, Spanish, and Central or South American origin living in the United States who may be of any race or ethnic group; about 15.1% of the total United States population is Hispanic." See *The World Factbook: United States*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> [<https://perma.cc/2CF8-FHKN>]. Japan demographics by race: 98.5% Japanese, 0.5% Korean, 0.4% Chinese, 0.6% others. *The World Factbook: Japan*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html> [<https://perma.cc/MHJ8-6V98>]. Korea demographics by race: homogenous. See *The World Factbook: Korea, South*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html> [<https://perma.cc/7VUU-86U6>].



Korea's racial composition are such that almost the entire population is comprised of only people of a single ethnicity. While it is natural for people in the United States to think of interaction among different races, as they are exposed to people of different skin color on a daily basis, such is not the case in the two Asian countries.

Precisely because of the mono-ethnic nature of their cultures, the two nations must strive even further to promote racial diversity, in particular through education of the population. In the United States, through various measures, including but not limited to education and social policies, there is an endorsement of diversity, which helps people realize it is a value that the society as a whole should promote. Such efforts can be seen in college admissions and employment applications in the form of affirmative action.<sup>216</sup> In the case of Korea, such educational efforts could start by eliminating the use of terms such as "pure blood" or "mixed-blood."<sup>217</sup> Korea can expand and improve on the existing Support for Multicultural Families Act, by covering individuals as well as families, and have the central government provide clear guidance to local governments to ensure that multi-cultural education will be effectively conducted throughout the country in a uniform manner. Similarly, Japan would benefit from implementing educational policies in schools, emphasizing the benefits of embracing diversity and deemphasizing the notion of "purity" and "one-ness."

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<sup>216</sup> See generally Judson MacLaury, *President Kennedy's E.O. 10925: Seedbed of Affirmative Action*, SOCIETY FOR HISTORY IN THE FEDERAL GOVERNMENT, [http://shfg.org/shfg/wp-content/uploads/2011/01/4-MacLaury-design4-new\\_Layout-1.pdf](http://shfg.org/shfg/wp-content/uploads/2011/01/4-MacLaury-design4-new_Layout-1.pdf) [https://perma.cc/H9BC-ZKDT].

<sup>217</sup> Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Republic of Korea*, ¶ 12, U.N. DOC. CERD/C/KOR/CO/14 (Aug. 17, 2007).

Repeated exposure to such conceptualization will help citizens to recognize the benefits of diversity and work to counter historical notions of “purity” and “one-ness”—and eventually change the social conception of race.

## VI. CONCLUSION

Japan and Korea both lack adequate anti-discrimination laws. As these nations move forward they may seek to combat their aging populations, declining birthrates, and overall population decline with more relaxed immigration policies. However, legislation providing sufficient anti-discrimination laws and cultural education on diversity is a prerequisite to being able to successfully integrate a global workforce. Until these nations enact reform, international authorities such as the U.N. Special Rapporteur may continue to monitor and condemn the situation and urge development in these countries.

The United States’ approach to anti-discrimination policy and cultural attitudes towards diversity are vastly different than in Japan and Korea. While full adoption of American policy may not be possible, these nations can look toward the United States for guidance on how to promote inclusion and fight discrimination.

In sum, both Japan and Korea lack effective laws that prohibit racial discrimination against the non-ethnic Japanese and non-ethnic Korean population, respectively. It is in the best interests of both nations to enhance the protection against racial discrimination for citizens, residents, visitors, and all who are present in their nation.