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Insular Minorities: International Law’s Challenge to Japan’s Ethnic Homogeneity

Timothy Webster

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Timothy Webster†

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Throughout its modern history, Japan has conceived of itself as ethnically one. Various explanations account for this politics of ethnic homogeneity: geographical isolation from the rest of Asia; self-imposed closure to the rest of the world; and a cultural disposition that is introverted, communitarian-minded, or simply xenophobic. † Each theory may reflect aspects of a broader truth,

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† See generally TESSA MORRIS-SUZUKI, BORDERLINE JAPAN 10-11 (2010) (discussing various theories to explain Japan's "closed country" mindset); Tessa Morris-Suzuki, Immigration and Citizenship in Contemporary Japan, in JAPAN - CHANGE & CONTINUITY, 163, 171-72 (Javed Maswood, Jeffrey Graham & Hideaki Miyajima eds., 2002) (discussing Japan's modern "cosmetic multiculturalism" that recognizes limited diversity and the constraints of xenophobia); John Lie, The Discourse of Japaneseness, in JAPAN & GLOBAL MIGRATION: FOREIGN WORKERS AND THE ADVENT OF A
but they collectively overlook the institutional features of Japan’s ethnic homogeneity. This paper suggests that a matrix of laws and policies from the late nineteenth century to the present simultaneously privileges ethnic Japanese and subordinates other ethnic groups. Numerous laws and regulations decide who belongs in Japan, who qualifies for citizenship, and who deserves legal protection under Japanese law. Focusing on the institutional factors of the “ethno-state,” this article examines practices and decisions of the contemporary Japanese state and its policies to deal with other ethnicities.

After discussing the historical manifestations of the ethno-state, this article posits a meaningful role for international human rights law (“IHRL”) in entrenching the rights of ethnic minorities in Japan. Though IHRL cannot possibly solve all of Japan’s racial and ethnic problems, it has alleviated many of them, and it has the potential to do so for others. Since the early 1980s, when it signed many international instruments, Japan has increasingly conformed to the basic principles of IHRL, both revising discriminatory laws and instituting new, more protective ones. Yet even when Japan does not change its laws and policies, IHRL can provide plaintiffs a legal basis, additional moral suasion, and a broader panoply of standards by which to evaluate state policy.

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2 See infra Part I (analyzing the Japanese Constitution, election laws, refugee policies, Immigration Acts, and other laws and policies dealing with foreigners and their legal status in Japan).

3 See infra Part II (discussing three types of cases in which minorities have successfully used and Japanese judges have cited to international human rights law to challenge domestic discriminatory policies).

administrative action, and other instrumentalities of the state. IHRL is no panacea to all of Japan’s ills, but its ratification has led to notable victories for minority plaintiffs, a forum to challenge state laws and policies, and occasional condemnation or legislative guidance.\(^5\) International law has helped Japan recognize ethnic others, improve its treatment of them, and endow them with certain unalienable rights.\(^6\)

This paper proceeds in two parts. Part I explains how Japan has actively promoted an ethnically homogenous state, beginning with a brief detour of critical race theory as developed in the United States. From the Meiji period onward, the Japanese government has implemented a wide range of laws and policies to assimilate indigenous people, exclude foreign nationals, denationalize ethnic minorities, weaken legal protections to non-ethnic Japanese, and privilege the Japanese diaspora in immigration policy.\(^7\) The combined effect of such practices has been an extraordinarily high degree of ethnic homogeneity across decades, a rise in the status of ethnic Japanese in the country’s racial hierarchy, and the hardening of that hierarchy.\(^8\) Part II investigates the ways that IHRL has challenged aspects of the ethno-state through two important mechanisms: amending laws that offend international law and offering a legal basis for ethnic minority plaintiffs to ground their claims.

I. Japan’s Promotion of Ethnic Homogeneity

Before turning to Japan, it is important to realize that the United States also has a long history of using law to privilege one

\(^5\) See infra Part II (analyzing cases in which plaintiffs in Japanese discriminatory cases have successfully relied on IHRL and judges have used IHRL to support their holdings).

\(^6\) Following Ian Haney López, I deploy a relatively diffuse concept of law, incorporating not simply legislation passed by the Japanese Diet (legislature), but also policies promulgated by various ministries in the Cabinet (executive) and judicial decisions. While this may blur issues such as accountability—for some government actors are likely more responsible than others—this broad view offers insight into the panorama of state policies used both to privilege one racial or ethnic group and to subordinate another. Ian Haney López, White by Law 80 (2d ed. 2006).

\(^7\) See infra Part I.

\(^8\) See infra Part I.
ethnic group over others. Critical race theorists have described the United States as a “racial state” that has limited the privileges of citizenship and equal protection of the law to white people. Michael Omi and Howard Winant find the State is “inherently racial,” and the main objectives of its racial policy are “repression and exclusion.” For example, the Naturalization Act of 1790, which restricted U.S. citizenship to “free white persons,” is reflective of the state’s racist inclinations during its foundational period. Even before this Act, the U.S. Constitution itself contained the “three-fifths compromise,” which excluded “Indians” in full and reduced by forty percent the number of slaves to be counted in a state’s population to determine congressional representation. In other words, the Constitution did not view Native Americans and slaves—most of whom were African-American—as fully human. They were not considered full persons for the purpose of assigning representation in the federal government and were forbidden from the political processes.

Racially preferential laws did not end with the early colonial period. Ian Haney López has excavated laws and court decisions from the eighteenth to the twentieth century that subordinated Native Americans, Asians, Asian Americans, and African-Americans to white people in various ways. For instance,

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10 Id. at 81-82.
11 Id. at 82.
12 Id. at 81.
14 U.S. CONST. art. I, § 2, cl. 3, repealed by U.S. CONST. amend. XIV.
15 James Madison actually proposed the ratio of three-fifths after proposed compromises of one-half and three-quarters were deemed unsatisfactory. Garry Wills, “Negro President” Jefferson and the Slave Power 52-54 (2003).
16 See id.
17 See id.
18 López, supra note 6, at 78-85.
such laws . . . established material conditions of belonging and exclusion that code as race. In all of these ways, legal rules constructed race.\textsuperscript{19}

Haney López highlights several laws and policies policing boundaries of the racial divide, but does not suggest that law is the only tool to sublimate whites.\textsuperscript{20}

Given the long history of racialized laws and policies in the United States, it is not surprising to find similar policies in other countries. Japan is a far less ethnically diverse country; among the countries in the Organization for Economic Cooperation and Development, only Korea and Iceland are more homogenous.\textsuperscript{21} Also, Japan has historically been less open to immigration than the United States. To remark on Japan’s ethnic homogeneity is on one level, to state the obvious. But on another level, it is to comment on over a century of laws and policies that both promote the notion of a separate and singular Japanese ethnicity and privilege the position of ethnically Japanese people vis-à-vis ethnic others.

Since the Meiji Period (1868-1912), Japan has enacted a wide range of policies to produce, and reproduce, an ethnically homogenous nation-state.\textsuperscript{22} By limiting the number of foreigners allowed into Japan, tightly policing citizenship requirements, expelling ethnic others, privileging the Japanese diaspora in immigration policy, assimilating indigenous persons and ethnic others, and maintaining a rigid refugee regime, the Japanese state has indelibly shaped the body politic and the body genetic.\textsuperscript{23}

A. Meiji Period

Japan’s policies of ethnic unity date from the late nineteenth century.\textsuperscript{24} During the Meiji Period, Japan opened itself up to

\textsuperscript{19} Id. at 85.

\textsuperscript{20} Id.


\textsuperscript{22} Japan’s assimilation of the Ainu indigenous people began in the 1870s, while restrictions on foreign labor began in the late 1890s. See infra, notes 28-32 and accompanying text (describing restrictions on foreign labor), and notes 41-51 and accompanying text (describing policies on the Ainu).

\textsuperscript{23} See infra, Parts I.B, I.C, I.D.

\textsuperscript{24} See supra note 22.
various modes of Western learning: science, technology, military, medicine, culture, literature, colonialism, and other fields. But it also implemented policies similar to those taken by Western powers in matters of immigration and indigenous peoples.

Two groups that concerned the Japanese government were Chinese laborers and the Ainu—an indigenous population in northern Japan.

In 1899, a few years after defeating China and colonizing Taiwan, Japan issued two directives to restrict foreign immigration. The first, an Imperial Ordinance, limited immigrant labor for the first time in Japan’s history, permitting foreign migrants to live in Japan, but only if they refrained from working in a range of low-skilled occupations. A second directive specified positions forbidden to foreigners, such as “farming, fishing, mining, construction, building, [and] manufacture.” Under that directive, foreigners could be tailors, cloth merchants, servants, knife-grinders, and so forth. These policies protected Japanese workers from competition in skilled labor, aiming primarily at one common type of nineteenth-century immigrant: mainland Chinese who would work for lower wages.

Faced with similar fears of inexpensive Chinese labor, the United States and Australia reacted with even more sweeping legislation. In the United States, the 1882 Chinese Exclusion Act prohibited not only the immigration of Chinese subjects, but also

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25 See John Lie, Multicultural Japan 36 (2001) (“Catching up with the West was perhaps the most important prewar national mandate . . . . [L]eaders acknowledged Western superiority and sought to emulate the West.”).

26 See infra notes 33-36 and accompanying text (discussing legislation in the United States and Australia that restricted the immigration of the Chinese).


28 See Morris-Suzuki, supra note 1, at 41-42.

29 Id. at 42-44 (discussing Imperial Ordinance No. 352 of 1899).

30 Id. at 44 (quoting the Ministry of the Interior’s Directive No. 42 of 1899).

31 Id.

32 See id. at 44-45; see also Lie, supra note 25, at 104.

banned their naturalization. It was the only United States law ever to ban a particular nationality. The White Australia Policy likewise restricted Chinese and other Asian immigrants to the antipodes. In the late nineteenth century, Japan strode alongside Western governments, which restricted immigration and imposed racially selective qualifications for citizenship. Like those countries, Japan resisted ethnic dilution by keeping out foreigners, assimilating indigenous others into more Japanese ways of living, and thereby privileging the position occupied by ethnic Japanese. A similar approach to immigration reemerged nearly a century later, in 1989, when Japan revised its Immigration Control Act to keep out other Asians while welcoming “back” ethnic Japanese from countries such as Brazil, Peru, and the United States.

Meiji ethnic policy was not solely concerned with foreign threats, but also targeted ethnic groups within Japan. In the 1870s and 1880s, the Japanese government passed a series of policies to assimilate, or more specifically, to Japanize the Ainu. Ainu cultural practices, such as tattooing and cremating the dead in their homes, were prohibited. Likewise, the government

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34 See López, supra note 6, at 32.
35 The policy refers to several measures passed by the colonies and federal government of Australia from the late nineteenth to the mid-twentieth centuries. For instance, several Australian colonies excluded Chinese miners during the gold rush of the 1950s. The Australian federal government’s first laws included the Immigration Restriction Act of 1901 (which allowed immigration officers to offer written tests in European languages) and the Naturalization Act of 1903 (which denied citizenship and the right to vote to non-Europeans). See generally Catherine Skulan, Australia’s Mandatory Detention of “Unauthorized” Asylum Seekers: History, Politics and Analysis Under International Law, 26 Geo. IMMIG. L.J. 61, 66-67 (2006).
36 See Morris-Suzuki, supra note 1, at 163-64.
40 See id. at 115-16 (1996).
41 See Kayano v. Hokkaido Expropriation Committee, 1598 HANREI JIHO 33 (Sapporo D. Ct., Mar. 27, 1997), translated in Mark A. Levin,
banned traditional modes of sustenance on which the Ainu depended for their survival: fishing with traditional nets, felling timber, and removing bark from trees.\footnote{42}

With the passage of the 1899 Hokkaido Former Aborigine Protection Act,\footnote{43} the Japanese government accelerated the assimilation of the Ainu.\footnote{44} The Act itself provided various forms of assistance to the Ainu in agriculture (land grants, seeds, tools, and other supplies), education (buildings and schools), and social welfare.\footnote{45} But despite the beneficent intentions of the law, scholars have suggested that the emphasis on agriculture sought to push the Ainu towards more cognizably Japanese pursuits such as farming, and away from traditional Ainu modes of subsistence such as fishing and hunting.\footnote{46} The provision of seeds and tools was “limited and haphazard,” and the land grants were ineffective and often significantly smaller than provided by law.\footnote{47} Indeed, the Protection Act was part of a broader web of policies promoting the “eradication of [Ainu] language, customs and values.”\footnote{48} Henceforth, the Ainu were to acculturate into Japan by assuming Japanese names, speaking the Japanese language, and engaging in farming, day labor, and other ostensibly Japanese jobs.\footnote{49} A 1937 revision to the Act aimed primarily at providing welfare assistance to the Ainu because the “original objective of the Protection Act, the Japanization of the Ainu, was seen as having largely been accomplished.”\footnote{50}

To this day, only about 25,000 people self-

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Kayano v. Hokkaido Expropriation Committee, 38 I.L.M. 394 (1999). Early treatment of the Ainu appears toward the end of the opinion. Id. at 422.
\footnote{42} Id. at 422-23.
\footnote{43} Hokkaidō kyūdojin hogohō [Hokkaidō Former Aborigine Protection Act], Law No. 27, Mar. 1, 1899 (Japan), reprinted in SIDDELL, supra note 39, at app. 1, 194-96 (English translation). The name of the legislation itself is quite suggestive. By calling the Ainu “former aborigines,” the Act asserts that the State has successfully integrated the “aboriginal” Ainu into “modern” Japanese way of living. Id.
\footnote{44} See LIE, supra note 25, at 92.
\footnote{45} See SIDDELL, supra note 39, at 70. A translation of the law appears in the appendix. See id. at 194.
\footnote{46} See LIE, supra note 25, at 92.
\footnote{47} See SIDDELL, supra note 39, at 71.
\footnote{48} Id. at 70-71.
\footnote{49} Id.
\footnote{50} Id. at 144.
\end{flushright}
identify as Ainu, though perhaps as many as 300,000 Japanese could claim Ainu ancestry.\textsuperscript{51} This suggests that the policies have limited the number of people who identify as Ainu, while increasing the number identifying as Japanese. Numerically at least, the Japanese assimilation of the Ainu was a success.

\textbf{B. Multiethnic Empire (1910-1945)}

As Japan’s colonial ambitions mounted, however, a more expansive assimilation policy emerged. Immigration to Japan, both voluntary and involuntary, grew over the course of its colonial period (1895-1945), particularly towards the end.\textsuperscript{52} With the annexation of Taiwan in 1895, Korea in 1910, Manchuria in 1931, and Singapore in 1942, Japan led an essentially multiethnic empire.\textsuperscript{53} Japan, however, did not aim to integrate colonial others with ethnic Japanese.\textsuperscript{54} Despite a range of assimilation policies with varying degrees of success, Japan essentially opposed assimilation between colonial others and Japanese.\textsuperscript{55} Japan sought to maintain positions of privilege for ethnic Japanese.\textsuperscript{56} The “actual environment of Japanese colonialism was hostile to any true merger of the Japanese with their dependent peoples,”\textsuperscript{57} As manifest in both active discouragement of intermarriage and relatively cloistered quarters in the metropole.\textsuperscript{58}

Despite legal equality between Japanese and colonized subjects, there was little doubt that the Japanese retained the positions of power in colonial relations. While there may have been talk of universal brotherhood and equal treatment (\textit{isshi dōjin}) between colonized peoples and Japanese and legal equality

\textsuperscript{51} See \textsc{lie}, supra note 25, at 4.

\textsuperscript{52} See \textsc{morris-suzuki}, supra note 1, at 42-44 (noting that surprisingly Japan did not have a centralized system of immigration control until it took measures during the end of the nineteenth century when it first acquired a colony, namely Taiwan).

\textsuperscript{53} See \textsc{loyd e. lee}, \textsc{world war 2 in asia and the pacific and the war's aftermath, with general themes} 122 (1998).

\textsuperscript{54} See \textsc{morris-suzuki}, supra note 1, at 42-43.

\textsuperscript{55} Id.

\textsuperscript{56} Mark R. Peattie, \textsc{Japanese Attitudes Toward Colonialism, 1895-1945, in the Japanese Colonial Empire} 80, 98 (Ramon H. Myers & Mark R. Peattie eds., 1984).

\textsuperscript{57} Id.

\textsuperscript{58} Id.
guaranteed as a matter of imperial citizenship (teikoku shinmin),\textsuperscript{59} colonial subjects only enjoyed de jure equality. To ensure segregation of Japanese and colonial populations, the Japanese government maintained separate family registries (hoseki) for ethnic Japanese (naichijin—people of the interior) and for colonized subjects (gaichijin—people of the exterior).\textsuperscript{60} Distinct registries ensured that colonized subjects were still marked as “other” and filed away accordingly.\textsuperscript{61} The family registry system contains information about one’s lineage that employers, schools, potential spouses, and others may wish to access before making a decision about employment, matriculation, or marriage, often for discriminatory purposes.\textsuperscript{62} After World War II, separate registries facilitated the separation of ethnic Korean and Taiwanese from ethnic Japanese, leading to their eventual denationalization.\textsuperscript{63}

In the early 1940s, as the war effort decimated the Japanese labor force, Japan started to mobilize Koreans—usually forcibly—from the peninsula to work in Japan.\textsuperscript{64} The same was true for mainland Chinese.\textsuperscript{65} Both Koreans and Chinese performed hard labor in mines, factories, and construction sites throughout the archipelago.\textsuperscript{66} By the time Japan surrendered in 1945, over two million Koreans resided in Japan,\textsuperscript{67} as did over 40,000 mainland

\begin{footnotesize}
\textsuperscript{59} See Lie, supra note 25, at 123.
\textsuperscript{60} Yuji Iwasawa, Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law, 8 Hum. RTS. Q. 131, 144 (1986).
\textsuperscript{61} See id. at 146.
\textsuperscript{62} See generally Taimie L. Bryant, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan, 39 UCLA L. Rev. 109 (1991) (discussing the impact of the family registration system in Japan). The family registry helps maintain hierarchy in Japanese society by excluding persons such as illegitimate children, burakumin (ethnic Japanese who have historically worked in undesirable or culturally “unclean” professions) and resident Koreans and Taiwanese. Id. Information on the family registry is used by employers, potential spouses and schools to learn more about a person, and evaluate his or her desirability accordingly. See id. at 111-12.
\textsuperscript{63} See Kim, supra note 38, at 51, 56.
\textsuperscript{64} See id. at 55.
\textsuperscript{66} Kim, supra note 38, at 55.
\textsuperscript{67} Id.
\end{footnotesize}
Chinese.\textsuperscript{68} The Chinese were sent back, but at least some of the Koreans chose to remain in Japan, as discussed in the following section.

When it suited Japan’s political aspirations, even Koreans and Taiwanese could be legal equals to ethnic Japanese nationals, at least as a matter of law. Despite formal equality, however, there is no doubt that resident Koreans and resident Taiwanese have enjoyed second-class treatment in Japan from the colonial period to the present.

\textit{C. Postwar Period (1945-1980)}

After World War II, the Allied powers attempted to democratize Japan.\textsuperscript{69} The Potsdam Declaration proposed that, “[t]he Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.”\textsuperscript{70} The Declaration’s focus on “the Japanese people” may have unwittingly overlooked the presence of over two million non-Japanese who resided in the archipelago after the war, most of them Korean.\textsuperscript{71} In brief, the Occupation Years (1945-1952) were foundational not only in rebuilding and transforming Japanese society, but also in promoting a distinctly ethnic Japanese citizenship that rested atop the pyramid of privileges.

Japan’s reorientation was complicated. The imperial power that once sought to colonize all of East Asia turned inward to address problems stemming from its militaristic drift of the 1930s and 1940s. After the war, and under intense pressure from the American “allies,” a primary item of democratization was a new Constitution.\textsuperscript{72} Spearheaded by the Supreme Commander of the Allied Powers (“SCAP”), and General Douglas MacArthur, many

\textsuperscript{68} Webster, \textit{supra} note 65, at 736.


\textsuperscript{71} See Sonia Ryang, \textit{Resident Koreans in Japan}, in \textit{KOREANS IN JAPAN: CRITICAL VOICES FROM THE MARGIN} 1, 3-4 (Sonia Ryang ed. 2000).

\textsuperscript{72} See Webster, \textit{supra} note 69, at 435-36.
of the initial drafters of the Japanese Constitution were young American soldiers. But Japanese politicians also played an active role in drafting the Constitution, and subsequently modifying it during internal debates. As argued elsewhere, the Japanese side played a critical role in narrowing the protective ambit of the Constitution. Though others have ably excavated the many sessions and negotiations comprising the drafting process, this section focuses on the ethnic implications of those debates.

In the initial draft, SCAP included two provisions to expansively protect human rights in the Japanese Constitution. Both provisions were significantly narrowed by the Japanese side. One article read, "[a]ll natural persons are equal before the law. No discrimination shall be authorized or tolerated in political, economic or social relations on account of race, creed, sex or social status, caste, or national origin." This is an extraordinarily broad set of protections—far broader than those enjoyed by Americans at the time—that would reach not only young Americans and other foreigners residing in Japan, but also Ainu, Koreans, Chinese, Taiwanese, Okinawans, and others. Over the course of negotiation and translation from English to Japanese (and back again), the subject of the nondiscrimination provision shrank from "all natural persons" to "all people" in English and "all citizens" in Japanese. It is unclear whether SCAP appreciated the linguistic differences between "all people" and "all citizens," but it is clear from the historical record that the Japanese side wanted to diminish the Constitution’s protective

73 See id.
74 See id. at 442.
75 Id.
76 See, e.g., Ray Moore & Donald Robinson, Partners for Democracy (2002). This book outlines the entire history of the Japanese constitutional drafting process, including the “marathon session” which changed some of the language pertaining to the rights of foreigners. See id. at 129-130.
77 Webster, supra note 69, at 443. The MacArthur Draft specifically extended basic rights to “Japanese subjects and to all persons within Japanese jurisdiction.” Id.
78 Id.
79 Id. (emphasis added).
80 See id.
81 Id. at 443-44.
ambit and succeeded in doing so. In addition, one of the bases—nationality—was scrapped from the list of protected categories. This alteration helped establish a constitutional regime that protects Japanese citizens, but no one else, which is essentially how the Japanese Constitution reads today.

A second provision read, "[a]liens shall be entitled to the equal protection of law," but the Japanese side questioned the necessity of protecting aliens and decided to remove this provision in its entirety. Aliens enjoy no rights under the Japanese Constitution. While this is not necessarily different from many other constitutions, the removal of aliens is important because the American side intended to protect aliens, and the Japanese side resisted this move by narrowly circumscribing legal protections.

The exclusion of non-Japanese was no aberration, but part of a coordinated policy to expel ethnic others—particularly resident Koreans—from the Japanese body politic. Even before the drafting of the Constitution, the Japanese government expressed its views on the presence of non-Japanese in Japan. A 1945 amendment to the Election Law nullified the right to vote, and

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82 Id. at 447-48.
83 Webster, supra note 69, at 444.
84 Id. at 443.
85 Id. at 444-45 (describing the process by which "all natural persons" became "all citizens"). In addition, the Japanese side changed the protected base of "nationality" into "family lineage," which moves the issue away from nationality, and towards class, status and family background. Id. at 444.
86 See id. In the 1977 McLean decision, the Supreme Court of Japan determined that aliens in Japan enjoy equal constitutional rights as citizens of Japan, save for those rights that "by their nature" should not apply to aliens (such as the right to vote, the right to serve in political office, etc.). Id. at 449.
87 See id. at 445; see also Iwasawa, supra note 60, at 146 ("Japan should not have deprived all Koreans of their Japanese nationality unilaterally based on [their] koseki (family registry) system, but should have referred to the nationality laws of Korea and given to those Korean residents who wished to select Japanese nationality a chance to do so.").
88 See Kim, supra note 38, at 56.
89 See id. The drafting began in January 1946, with the American and Japanese side conducting their most vigorous debates in February and March 1946. Id. The Diet debated the Constitution over the summer of 1946, before promulgating it in November 1946. Webster, supra note 69, at 441-442.
90 Election Law, Law No. 42 of 1945 (suspending the electoral eligibility of persons not covered by the Family Registry Act).
the right to run for office, of persons not covered by Japan's family registry, namely resident Koreans and Taiwanese.91 Just months after surrender, Japan was already seeking to limit the legal rights of ethnic minorities by prohibiting their participation in politics.92 Suffrage and electoral eligibility are two key channels for people, including minorities, to express their voice on national debates and to influence policy and legislation. Both channels were severed by this amendment.

In May 1947, the Cabinet also weighed in on the debate.93 An Alien Registration Ordinance94 stipulated that "in the application of this Ordinance Taiwanese and Koreans shall be deemed, for the time being, as aliens."95 After disenfranchising resident Koreans and Taiwanese, the next step was to alienate them, that is, to subject them to alien registration procedures: annual registration, periodic fingerprinting, and the obligation to carry one's alien registration card at all times.96 Most Koreans and Taiwanese returned to their newly independent homelands after the war,97 yet many remained in Japan. For several years in the late 1940s, the number of aliens registered in Japan hovered around 640,000, some 600,000 of whom were Korean.98 It was only in 1952, just prior to the effectuation of the San Francisco Peace Treaty,99 that the legal determination of resident Koreans and Taiwanese took final form.100 In April, the Ministry of Justice issued a circular, stripping all ethnic Koreans and Taiwanese of their Japanese nationality.101 One way to interpret these events is to suggest that since Japan no longer maintained control over Korean and Taiwanese territory, why should its

91 Kim, supra note 38, at 56.
92 See id.
93 See id.
94 Alien Registration Ordinance, Order No. 207 of 1947, Art. 11.
95 Id.
96 See id. at 58-59.
97 See id. at 55.
98 Id. at 57.
100 See Iwasawa, supra note 60, at 144.
101 See id.
government bestow the benefits of citizenship on people who came therefrom? To be sure, resident Korean and Taiwanese residents of Japan could have naturalized through standard Japanese immigration processes, but they would have had to shed their original name, take on a Japanese name, and submit their applications to the discretionary selection processes of the Ministry of Justice.102 As a matter of law, resident Koreans and Taiwanese were henceforth aliens, subject to a new legal framework, including the Immigration Control Act103 and Alien Registration Ordinance.104

The Alien Registration Law imposed numerous restrictions on the Korean and Taiwanese minorities.105 For instance, they had to register as aliens, renew their registration every three years, carry their registration card at all times, and present it when requested by a police officer.106 When renewing their registration, resident Koreans and Taiwanese had to be fingerprinted, which many considered offensive given the criminal connotations of fingerprinting.107 They were excluded from social welfare programs that require Japanese nationality,108 and they were denied the opportunity to work in many civil service positions that involve the "exercise of public authority or the formation of public will."109 Such a constraint may seem appropriate for positions where exercise of state sovereignty is implicated, such as diplomatic service, or service as prime minister,110 but this

102 See Kim, supra note 38, at 65.
103 See id. at 57-58 (discussing the Immigration Control Act, Cabinet Order No. 319 of 1951).
104 The Alien Registration Law was promulgated on the same day that the Peace Treaty took effect: April 28, 1952. Id. Law No. 125 of 1952. The message from the Japanese government was clear: having lost the former colonies by virtue of the Peace Treaty, we hereby renounce any responsibility to the people we colonized. See Kim, supra note 38, at 58.
105 See Kim, supra note 38, at 61.
106 Id.
107 See Bryant, supra note 62, at 126.
108 Kim, supra note 38, at 61.
109 Id.
regulation also prohibits resident Koreans and Taiwanese from teaching in public schools, delivering the mail, and working as nurses in public hospitals.\textsuperscript{111} In a controversial 2005 decision, the Supreme Court of Japan upheld a Tokyo ordinance that prevented a resident Korean nurse from working in a public hospital.\textsuperscript{112}

Policies from half a century ago continue to be relevant in the present. As we shall see in the next part, resident Koreans have mounted a host of legal challenges to various aspects of the legal framework governing permanent aliens, with varying degrees of success.\textsuperscript{113} In these suits, international human rights law provides essential legal and normative bases for their claims.\textsuperscript{114}

\subsection*{D. Contemporary Japan (1980 to present)}

By 1992, 1.3 million registered foreigners lived in Japan, about one percent of the total Japanese population.\textsuperscript{115} About 35\% of these were so-called special permanent residents, mainly Koreans (and some Chinese), mostly descended from the migrants who entered Japan during the colonial period from 1895-1945.\textsuperscript{116}

One of the most explicitly racialized policies of recent vintage is the 1990 revision of the Immigration Control and Refugee Recognition Act.\textsuperscript{117} In the 1980s, as Japan became the second largest economy in the world, migrants from Asia flocked to Japan

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\textsuperscript{111} Kim, \textit{supra} note 38, at 61.
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\textsuperscript{112} Webster, \textit{supra} note 69, at 451-53. Thirteen of fifteen Justices agreed that Tokyo had a "rational basis" to distinguish foreigners from citizens in appointing local civil servants. \textit{Id.} at 453. The Tokyo District Court agreed with this ruling, finding that "the Constitution does not guarantee foreigners the right to employment as a civil servant." \textit{Id.} at 452. The Tokyo High Court reversed, holding that employing foreigners in certain civil service positions would not infringe upon national sovereignty, but the Supreme Court overturned the appellate court's ruling by discerning a rational basis in the city policy. \textit{Id.} at 453.
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\textsuperscript{114} \textit{Id.}
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\textsuperscript{115} Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 1951, \textit{translation available at} \url{http://www.cas.go.jp/jp/seisaku/hourei/data/icrra.pdf}.
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\textsuperscript{116} \textit{Id.}
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\textsuperscript{117} Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 1951, \textit{translation available at} \url{http://www.cas.go.jp/jp/seisaku/hourei/data/icrra.pdf}.
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to perform unskilled labor, often illegally.\(^\text{118}\) Higher up the value chain, skilled workers were needed to supply Japan with the talent necessary to compete globally.\(^\text{119}\) The immigration law was revised to respond to these fluctuations, responding in three main ways. First, the law broadened the scope of legal employment in which certain skilled and professional foreigners could engage.\(^\text{120}\) Second, it introduced penalties against employers that illegally employed foreign workers, and against brokers that found jobs for them.\(^\text{121}\) Third, it permitted descendants of overseas Japanese—primarily in Brazil and Peru—to work in Japan with no job restrictions, for up to three years.\(^\text{122}\) In effect, this opened up the unskilled labor market to the Japanese diaspora and closed it to the South Asians, East Asians, Southeast Asians, and others who had been working in Japan during the 1980s.\(^\text{123}\) The Japanese government accepted almost 200,000 ethnically Japanese workers and effectively excluded all other unskilled laborers.\(^\text{124}\)

Though ethnically Japanese, most Japanese-Brazilians and Japanese-Peruvians experience a completely different language, culture and society upon touching down in Japan. Nevertheless, their presence in Japan highlights official concern with maintaining ethnic homogeneity in the face of cultural diversity.\(^\text{125}\) It is unlikely that many Japanese citizens would actually encounter Japanese Latinos, who are normally concentrated in company housing and bused to their jobs through company transportation.\(^\text{126}\) The Japanese physiognomies sought by the national government remain largely invisible to the populace.

A final note touches on Japan’s refugee policy. It would be

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\(^{119}\) See id. at 183-84.

\(^{120}\) Id. at 183.

\(^{121}\) Id. at 183-84; see also Timothy Webster, *Reconstituting Japanese Law: International Norms and Domestic Litigation*, 30 Mich. J. Int’l L. 211, 214 (2008) (discussing the creation of penalties for employers hiring illegal workers and for individuals who help employers find illegal labor).

\(^{122}\) Webster, *supra* note 121, at 214-15.

\(^{123}\) See id. at 215.


\(^{125}\) See id.

\(^{126}\) See id. at 200.
unfair to evaluate a country’s openness to ethnic others solely by looking at its treatment of refugees. But refugee policy can reflect attitudes towards foreigners and international commitments to provide for stateless people. In this respect, Japan has gone from a policy of refusing asylum-seekers for the first part of the postwar period (1945 to 1978), to one of grudging acceptance of a small number of refugees since it ratified the Refugee Convention in 1981.127

Criticism of the tightly circumscribed nature of Japan’s refugee regime has been widespread.128 Even after ratifying the Refugee Convention, Japan has been loath to accept asylum-seekers; in each year from 1989 to 1997, the number of acceptances never exceeded single-digits.129 From 1998 to 2004, acceptances averaged around twenty per year.130 And while numbers have increased slightly since then, it is fair to conclude that Japan has not been a major destination country for refugees. With this slight uptick in acceptances, however, has also been an increased willingness by courts to appeal decisions rendered by the Ministry of Justice, and grant asylum.131 This will be more fully explored in the next section.

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128 See, e.g., OSAMU ARAKAKI, REFUGEE LAW AND PRACTICE IN JAPAN 233 (2008) (“Japan’s refugee determination system conflicts with any reasonable understanding of the notions of fair decision-makers and fair procedure. Under the present Japanese determination system, it is difficult to believe that accurate and fair decisions can be assured.”); Akashi Junichi, Challenging Japan’s Refugee Policies, 15 ASIAN & PAC. MIGRATION J. 219, 221 (2006) (“Many existing studies and commentaries on Japan’s refugee policy are inclined to take a critical attitude toward Japanese society or government for falling short of complying with international humanitarian regimes.”); MUKAE, supra note 127, at 242 (“In a nutshell, Japan’s isolationist asylum (and more generally immigration) policy has been construed and in fact used in order to defend Japan’s putative national cultural/ethnic purity and hence its economic prosperity and public safety. Obviously, Japan, as a major economic power, cannot get away with keeping such an exclusionist attitude in this increasingly interdependent world.”).
129 ARAKAKI, supra note 128, at 27; Junichi, supra note 128, at 219.
130 See ARAKAKI, supra note 128, at 27.
II. Cases: Litigation Challenges Disparate or Unfair Treatment

We have examined how over time the Japanese state has promoted the interests of ethnic Japanese over those of various minority groups. Given the demographic dominance of ethnic Japanese citizens in Japan, minorities encounter serious obstacles in protecting themselves through political processes. A group numbering in the tens of thousands (like the Ainu), or even in the hundreds of thousands (like resident Koreans), does not count for much in a country with 125 million people. Moreover, permanent residents and temporary residents cannot vote in national elections and in most local elections, eliminating one common channel to voice grievances.

Lawsuits, on the other hand, offer one way through which dispossessed minorities can challenge laws that inure to their detriment. Since the laws in many cases do not provide for causes of action, minority plaintiffs often cite international human rights law to lend additional moral, legal, or normative weight to their claims. Several kinds of cases illuminate the ways that international law has served to challenge the Japanese ethno-state. This section focuses on three cases that correspond to the general

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132 With a population of less than 2%, only a fraction of which are citizens of Japan (and hence voters in national elections), minorities have a difficult time availing themselves of political processes. See Registered foreign population in Japan hits record-high 2.21 million, JAPAN TODAY, July 11, 2009, http://www.japantoday.com/category/national/view/registered-foreign-population-in-japan-hits-record-high-221-million.

133 John Lie, relying on Japanese sources, puts the number of Ainu at 24,000, though the number of people with Ainu ancestry could easily exceed that number by a factor of ten. JOHN LIE, supra note 25, at 94. The Economist fixes the number of resident Koreans at 406,000. See A foreigner in her own home: Shady treatment of its Korea residents once again deals Japan a black eye, ECONOMIST, Mar. 10, 2011, available at http://www.economist.com/node/18338862.

134 See Miles J. Hawks, Translation and Comment, Granting Permanent Resident Aliens the Right to Vote in Local Government: The New Komeito Continues to Promote Alien Suffrage in Japan, 17 PAC. RIM L. & Pol’y J. 369, 370-71 (2007) (noting that only Japanese citizens can vote in national elections, but local governments are currently considering provisions to allow permanent residents the right to vote).

135 See supra note 4 and accompanying text.
types of minorities in contemporary Japan. The first type of case concerns Japan’s Ainu population by analyzing an important decision from 1997, showing how international human rights law expanded the scope of applicable law and led judges to hold an administrative taking illegal under domestic and international law. The second type of case involves a cluster of challenges brought by resident Koreans to two of Japan’s policies on resident aliens: the fingerprinting regime and the refusal to grant various forms of welfare. The third type of case addresses the absence of domestic protections for discrimination in the private sphere, rather than any particular enacted law or policy. While it may seem unfair to focus on the absence of law, I argue that this lacuna is significant as the result of the Diet’s failure to pass protective legislation.

A. Ainu

The Ainu people represent a tiny subpopulation within Japan. By one estimate, approximately 24,000 Japanese self-identify as Ainu, though many more can trace their lineage back to Ainu ancestry. As with indigenous populations in other countries, the Ainu face various socioeconomic challenges in their encounters with mainstream society: they are twice as likely to receive welfare as the average Japanese citizen, yet less than half

136 This typology is modified slightly from David L. Howell, Ethnicity and Culture in Contemporary Japan, in 1 RACE, ETHNICITY AND MIGRATION IN MODERN JAPAN 103 (Michael Weiner ed., 2004). Howell divides Japan’s minorities into native minorities (Ainu, Okinawans, and Burakumin), Koreans brought to Japan during World War II and their descendants, and recent immigrants from Asia and Latin America. Id. at 104. This article narrows the focus of the first category to examine only one group of natives: the Ainu people. I do this because of the long period of acculturation policy that the Japanese state directed at the Ainu, and because, so far as I can tell, Okinawans and Burakumin have not used international human rights law to bolster their legal claims. Conversely, this article expands the focus of category three to include other recent immigrants from the United States and Europe.

137 See infra, Parts II.C.1, II.C.2.

138 Tsunemoto, supra note 110, at 120.

139 For example, only eighteen percent of Native Americans aged eighteen to twenty-four enroll in college, while forty-two percent of whites aged eighteen to twenty-four enroll in college. Michelle J. Nealy, Chronicling the Lives of Native Americans on Predominantly White Campuses, DIVERSE: ISSUES IN HIGHER EDUCATION (Mar. 4, 2009), http://diverseseconducation.com/article/12362/.
as likely to attend university.\textsuperscript{140} Since the 1980s, as indigenous rights movements have sprung up in other areas of the globe, the Ainu too have launched a movement to establish their ethnic identity and secure certain indigenous rights.\textsuperscript{141}

The minority status of the Ainu in Japan has been contested since at least 1980, when Japan, in its first periodic report to the U.N. Human Rights Committee, stated that the Japanese Constitution supports "[t]he right of any person to enjoy his own culture, to profess and practice his own religion or to use his own language.... However, minorities of the kind mentioned in the Covenant do not exist in Japan."\textsuperscript{142} This statement reflects an official view of ethnic differences in Japan, or rather their absence, while providing an important starting point for official discussions about the recognition of minority culture. In a later periodic report, the Japanese government acknowledged that under Article 27 of the International Covenant on Civil and Political Rights ("ICCPR"),\textsuperscript{143} the Ainu constituted a minority,\textsuperscript{144} yet the government has been unwilling to officially recognize the Ainu as an \textit{indigenous} minority.\textsuperscript{145} This is perhaps out of fear that such recognition would validate, and possibly increase, claims for self-determination by the Ainu.

A degree of self-determination was at the heart of a lawsuit

\textsuperscript{140} See Tsunemoto, \textit{supra} note 110, at 121.

\textsuperscript{141} \textit{Id.} at 121-22.


\textsuperscript{143} International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171, 179 [hereinafter ICCPR].


filed in 1993 by two members of the Ainu minority.\textsuperscript{146} The pair sued a Japanese administrative agency for approving a dam that eventually flooded lands sacred to the Ainu.\textsuperscript{147} In a strongly worded 1997 decision, the Sapporo District Court found the Minister of Construction, who was ultimately responsible for the approval, had not sufficiently investigated the case and had failed to understand the harm done to the Ainu.\textsuperscript{148} But since the dam had already flooded the religious site, and would require great expense to remove, the court deployed the “public welfare” exception to conclude that the dam could remain where it was.\textsuperscript{149}

In concluding that the Ainu were an ethnic minority deserving of protection, the court relied heavily on international law, primarily the ICCPR, but also the International Labor Organization (“ILO”) Convention on Indigenous People.\textsuperscript{150} The judgment recognized that the Ainu were an ethnic minority under the ICCPR.\textsuperscript{151} Moreover, the Ainu constituted an “indigenous people” that retained a unique culture and identity, “even after suffering enormous social and economic devastation wrought by policies adopted by the [ethnic Japanese] majority.”\textsuperscript{152} In light of the comments made to the Human Rights Committee a decade before, this recognition represents real progress.

Plaintiffs cited Article 27 of the ICCPR, which provides that minorities “shall not be denied the right . . . to enjoy their own culture.”\textsuperscript{153} Though this provision imposes a negative obligation upon member states (\textit{not} to deny the right), the Japanese court found “a positive obligation”\textsuperscript{154} upon Japan to “exercise due

\begin{thebibliography}{99}
\item Levin, \textit{supra} note 41, at 399-400.
\item \textit{Id.}
\item \textit{Id.} at 398-99, 403.
\item \textit{Id.} at 429.
\item Levin, \textit{supra} note 41, at 418.
\item \textit{Id.} at 422.
\item ICCPR, \textit{supra} note 143, 999 U.N.T.S. at 179.
\item Tokushiro Ohata & Takahide Nagata, \textit{Illegality of the Expropriation of Ainu Land in View of Their Rights As an Indigenous People}, 18 WASEDA BULL. COMP. L. 99,
\end{thebibliography}
care . . . when deciding upon, or executing, national policies that risk adversely affecting a minority’s culture." This amounts to a fairly robust reading of Article 27, which is otherwise phrased quite passively. In no uncertain terms, the court held that the Japanese Ministry of Culture failed to exercise due care in reviewing materials that authorized the dam. The Minister “neglected the investigative and research procedures that were necessary to judge the priority of the competing interests; . . . unreasonably made little of and ignored various factors and values that should have been given the highest regard; [and] . . . recognized only the smallest possible impact on Ainu culture and left any damages thereupon unremedied.”

While decrying the Minister’s neglect, the court did not offer compensation for the authorization, and indeed permitted the dam to reach completion. Still, in cataloguing the various misdeeds of the Minister, and importing various notions about the rights of indigenous people, the court fulfilled international legal obligations to protect human rights. One can rightly dispute the nature of the remedy ordered—essentially a slap on the wrist of the Ministry—but the influence of international law in judicial reasoning was impressive and still relatively scarce, up until that point, in Japanese jurisprudence.
B. Ethnic and Racial Discrimination\textsuperscript{160} Lawsuits

In a string of racial discrimination lawsuits brought in the past decade, courts have had ample opportunity to use international human rights law to correct domestic law, or more accurately, to correct the absence of domestic law.\textsuperscript{161} In 2003, the Japanese Diet debated, but failed to pass, a human rights protection bill that would make illegal much of the conduct at issue in these cases, such as discrimination by real estate agents, shopkeepers, bar owners, and providers of services.\textsuperscript{162} It has been subsequently resubmitted, but failed to find the necessary political support among members of the Diet.\textsuperscript{163} For the time being, victims of racial and ethnic discrimination will have to look beyond Japan's domestic legislation, and the political processes that create it, to fashion their arguments.

The issue of racial discrimination in the private sphere is not new in Japan. Resident Koreans challenged employment discrimination in the 1970s\textsuperscript{164} and housing discrimination in the

\textsuperscript{160} The differences between race and ethnicity are complex and beyond the scope of this inquiry. For purposes of this paper, cases of ethnic discrimination refer to lawsuits brought by resident Koreans, ethnic Chinese, or other East Asians whose physical appearance would not permit immediate differentiation from the “typical” Japanese physiognomy. Cases of racial discrimination refer to cases brought by whites, African-Americans, Latinos, South Asians, and others whose physical appearance is distinguishable from the typical Japanese.


\textsuperscript{162} Id. at 247. Certain forms of discriminatory behavior, such as differential treatment in wages and working conditions, were proscribed by the Labor Standards Act. See Labor Standards Act, Law No. 49 of 1947, arts. 3, 4 (Japan). But this act does not address discrimination in hiring, nor discrimination on the basis of race, national origin, or ethnicity. See id.

\textsuperscript{163} See Webster, supra note 161, at 248 (stating the human rights protection bill was resubmitted in 2005). With the change of political power in September 2009, it is conceivable that the more liberal Democratic Party of Japan may resubmit the bill. See Japan NGO Network for the Elimination of All Forms of Racial Discrimination, NGOs Answers to the Questions by the Rapporteur in Connection with the Consideration of the Third to Sixth Periodic Reports of Japan (CERD/C/JPN/3-6), 17 (Feb. 3, 2010) available at http://www2.ohchr.org/englishbodies/cerd/docs/ngos/SNMJ_Answers_Japan_76.doc.

1980s. However, a 1998 decision rendered by the Shizuoka District Court has reinvigorated racial discrimination lawsuits. In this case, a Japanese owner of a jewelry store expelled a Brazilian woman from his store because she was a foreigner, which she believed was an illegal violation of her human rights. The court agreed with her claim, ordered compensation for the plaintiff, and relied heavily on the International Convention to End All Forms of Racial Discrimination ("CERD") in so doing. This set an important, although unbinding precedent for future victims of racial discrimination in the private sphere.

In his judgment, Judge Soh Tetsuro fashioned a tort remedy out of international and constitutional law. He did not specifically examine the issue of whether CERD had direct or indirect effect, but simply noted that, "CERD is beneath the Constitution, but still has effect in this country as domestic law." In his analysis, Judge Soh focused on a comment made by the Japanese Minister of Foreign Affairs to the CERD Committee that Japan did not need to take "[n]ew legislative measures ... to effectuate this treaty." The official posited that Japan's existing legal system could handle racial discrimination in the private sphere without implementing additional legislation. The judge disagreed, asking rhetorically, "do we dare think that legislative measures and budgetary measures will not be necessary [to adequately safeguard these rights]?" By and large, Japanese judges defer to the decisions and statements of the political branches, so this amounted to a fairly strong judicial rebuke both to the executive (for its statement) and to the legislature (for

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167 Webster, supra note 166, at 631-32.
168 Id.
169 Id.
170 Id. at 651.
171 Id. at 651 (alteration in original).
172 Webster, supra note 166, at 631-32.
173 Id. at 652 (emphasis added).
174 See Webster, supra note 161, at 260.
failing to pass a racial discrimination law). Indeed, the nature and
discursiveness of this opinion suggest that the judge aimed to send
a message. CERD urges states to pass laws banning racial
discrimination by private persons, and if the state fails to do so,
it states that courts are the appropriate venue to handle the
dispute. As the verdict states,

CERD goes one step farther [than the Universal
Declaration of Human Rights] by requiring signatories to
take legislative and other measures to deal with individual
and group acts of racial discrimination.

This means that if an act of racial discrimination
violated a provision of CERD, and the state or organization
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 take other
measures for relief, against the state or organization due to
the omission.

Article 6 of CERD guarantees victims of racial discrimination
"effective protection and remedies, through the competent national
tribunals." If Japan does not pass laws to proscribe
discriminatory conduct, either nationally or locally, this absence
cannot inoculate racist behavior.

To fill the gap in legislation, Judge Soh used CERD's
prohibition on racial discrimination by third parties as an
interpretive aid (or "interpretive standard" in Japanese parlance)

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175 The opinion is also noteworthy for its didactic introduction to the history of
human rights, from Confucius and Mencius to Martin Luther and World War II. See
Webster, supra note 166, at 652-53, 656. Needless to say, such a historical introduction
would be rare in most jurisdictions.

176 See International Convention on the Elimination of All Forms of Racial
that "Each State Party shall prohibit and bring to an end, by all appropriate means,
including legislation as required by circumstances, racial discrimination by any persons,
group or organization.").

177 Id. art. 6.

178 Webster, supra note 166, at 652.

179 CERD, supra note 176, art. 6.

180 To this day, Japan has not passed a law proscribing discriminatory conduct at
either national or local levels. See Webster, supra note 161, at 250.

181 CERD, supra note 176, art. 2(1)(d).

182 Webster, supra note 166, at 652.
to determine that the storeowner’s expulsion was illegal. By denying plaintiff access to services held out to the general public, the storeowner certainly violated Article 5(f) of CERD, even if no domestic law was violated. In so doing, Judge Soh seems to have applied Article 6 of CERD, which empowers national tribunals to adjudicate disputes and award compensation. By awarding damages and finding an illegal act—the tort of racial discrimination—Judge Soh provides both process and compensation for the dispute. To reiterate, the opinion does not say it is directly applying CERD, but seems to achieve as much by finding liability and ordering compensation anyway.

Many subsequent cases also applied CERD in this way. Japanese courts apply international human rights law between private citizens by citing to CERD as an “interpretative standard.” Several courts have held that private acts of racial discrimination (rejecting people from public places, golf clubs, stores, house rentals, and bars) are “illegal,” and have ordered compensation accordingly, even in the absence of directly applicable domestic law. This “personalization” of international law suggests that international human rights law can meaningfully gap-fill in Japan’s unregulated private sector and may even be able to influence private persons’ behavior.

Over the years, courts have taken a relatively unified stance in applying CERD to private parties, reading international law through the language of domestic tort law. The Sapporo District Court spelled out this process a bit more elaborately:

Article 14(1) of the Constitution, the ICCPR, and CERD

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183 Id. at 631-32.
184 CERD, supra note 176, art. 5(f). CERD guarantees “right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.” Id. (emphasis added).
185 Id. art. 6.
186 Webster, supra note 166, at 631-32.
188 See generally Webster, supra note 159 (outlining how Japanese courts have turned to international human rights law to address racial discrimination).
189 Id. at 260.
190 Id. at 260-61.
do not apply directly to relations between private persons. But if private conduct specifically violates, or risks violating, another person’s basic rights or equality, these provisions can be used to evaluate social norms. Articles 1 and 90 of the Civil Code,\(^{191}\) among others, generally regulate private autonomy, and protect an individual’s interests against illegal infringements of basic rights and equality. Thus, Article 14(1) of the Constitution, the ICCPR, and CERD can serve as one standard in interpreting the above provisions of private law.\(^{192}\)

Cases such as these suggest that international law—even when not accompanied by relevant domestic law—can advance human rights in important areas that domestic law, and the political process, may leave untouched.

C. Resident Koreans

The third type of case involves Japan’s resident Korean population, which has comprised its largest ethnic minority presence for most of the postwar period.\(^{193}\) At present, some 600,000 resident Koreans live in Japan, most of them descended from those who immigrated to Japan during the colonial period.\(^{194}\) They do not possess Japanese citizenship, which in turn subjects them to various forms of discrimination by state and private actors.\(^{195}\) In light of the weak protections offered by domestic law, resident Koreans often turn to international human rights law to protect their rights.\(^{196}\)

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\(^{191}\) Article 1 of the Civil Code requires that rights and obligations shall be performed “in good faith.” MINPÔ [CIV. C.], art. 1 (Japan). Article 90 proscribes acts that are “against public policy.” Id. art. 90. The latter provision is commonly used in cases where a person discriminates against another, for example, on the basis of gender. See Hidenori Tomatsu, Equal Protection of the Law, 53 LAW & CONTEMP. PROBS. 109, 114 (1990).

\(^{192}\) Webster, supra note 159, at 317 (emphasis added). The court went on to note that Yonohama’s conduct amounted to “discrimination based on race, skin color, descent, ethnic origin or racial origin. In light of the meaning of Article 14(1) of the Constitution, Article 26 of the ICCPR, and CERD, these amount to private acts of racial discrimination that ought to be eliminated.” Id. at 317-18.

\(^{193}\) IWASAWA, supra note 113, 123.

\(^{194}\) Id. at 123-25.

\(^{195}\) Id. at 125.

\(^{196}\) Id. at 123-24.
Two clusters of cases in particular have cited numerous international human rights instruments: those challenging Japan's restrictive residency requirements and those challenging exclusive pension laws. First, for several decades, resident Koreans had to be fingerprinted whenever they renewed their alien registration cards or returned to Japan after traveling abroad. Through a series of lawsuits in the 1980s and early 1990s, resident Koreans challenged the necessity and legality of the fingerprinting regime, which was ultimately repealed in 1993. Many of their challenges were based on the prohibition on degrading treatment found in the ICCPR. Second, resident Koreans have routinely cited international human rights law to prod the Japanese government to provide them with pensions. Japan significantly revised its pension laws in the early 1980s, after ratifying the Refugee Convention, but many resident Koreans were still excluded from disability pensions, military pensions and old age pensions due to loopholes in the revised pension system. They have appealed to the International Covenant on Economic, Social and Cultural Rights ("ICESCR") in order to protect the right to social insurance.

1. Fingerprinting

After denationalization in 1952, resident Koreans and Taiwanese became aliens in Japan, and henceforth subject to its Alien Registration Law. Under this system, they had to have their fingerprints taken on a registration card, a registration certificate, and a fingerprint card, once every five years.

197 Id. at 150.
198 IWASAWA, supra note 113, 151 & n.102.
199 Id. at 151.
200 Id. at 171.
201 Id.
202 Id. at 172.
204 IWASAWA, supra note 113, 172-73.
205 Id. at 150.
206 Id. at 150.
Refusal to submit to this requirement could lead to up to one year of imprisonment, or a fine of up to 200,000 yen. Needless to say, a similar requirement was not imposed on Japanese nationals. The fingerprinting regime was gradually loosened over the course of the 1980s, and ultimately abolished in 1993. While this abolition came as the result of various political factors, including official negotiations between Japan and Korea, a series of lawsuits in the 1980s and 1990s added pressure and visibility to the cause.

For many aliens, the fingerprinting requirement was objectionable because of its associations with the criminal process; in Japan, as in many other countries, criminals are fingerprinted upon arrest. Beginning in the 1980s, resident Koreans refused to be fingerprinted upon renewing their registration forms or reentering Japan after traveling abroad. In 1985, some 360,000 aliens renewed their registrations, but over 10,000 refused to be fingerprinted.

In addition to these large-scale protests, a number of resident Koreans also launched legal challenges to the fingerprinting regime, relying heavily on international law. In an early case, the Tokyo District Court claimed that “to compel fingerprinting without just cause or need” could indeed amount to “degrading treatment” stipulated in Article 7 of the ICCPR.” But since there was a reasonable basis for the fingerprinting system—to wit “clarifying the residential and family relations of resident foreigners”—the court did not find a violation of international law.

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207 Id.
208 Id.
209 IWASAWA, supra note 113, 154-56.
210 Id. at 155.
211 IWASAWA lists half a dozen lawsuits, two of which went as far as the Supreme Court. Id. at 151, n.102.
212 Id. at 150.
213 Id. at 150.
214 IWASAWA, supra note 113, at 151.
216 Id. at 245.
In another lawsuit filed in 1989, plaintiff Yun Chang-yol claimed that the fingerprinting system violated his constitutional rights, as well as Articles 7 (degrading treatment) and 26 (non-discrimination) of the ICCPR.\(^{217}\) The Osaka High Court found the fingerprinting system constitutional, even though the Diet had abolished the system two years earlier.\(^{218}\) Under international law, however, the court arrived at a different conclusion.\(^{219}\) The international law claims pushed the court to examine a significant amount of foreign jurisprudence, including the *Tyrrer* decision from the European Court of Human Rights,\(^{220}\) the *East African Asian* cases of the European Commission of Human Rights,\(^{221}\) and various views and General Comments of the Human Rights Committee.\(^{222}\) These materials proved helpful to the Japanese court's conception of "degrading treatment."\(^{223}\) In particular, the foreign material instructed the court that degrading treatment involved a certain amount of humiliation beyond that normally felt from criminal conviction, yet below that felt from torture.\(^{224}\) In the end, the court decided that the fingerprinting system did not rise to the level of "degrading treatment" as proscribed by Article 7 of the ICCPR, though it did caution that "special considerations" were necessary when analyzing the treatment of resident aliens.\(^{225}\) Concerning the discrimination claim of Article 26 of the ICCPR, the court found that there was "room to suspect" that it was unreasonable to treat resident aliens differently from Japanese citizens as mandated by the fingerprinting system.\(^{226}\) While not a


\(^{218}\) Id. at 129-33.

\(^{219}\) Id.


\(^{223}\) ICCPR, supra note 143, at 7.

\(^{224}\) Yun Chang-yol, 38 JAPANESE ANN. INT’L L. at 130 (emphasis added).

\(^{225}\) Id.
strong condemnation of the fingerprinting policy, reference to international law permitted the court to suggest that a particular policy may have been illegal.\textsuperscript{227} The court was clear that neither the ICCPR nor the Constitution was violated, yet the ICCPR provided some cover for the court to question the legality and sagacity of the fingerprinting system as applied to resident aliens.\textsuperscript{228}

2. Pension Rights

One common feature of citizenship, in Japan and elsewhere, is the right to access social welfare programs, including pensions. In 1952, when all resident Koreans were stripped of their Japanese citizenship, they also lost the right to access pensions, national health insurance, and other entitlements of the welfare state.\textsuperscript{229} Though some Japanese municipalities made health insurance available on a local level, not all resident Koreans lived in such areas.\textsuperscript{230} Not until 1986 were all resident Koreans guaranteed national health insurance.\textsuperscript{231}

In 1982, upon acceding to the Refugee Convention, Japan revised its laws to nullify the nationality requirements for pensions.\textsuperscript{232} However, the revisions still excluded many resident aliens.\textsuperscript{233} Resident aliens over the age of thirty-five in 1982 were effectively barred because they were unable to make twenty-five years of payments by the time they would qualify for old age pensions at age sixty.\textsuperscript{234} Though an interim measure was later passed to cover these people, others remained ineligible for pensions, even to this day.\textsuperscript{235} For example, persons over sixty

\textsuperscript{226} Id. at 132. The court also held that "it cannot be denied that doubts are raised, with respect to [resident aliens] . . . that may give rise to a situation violating Article 13 and 14 of the Constitution and Article 7 and 26 of the Covenant." Id. at 132-133.

\textsuperscript{227} Id. at 129-131.

\textsuperscript{228} Id. at 132.

\textsuperscript{229} Yun Chang-yol, 38 JAPANESE ANN. INT'L L. at 130 (emphasis added).

\textsuperscript{230} See IWASAWA, supra note 113, at 170.

\textsuperscript{231} Id.

\textsuperscript{232} Id.

\textsuperscript{233} Id.

\textsuperscript{234} Id. at 172.

\textsuperscript{235} See IWASAWA, supra note 113, at 170.
years of age in 1986 cannot receive old age pensions, while persons over twenty years of age in 1982 cannot receive disability pensions.\textsuperscript{236}

Faced with such loopholes, many resident Koreans have turned to Japanese courts, and to international law, to challenge their exclusion from Japan’s pensions programs.\textsuperscript{237} In particular, the ICESCR guarantees “the right of everyone to social security, including social insurance.”\textsuperscript{238} Even so, disputes concerning disability pensions,\textsuperscript{239} old age pensions,\textsuperscript{240} and military pensions\textsuperscript{241} have generally not favored plaintiffs. Courts wriggle out of the very clear language of the ICESCR by claiming the treaty lacks direct effect; in the words of the ICESCR, its obligations are to be “achieved progressively.”\textsuperscript{242} In these cases,\textsuperscript{243} Japanese courts

\textsuperscript{236} Id.
\textsuperscript{237} Id.
\textsuperscript{238} ICESCR, \textit{supra} note 203, art. 9, 993 U.N.T.S. at 7.
\textsuperscript{239} Shiomi v. Governor of Osaka, 31 GYO\textsuperscript{2}SAISH\textsuperscript{U} 216 (Osaka Dist. Ct. Oct. 29, 1980), aff'd 35 GYO\textsuperscript{2}SAISH\textsuperscript{U} 2220 (Osaka High Ct., Dec. 19, 1984), aff'd 1363 HANREI JIH\textsuperscript{O} 68 (S. Ct., Mar. 2, 1989).
\textsuperscript{240} Hyon Sun Im v. Governor of Osaka, 1993 HANREI JIH\textsuperscript{O} 104 (Kyoto Dist. Ct., Feb. 23, 2007).
\textsuperscript{241} Kang Bu Jung v. Governor of Osaka, 1718 HANREI JIH\textsuperscript{O} 30 (Osaka H. Ct., Oct. 15, 1999);
\textsuperscript{242} ICESCR, \textit{supra} note 203, art. 2(1), 993 U.N.T.S. at 5. They arrive at this conclusion by reading one particular provision of the ICESCR, which obligates State Parties to “take steps... with a view to achieving progressively the full realization of the right recognized [herein].” Id.
refuse to extend pension rights to resident Korean claimants and refuse to find the existing pension scheme illegal. These lawsuits do not reflect well on the idea that courts can substantively entrench international human rights in order to contradict or overrule domestic policies that plainly violate treaty terms.

On occasion, courts have used their verdict to appeal to the Diet to bring about changes. For instance, a resident Korean veteran from World War II challenged the government’s refusal to provide him a pension. Kang Bu-jung applied for a pension to cover an injury sustained while he served in the Japanese Navy during World War II. Kang was a Japanese citizen when he received the injury, but lost his citizenship with the denationalization of all Koreans in 1952. That meant he was no longer able to receive a military pension under the Assistance Law. He applied for a pension in 1993, but was turned down because of the nationality requirement of the 1952 Assistance Law.

On appeal, the Osaka High Court noted that the right to equality enshrined in Article 26 of the ICCPR and Article 2(1) of the ICESCR was coterminal with that enshrined in Article 14 of the Japanese Constitution, which guarantees the right to equality. The court further determined that the ICESCR was not binding on Japanese courts, due to its language about progressive achievement, and hence its antidiscrimination provisions could not support the finding of an illegal violation. It did state, however, that the Assistance Law’s exclusion of Kang, based on his nationality, “may have violated Article 14 of the Constitution and Article 26 of the ICCPR,” both of which guarantee the right to

244 See Kang, 1718 HANREI JIHO at 42. See generally Nonpayment of War Pensions to Koreans Unconstitutional, ASIAN POL. NEWS, Oct. 18, 1999.
245 Id. See Kang, 1718 HANREI JIHO at 42. See generally Nonpayment of War Pensions to Koreans Unconstitutional, ASIAN POL. NEWS, Oct. 18, 1999.
246 Id.
247 The 1952 Law for Assistance to War Victims and Their Bereaved Families required that recipients of assistance hold Japanese citizenship. See IWASAWA, supra note 113, at 176.
248 See Nonpayment of War Pensions supra note 244.
250 Id. at 50.
equality. The court further "requested the Diet to take legislative measures to correct the legal treatment of these people."252

While the court specifically rejected the notion that the ICESCR could have direct or indirect effect in this case, it nonetheless fused the normative force of international law (the binding ICCPR) with domestic constitutional law to suggest that domestic law may have been illegal.253 While this conclusion is not as strong as, say, an outright finding of a violation, it nonetheless represents progress in the ongoing domestication of the norms of international law. It also recalls the circuitous criticism of the fingerprinting system discussed in the Yun decision.254 Japanese courts do not "call out" the political branches as United States courts sometimes do, but their less confrontational stance can signal disapproval with much the same effect.

III. Conclusion: The Signaling Function of International Law

Minorities face a number of challenges in asserting their rights in many jurisdictions. Quite apart from procedural impediments—knowing one's rights, hiring a lawyer, trusting the legal system enough to bring a claim—the legal system itself may offer limited channels to challenge discriminatory policies or laws. That has certainly been the case with minorities in the United States and Japan. Given some of the structural obstacles that the domestic legal system may pose to the protection of minority rights, international human rights law can play a helpful role. International law provides a significant amount of support for the entrenchment of various rights, both positive (the right to a pension, the right to enjoy one's culture) and negative (the right not to be discriminated against, the right not to be fingerprinted).

International law has contributed to the diversification of Japan, or at least to the expansion of protections of ethnic minorities under Japanese law and litigation. The revision of certain laws following ratification of key treaties has made most

251 Id.
252 Id.
253 Id.
254 See supra notes 217-229 and accompanying text.
resident Koreans eligible for Japan's social welfare. But where Japan has not revised its laws to adhere to international standards, the lawsuit offers a mechanism to challenge discriminatory laws and an opportunity to register dissent over the unfairness of a particular policy. These lawsuits permit judges a chance to reflect upon the constitutionality, sagacity, or desirability of the discriminatory law or policy at issue. In practice, Japanese courts rarely find a law unconstitutional, or chastise the Diet's failure to pass protective legislation. When they do, it sends a strong message to the legislature to review the offending law or policy. Sometimes an issue must be litigated many times before the underlying law is changed. Of course, not every suit brings about the desired policy change, but it allows a challenge.

This is not the end of the story, of course, as judges often decide just what form these international obligations will take, and how they will interact with existing domestic laws. But in the absence of real political power, as is the case for virtually all the minorities discussed above, litigation provides a powerful tool to challenge discriminatory laws and policies. In light of the fact that many domestic laws and policies themselves discriminate against minorities, recourse to international law helps buttress legal claims and prods judges to expand their horizon of consideration above the domestic plane. Litigation injects global standards into the evaluation and disposition of domestic policies—concerns that may be overlooked by the political process. The results are far from certain, and frequently do not favor the plaintiff. But invoking international law provides a counterweight to a state that has long prioritized the dominant ethnicity.