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Global Migration: The Impact of “Newcomers” on Japanese Immigration and Labor Systems

By
Sumi Shin*

I. INTRODUCTION¹

In January 1999, I witnessed a small example of the changes afoot in Japan. While visiting the office of the Asian People's Friendship Society (“APFS”), a Tokyo-based NGO advocating for migrant workers' rights, I watched Katsuo Yoshinari conduct a meeting with five natives of Bangladesh. He spoke in rapid-fire Japanese. The Bangladeshis—obviously comfortable with speaking in Japanese—participated actively in the discussion. They had gathered to discuss the Third National Forum on Migrant Workers, scheduled to occur in June. Ten years ago, this scenario, if it had occurred at all, would have involved fewer participants and less certainty of communication. Twenty years ago, the NGO did not exist, and few Bangladeshis lived in Japan.

As the preceding scenario illustrates, Japan has recently experienced dramatic growth and change in the composition of its foreign population. The number of foreigners registered with the government is one measure of this growth.² From the immediate post-World War II years through the early 1960s, registered

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1. All Japanese-language materials are on file with the author. The exchange rate used throughout, unless otherwise specified, is 100 yen to one U.S. dollar.

2. The Alien Registration Law requires all foreigners with visas of at least a one-year term, including permanent residents, to register with the local government office in their area of residency. It aims “to make for equitable control over the aliens residing in Japan by clarifying matters pertaining to their residence and status by enforcing the registration of such aliens.” *Gaikokujin Tōrōku Hō* [Alien Registration Law], Law No. 125 of 1952, art. 1.

foreigners consistently hovered around 600,000 persons,³ approximately 90% of whom had special permanent residency status. The special status was created for Japan's former colonial subjects, Koreans and Taiwanese, and their descendants.⁴ Initially a legacy of imperialism, Japan's foreign population has significantly diversified in the past three decades. By 1997, registered foreigners had reached a record number of 1,482,707, and special permanent residents accounted for a mere 36%, or 543,464 of all registered foreigners.⁵

Starting in the mid-1980s, a wave of people began to arrive in Japan, most of them looking for work. They came primarily from Asia but also from South America and Africa.⁶ The Japanese labeled the migrants "newcomers" (*nyūkamāzu*). The term distinguishes the migrants from "oldcomers" (*orudokamāzu*), a word used to describe former colonial subjects who settled in Japan and their descendants.

The newcomer population encompasses both documented and undocumented foreigners. Among documented foreigners, many hold the immigration status of student, entertainer, trainee, spouse of a Japanese citizen, permanent resident, or long-term resident. The undocumented population consists of two broad groups: "overstayers" and illegal entrants. An "overstay" is a foreigner who enters Japan with a proper visa (most commonly a short-term stay visa)⁷ and remains after its expiration. An "illegal entrant" (*fuhōnyūkokuisha*) or "person who lands illegally" (*fuhōjōrikusha*) is one who enters either without first passing through immigration control or with falsified travel documents. The government has no estimates of the number of illegal entrants in Japan.⁸

3. SHUTSUNYŪKOKU KANRI: 21 SEIKI NO ENKATSU NA KOKUSAI KŌRYŪ NO TAME NI [IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY] 42-43 (Immigration Control Bureau, Ministry of Justice ed., 1997).

4. The term, "special permanent resident" (*tokubetsu eijūsha*), refers to a person (or her descendant) who resided in Japan prior to the end of World War II and was deprived of Japanese citizenship when the Treaty of Peace with Japan went into effect in 1952. A foreigner may obtain permanent resident status, as opposed to special permanent resident status, via a process set forth in the Immigration Control and Refugee Recognition Act. See Shutsunyūkoku Kanri Oyobi Nanmin Nintei Hō [Immigration Control and Refugee Recognition Act], Cabinet Order No. 319 of 1951, art. 22 [hereinafter Immigration Act].

5. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 42-43. In 1997, ordinary permanent residents accounted for an additional 6% of all registered foreigners. *Id.* at 43.

6. From 1955 to 1991, the Ministry of Health and Welfare divided its statistics on foreigners by nationality into only four categories: North/South Korea, China, America, and "other." In response to Japan's increased diversity, the Ministry added five more countries in 1992: the Philippines, Thailand, England, Brazil, and Peru. Setsuko Ri, *Tōkei ni Miru "Uchi naru Kokusaika"* ["Internationalization from Within" as Seen Through Statistics], in TOWARERU TABUNKA KYŌSEI [MULTICULTURAL COEXISTENCE UNDER EXAMINATION] 75, 82 (1998).

7. More than half of the undocumented workers caught for Immigration Act violations in 1997 had entered as temporary visitors. JAPAN IMMIGRATION ASSOCIATION, SHUTSUNYŪKOKU KANRI KANKEI TŌKEI GAIYŌ 1997 [1997 STATISTICS ON IMMIGRATION CONTROL] 53, 86 (1998) [hereinafter 1997 STATISTICS ON IMMIGRATION CONTROL].

8. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 43 (citing the absence of computerized statistics); Interview with Katsuyuki Awamura & Yuko Tsukasaki, Ministry of Labor officials, in Tokyo, Japan (May 17, 2000) (stating the government has not estimated the total number of secret entrants).

Several factors converged in the mid-1980s to encourage migration to Japan. The rapid economic expansion of Middle Eastern oil-producing countries in the 1970s drew laborers from as far away as Pakistan and Bangladesh. A slowdown of this expansion, coupled with the Iran-Iraq War (1980-1988), compelled many migrant workers to seek jobs outside of the Middle East. The 1985 Plaza Accord dramatically strengthened the Japanese yen, and Japan quickly became a magnet for migrant labor. Starting in the mid-1980s, Japan embarked on a period of economic prosperity, popularly referred to as the "bubble" economy. With the resulting tight labor market, employers in the manufacturing and construction industries struggled to find workers. Developing countries, with their political and economic instability, provided Japan with a ready source of labor.⁹

The overwhelming proportion of newcomers works in small or medium-sized businesses¹⁰ in the construction, manufacturing, or service industries. Whereas both migrant women and men work in factories and restaurants, the construction industry hires mostly male newcomers. In general, only female foreigners work in bars as hostesses.¹¹ Common newcomer factory jobs are pressing metal parts for cars, binding pamphlets and other publications, processing rubber or plastics, and manufacturing foods.

Contrary to popular expectations, the collapse of the bubble economy in late 1991 did not lead to a rapid outflow of newcomers. The number of over-stayers declined by only 15.7%, falling from a peak of 298,646 on May 1, 1993 to 251,697 on January 1, 2000.¹² Independent of economic push and pull factors, the newcomers had developed "migration systems" that encouraged migration to Japan, even in the midst of an economic downturn. By spreading success stories and word of job opportunities to their home countries, migrants maintained Japan's image as an attractive work destination.¹³ Although Japan's economy has taken a downturn, many newcomers face even bleaker job prospects in their home countries. They cling on despite periods of unemployment and dismal job prospects in Japan.

9. HARUO SHIMADA, JAPAN'S "GUEST WORKERS" 33-36 (Roger Northridge trans., 1994) [hereinafter SHIMADA, JAPAN'S "GUEST WORKERS"].

10. For example, among the undocumented workers arrested for Immigration Act violations in 1997, nearly two thirds (63.9%) worked in companies with five or fewer Japanese employees. 1997 STATISTICS ON IMMIGRATION CONTROL, *supra* note 7, at 54, 99.

11. *Id.* at 54, 86; IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 140.

12. *Hompō ni Okeru Fuhō Zanryūshasū* [The Number of Persons Illegally Remaining in Our Country], 156 KOKUSAI JINRYŪ 19 (May 2000). The overstayer population rose tremendously in the early 1990s. On July 1, 1990, there were 106,497 overstayers, and by May 1, 1993, their numbers had grown to 298,646 persons. RŌDŌ HAKUSHO [LABOR WHITE PAPER] 41 (Ministry of Labor ed., 1999). In terms of nationality or country of origin, the top four groups based upon the January 1, 2000 statistics consist of Koreans (24.1%), Filipinos (14.4%), mainland Chinese (13.1%), and Thai (9.3%). *The Number of Persons Illegally Remaining in Our Country*, *supra*.

13. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 154.

In a nation of close to 126 million people, the newcomers represent a seeming drop in the bucket.¹⁴ Their impact upon Japanese government, institutions, and people, however, is both formidable and widespread. The presence of and continued demand for low-wage foreign workers threatens to weaken Japan's steadfast policy against creating an immigration category for unskilled workers. Furthermore, over the years, newcomers have begun to settle in Japan for longer periods of time.¹⁵ Some marry Japanese citizens or, for other reasons, decide to remain permanently.¹⁶ Japan's recession has enhanced the trend toward longer stays by making it harder for newcomers to save money. The newcomer wave, now more than a decade old, continues to send fresh ripples throughout society.

The primary purpose of this article is to analyze the impact of newcomers on Japan. In Part I, I focus on the rise of advocacy and support groups. In Parts II and III, I discuss newcomers' influence on Japanese immigration and labor systems. Although I separate the substantive topics for purposes of discussion, in reality they cannot be neatly compartmentalized—lack of a proper working visa, for example, leaves a newcomer vulnerable to workplace exploitation. With the help of attorneys, union organizers, and others, newcomers have brought court cases against the government or employers in each of the above areas. I survey the burgeoning case law as it relates to each topic, keeping in mind the innovative people who, through their dedication and support, help newcomers seek justice for themselves and their families. In Part IV, I assess newcomers' future prospects in Japan. Demographic forces, active grassroots advocacy, and newcomers' resilience, among other factors, augur for greater political tolerance of a truly multicultural populace.

II.

THE RISE OF NEWCOMER ADVOCACY AND SUPPORT GROUPS

One of the most remarkable outgrowths of newcomer migration has been the rapid proliferation of support organizations.¹⁷ These include "citizens' groups" (*shimin dantai*), women's shelters, health care-related groups, labor unions, and lawyers' associations. Initially, their growth lagged a few years be-

14. Registered foreigners, including oldcomers and newcomers, make up approximately 1.1% of the Japanese population. According to the census conducted in 1995, Japan's total population amounted to 125,569,000 persons, including foreigners. JAPAN ALMANAC 1997, at 48 (Asahi Shimbun ed., 1996).

15. Among the foreigners arrested in 1997 for working without proper immigration status, 29% of the males had a work history in Japan of over five years. The length of their Japanese work history continues to increase steadily. 1997 STATISTICS ON IMMIGRATION CONTROL, *supra* note 7, at 53, 86.

16. According to a survey of Japanese Latinos and Asians conducted by Kazuaki Tezuka, an academic who has written extensively on the newcomer migration, more than half of his respondents hope to find stable employment and live in Japan. Kazuaki Tezuka, *Gaikokujin Rôdôsha Mondai no Yukue* [The Future of the Foreign Worker Problem], 47 JIYŪ TO SEIGI 89 (May 1996).

17. Many Japanese language and bilingual manuals, books, and other materials provide lists of organizations supporting migrant workers. One of the more comprehensive lists is found in JŪMIN TO SHITE CHIKI DE KURASU TAME NO JÔHÔ: JŪ RÔDÔSHA SEIKATSU MANYUARU [MANUAL FOR MIGRANTS: INFORMATION FOR LIVING IN JAPAN] 216-33 (Catholic Diocese of Yokohama Solidarity Center for Migrants ed., 1996) (listing more than 120 organizations).

hind the wave of newcomer migration. When Asian People's Friendship Society ("APFS") was launched in December 1987, few support groups existed. The period from 1989 to 1992 witnessed a dramatic increase in the number of such groups. At present, well over 100 formal organizations exist throughout the country.

Japan is notorious for the racist and xenophobic statements of its politicians, and it is frequently viewed as an unwelcome society for foreigners. Most support organizations, however, arose under the leadership of Japanese, and their staff members are predominantly Japanese.¹⁸ A significant minority of those who support newcomers has had prior involvement in labor unions, student movements, or one of Japan's other human rights movements, such as the campaign to abolish the fingerprinting of Korean Japanese permanent residents.¹⁹ As a result, they are perhaps more sensitized to the plight of newcomers and more familiar with assuming an advocacy role than people without such prior experience. Others are drawn into groups through the encouragement of activist friends or acquaintances. Christians are a notable presence among staff members and volunteers of support groups. The Catholic Church's high profile involvement in migrants' issues contrasts sharply with the low percentage of Christians in Japan.²⁰ In light of the large number of ardent churchgoers among the Filipino and Latino migrant populations, however, this strong Christian presence is not as surprising as it may at first seem.

The final group of supporters consists of those who unintentionally "fell into" their roles, such as attorney Sōsuke Seki. Due to his interest in working on criminal cases, he registered himself on a list of government-appointed defense attorneys. By chance, a few foreigners became his clients. They, in turn, introduced Seki to other foreigners in need of legal assistance. Seki now maintains a

18. The language barrier and insecurity of immigration status are two major factors necessitating newcomers' reliance on Japanese persons. Over time, particularly as more newcomers speak Japanese comfortably, Japanese and newcomer activists are trying to involve newcomers as active members and leaders of support groups, and not merely as passive recipients of assistance. Interview with M.N. Tipu, Kalabaw-no-Kai Bangladeshi Group Representative, in Tokyo, Japan (Jan. 11, 1999).

19. Newcomers themselves often form informal networks, along ethnic or regional lines, and try to resolve problems on their own before turning to NGOs for assistance. Koreans from Cheju Island in South Korea, for instance, have a mutual aid association. If one member has a labor issue, they first attempt to address it themselves. If that is not possible, they then come to the Kotobuki Day Laborers' Union for advice. HIROKO SAITŌ, KANKOKUKEI NIHONJIN [KOREAN JAPANESE] 144 (1994) (quoting Mr. Kagoshima, Chairperson of Kotobuki Day Laborers' Union).

See, e.g., Interview with Tadanori Onitsuka, Attorney and Co-founder of Lawyers for Foreign Laborers' Rights, in Tokyo, Japan (Dec. 1, 1998) (detailing his involvement in ethnic discrimination issues); Interview with Tomonao Kawada, Administrative Solicitor, in Tokyo, Japan (Dec. 7, 1998) (revealing his involvement in anti-fingerprinting protests); Interview with three Foreigner's Labor Union (FLU) volunteer staff members in Tokyo, Japan (Jan. 31 & Feb. 6, 1999) [hereinafter Interview with FLU] (statement of Masao Shimizu, FLU Executive Committee Member) (regarding Shimizu's involvement in anti-fingerprinting protests).

20. Christians account for less than 1.5% of the Japanese population. As of December 31, 1997, Christian religious organizations under the Education Minister's jurisdiction reported 915,844 believers, divided nearly equally between Catholics and Protestants. SHŪKYŌ NENKAN [RELIGION YEARBOOK] 46-47 (Cultural Agency ed., 1998). According to the Cultural Agency (*Bunka Chō*), 1,761,835 Christians live in Japan, but the basis for its calculation is unclear. Cf. *id.* at 30-31.

steady civil and criminal caseload involving newcomer clients. He has even co-authored a book entitled *Fundamentals of Criminal Advocacy for Foreigners*.²¹

Below, I will briefly describe the five main types of organizations working with newcomers.

A. Citizens' Groups

"Citizens' groups" constitute the majority of support organizations. The broad term refers to not-for-profit organizations and is often used interchangeably with the increasingly popular English word, NGO (*enjiō*), or non-governmental organization. While the women's shelters and medical groups assisting newcomers technically fall within the sweep of "citizens' groups," newcomer advocates treat them as distinct types of organizations. I thus consider them separately.

Citizens' groups vary widely in format and content.²² However, most groups engage in one or some combination of the following activities: individual case advocacy, litigation support, labor organizing, governmental lobbying, classes (on topics such as Japanese language and cooking), social and cultural events, "international" marriage support and counseling, domestic travel excursions, conferences on newcomer issues, public speaking to local governments

21. Interview with Sōsuke Seki, Attorney, in Tokyo, Japan (Mar. 2, 1999). See generally KAZUHIRO OHKI ET AL., *GAIKOKUJIN KEIJI BENGŌ MANYUARU* [FUNDAMENTALS OF CRIMINAL ADVOCACY FOR FOREIGNERS] (1997).

22. I will present a snapshot of one organization involved in a diverse range of activities. The Catholic Diocese of Yokohama Solidarity Center for Migrants ("Sol") started in 1992 with an office in Kashimada Church. It established its own separate office in November 1994. (Unless otherwise indicated, information on Sol is from participant observation of a Sol Steering Committee meeting in Kawasaki, Japan on July 4, 1998.) Presently, Sol consists of three ethnic "desks" (Korea, Philippines, and Latin America), its administrative office, and four projects (labor organizing, women, detention ministry, and reintegration). Each desk provides advice to migrant workers in their native tongue on a host of issues from workplace problems to divorce, and may accept cases such as assisting a newcomer to obtain labor accident insurance benefits. The administrative office publishes a monthly newsletter and a "Manual for Migrants," see *supra* note 17, filled with practical information on issues ranging from immigration to divorce. Sol also engages in governmental lobbying activities at the local and national levels.

In terms of projects, the Philippines and Latin America desks organize workers. After nearly one year of planning, the Philippines desk announced the formation of a Filipino migrant workers' union, Samahan Ng Mga Migranteng Pilipino, in April 1999. As of May 1999, the union had a roster of 31 members and was in the process of refining its plans and goals. Samahan Ng Mga Migranteng Pilipino, Introduction at Sol's 1999 Labor Day Celebration in Kawasaki, Japan (May 1, 1999). The women's project works on organizing migrant women, conducting workshops on domestic violence, and establishing a day care center for young children. The detention ministry's main activities include visiting migrant workers held in jails, prisons, or immigration detention facilities; observing court cases; and gathering information on missing persons.

Sol is the first and thus far the only NGO in Japan to implement a reintegration project. The Asian Migrant Centre in Hong Kong developed the reintegration concept, which involves training migrants to pool their savings and to invest the accumulated capital, preferably in enterprises in their home communities. Once the migrants have made the investments, the project coordinators help the migrants' families and communities develop the investments. Interview with Rex Varona, AMC Executive Director, in Hong Kong, People's Republic of China (Mar. 26, 1999). The project aims to build "micro-alternatives for migrants." Rex Varona, *Re-integration and Alternatives to Migration: Evolving Concepts and Experiences*, 12 *ASIAN MIGRANT FORUM* 6 (1997).

and interested groups, and publication of newsletters, pamphlets, books, and reports.

B. Women's Shelters

Unlike most male newcomers, female newcomers face victimization through domestic violence or forced prostitution. In the Tokyo metropolitan area, three women's shelters assist and advocate for foreigners: House in Emergency for Love and Peace ("HELP"), Mizura, and Women's Shelter (*Sālā*). HELP and Mizura are open to all women. *Sālā*, founded in September 1992, is open only to foreign women.²³ The oldest of the three, HELP, opened on April 1, 1986 as a project of the Japan Woman's Christian Temperance Union.²⁴ Since its first year of operation, many foreign women (mostly Filipina and Thai) have sought shelter within its walls.²⁵

The shelters provide much more than emergency housing. HELP offers psychological counseling and assists its female residents with repatriation procedures and medical needs. In addition, the shelters have teams of cooperating volunteer attorneys who handle a range of legal matters, from unpaid wages to divorce. On a wider scale, HELP, Mizura, and *Sālā* all advocate for improved legal protections for migrant workers.

C. Health Care-related Groups²⁶

Many newcomers are either no longer eligible for or not enrolled in the various government-regulated programs offering health insurance. As a result, medical care is often prohibitively expensive. In response, newcomer activists create or use existing low-cost primary care clinics or mutual aid associations. In addition, various NGOs organize free medical checkup days. Solidarity Center for Migrants negotiates with the prefectural government to borrow x-ray and blood testing equipment for their medical checkup days.²⁷ Clinics and NGOs also provide a critical service by recruiting and training volunteers to provide language interpretation for newcomer patients and caregivers.

23. Nobuyo Tomita, *From Thailand to Japan: The Reality of Trafficking in Women—Voices from a Shelter*, in NGOs' REPORT ON THE SITUATION OF FOREIGN MIGRANT WOMEN IN JAPAN AND STRATEGIES FOR IMPROVEMENT 23 (Migrant Women Worker's Research & Action Comm. ed., 1995).

24. See SHIZUKO OHSHIMA & CAROLYN FRANCIS, JAPAN THROUGH THE EYES OF WOMEN MIGRANT WORKERS vii, 183-86 (1989).

25. During its first two years of operation, HELP served mostly Filipinas, who formed the overwhelmingly dominant group of foreign nationals. Since 1988, however, Thai women have become the largest group of foreign nationals. See HELP SETSURITSU 10 SHŪNEN KOKUSAI SHINPOJIMU HŌKOKUSHO [REPORT ON HELP'S 10TH ANNIVERSARY INTERNATIONAL SYMPOSIUM] app. (1997) (Breakdown of HELP Users by Country from Apr. 1, 1986 to Dec. 31, 1995); NETWORK NEWS (HELP, Tokyo, Japan) No. 27, Oct. 1996, at 1 & No. 31, Oct. 1997, at 1. NETWORK NEWS is HELP's newsletter.

26. For further information on health care-related groups, see Sumi Shin, *Newcomer Migrants: Implications for Japan's Administration of Social Services and Nationality*, 6 U.C.L.A. J. INT'L. L. & FOREIGN AFF. (forthcoming 2001).

27. Interview with Manny Rosales, Solidarity Center for Migrants Staff Member, in Yokohama, Japan (June 23, 1998).

D. Labor Unions

Unions have been slow to make overtures to newcomers. In Japan, labor unions focus on organizing employees of large enterprises and the government. The dominant labor unions have generally ignored newcomers who work in medium-sized and small enterprises. Occasionally, they even condemn the influx of migrant workers, claiming they will dampen the wages of Japanese and endanger public order and peace.²⁸

Yet, in the Tokyo area, a handful of unions have assisted newcomers since the early 1990s. They include Zentōitsu Labor Union, Foreign Laborers' Union ("FLU"),²⁹ National General Labor Union South (Nanbu), Shitamachi Union, and Kanagawa City Union.³⁰ The newcomer organizing sections of FLU, Nanbu and Zentōitsu are branches of existing national unions. Shitamachi Union and Kanagawa City Union, in contrast, are "regional unions" (*chiiki rōdō kumiai*).

At present, the unions' activities resemble those of citizens' groups, but with a narrower focus on labor issues. The bulk of their newcomer advocacy involves individual case resolution. Unlike other types of support groups, unions have the legal right to demand negotiations with employers and to protest labor violations in public. Under Japanese labor union law, even if a union represents only one employee of an enterprise, the employer must negotiate with the union upon demand.³¹ The unions are among the better-financed groups advocating for newcomer workers. For a union to legally represent the worker in negotiations with the employer, the migrant worker must first join the union. Joining the unions listed above entails paying union dues of 1,000 to 2,000 yen per month (\$10 to \$20). If the union resolves the worker's claim, it also requests a small "donation" of usually no more than 10% of the proceeds.

One issue the unions have yet to resolve involves the tendency of newcomers to discontinue union involvement once their cases are resolved. Union staff members and migrant workers acknowledge that most newcomers plan to return to their homelands as soon as they reach their monetary goals. Thus, they have little incentive to remain in the unions. Short-term membership also affects citizens' groups: few newcomers remain active participants in an organization once their problems are solved.

28. *Gaikokujin Tanjun Rōdō Ukeire ni Rōdōgawa Shōkyokuteki* [Labor Side Negative about Acceptance of Foreign Unskilled Labor], ASAHI SHIMBUN, Mar. 26, 1988, at 3.

29. FLU is a branch of Tokyo Labor Union, which is part of the National Trade Union Council of Japan-National General Labor Union [Zenrōkyō-Zenkoku Ippan Tōkyō Rōsō, Gaikokujin Rōdōsha Rōsō].

30. KCU started accepting foreign members in March 1991. KANAGAWA CITY UNION, WHAT IS KANAGAWA CITY UNION? 2 (n.d.). For a description of KCU's activities and cases, see Fumiko Abe, *Labor Related Problems: Focus on Korean Women*, in NGOs' REPORT ON THE SITUATION OF FOREIGN MIGRANT WOMEN IN JAPAN AND STRATEGIES FOR IMPROVEMENT 15, 15-18 (Migrant Women Worker's Research & Action Comm. ed., 1995).

31. See KAZUO SUGENO, JAPANESE LABOR LAW 481 (Leo Kanowitz trans., 1992) ("[Since Japan's] Trade Union Law has not adopted an exclusive bargaining representative system, any minority union has collective bargaining rights for its members.").

E. Lawyers' Associations

Several legal associations serve foreigners for reduced fees. One of the pioneers, Lawyers for Foreign Laborers' Rights ("LAFLR"), operated from 1990 to 2000. In 1998, 400 attorneys around the country were affiliated with LAFLR. LAFLR attorneys handled an annual average of 1800 legal counseling cases, 120 to 150 of which led to litigation.³² The attorneys charged their LAFLR clients lower fees than their ordinary clients. Bar associations also assist newcomers. In March 1990, the Tokyo Bar Association ("TBA") opened a Foreigners' Human Rights Assistance Center and, until 1994, it offered free legal advice one day per week. During the center's first year, 100 TBA lawyers participated in the program. By 1995, 150 TBA lawyers were counseling newcomers.³³ In 1994, the three Tokyo bar associations ("TBA," "First TBA," and "Second TBA") and the Tokyo branch of the Legal Aid Association set up a legal counseling center for foreigners in the Bar Association building in central Tokyo. The four organizations staff the counseling center every weekday afternoon on a rotating basis.³⁴ On Thursdays, the center offers free legal advice. On other days, counseling costs 5,000 yen (\$50) for the first 30 minutes and 2,500 yen (\$25) for each subsequent 15-minute interval. Similar legal counseling centers exist in other regions of Japan.³⁵ Currently, however, Japan does not have any public interest legal organizations offering free representation.

The preceding list of citizens' groups, women's shelters, health care-related groups, labor unions, and lawyers' associations only begins to capture the breadth and vitality of Japanese efforts to assist and empower newcomers. More than 100 formal organizations with established reputations currently exist in Japan. Additionally, dozens, if not hundreds of informal associations help newcomers in towns, neighborhoods, and churches.³⁶ Moreover, countless numbers of individuals, unaffiliated with any group, assist foreigners on an *ad hoc* basis.

F. Networks

With the proliferation of organizations over time, the loosely connected web of support groups has moved toward a higher level of coordination and

32. Interview with Tadanori Onitsuka, *supra* note 19.

33. Tatsuko Kamiko, *Rusu no Aida ni, Otto to Kodomo ga Kieta! Tsuma ni Mudan de Dasareta Rikontodoke* [While She Was Away, Her Husband and Child Disappeared! Divorce Notice Filed Without Wife's Permission], in 28 BENGÔ SHIMATSUKI [DIARY OF LEGAL ADVOCACY] 88 (Research Group on Legal Advocacy in Practice ed., 1998). Kamiko is a board member and former chair of the Tokyo Bar Association ("TBA") Steering Committee of the Foreigners' Human Rights Assistance Center.

34. Interview with Masaki Yamada, Attorney and Board Member of the TBA Foreigners' Human Rights Assistance Center, in Tokyo, Japan (Jan. 19, 1999).

35. For example, the Osaka Bar Association has set up a legal advice center for newcomers, and the Ministry of Justice's Human Rights Bureau offers consultation to foreigners. Katsuko Terasawa, *Labor Law, Civil Law, Immigration Law and the Reality of Migrants and their Children*, in JAPAN AND GLOBAL MIGRATION 231 (Mike Douglass and Glenda S. Roberts eds., 2000).

36. For example, Tomonao Kawada, an administrative solicitor, and an attorney run a free consultation clinic on Saturday afternoons for Filipinas at the Minato International Law Offices in Tokyo. A Filipina married to a Japanese national serves as interpreter. Conversation with Tomonao Kawada, Administrative Solicitor, in Tokyo, Japan (Dec. 12, 1998).

cooperation. Networks at all levels within Japan and with overseas groups continue to emerge. The most formal manifestation of such networking was the establishment, in 1997, of the Tokyo-based National Network for Solidarity with Migrant Workers ("National Net"). As noted in the introduction, 1999 marked the Third National Forum on Migrant Workers. At the First National Forum in 1996, participants called for a national network with more continuity than an annual forum. They also sought more structure than National Net's predecessor, the volunteer-run Forum on Asian Migrants in Japan. Finally, they aimed to strengthen connections among groups working on different aspects of newcomer issues.³⁷ With one paid staff member and a steering committee of activist leaders, National Net brings together, for the first time, citizens' groups, shelters, unions, medical groups, and lawyers' associations.³⁸ In 1998, over 70 organizations were dues-paying members.

In terms of cooperative advocacy, under the auspices of National Net, representatives of several member organizations hold meetings with various arms of the government. For example, in December 1998, they held discussions with the Ministries of Labor, Justice, and Health and Welfare and presented a list of demands to each ministry. In late 1998, when the government announced its plan to revise the Immigration Control and Refugee Recognition Act, National Net coordinated lobbying efforts in an attempt to block the tightening of restrictions on foreigners.

G. Summary

Support groups and networks have amplified the impact of newcomers on Japanese society. Support groups constitute an invisible hand deciphering administrative procedures in immigration matters, negotiating with employers, facilitating access to the court system, and otherwise assisting newcomers in a myriad of small but important ways. Through their lobbying efforts, the organizations enable newcomers to voice their concerns to the government. But these organizations continue to face many obstacles. Advocates have to contend with conservative bureaucrats and politicians, employers who seek expedient means of lowering costs, a weak economy, and the lack of widespread public interest in newcomers. Even if some of their efforts fail to bear fruit, they still play a significant role by challenging and pressuring both employers and the government to protect newcomers' rights.

37. Hidetoshi Watanabe, "*Ijū Rōdōsha to Rentai Suru Zenkoku Nettowāku*" no Teian ni Tsuite [Regarding the Plan for a "National Network for Solidarity with Migrant Workers"] in DAINIKAI IJŪ RŌDŌSHA MONDAI ZENKOKU FŌRAMU HŌKOKUSHŪ [REPORT ON THE SECOND NATIONAL FORUM ON MIGRANT WORKERS] 72 (1998).

38. National Net fulfills its mandate by organizing a National Activists' Conference (first held in 1998), taking a central role in organizing the annual National Forums, and publishing three informative monthly newsletters, two in Japanese and one in English. One of the Japanese-language newsletters, *Migrants' Net*, contains the full text of significant court decisions, and each issue concludes with summaries of the month's newspaper coverage of migrant worker issues.

III.

IMMIGRATION LAWS AND ENFORCEMENT³⁹

Japan has displayed historical reluctance to grant foreigners residency rights. On April 28, 1952, when the peace treaty formally ending the state of war between Japan and the Allied Powers went into effect, the Japanese government stripped all resident Koreans and Taiwanese of their Japanese citizenship.⁴⁰ Until then, they had enjoyed citizenship as colonial subjects of Japan. Their right to live in Japan under permanent residency status was not settled until years later.⁴¹ In the late 1970s, Japan again showed its aversion to accepting foreign residents through its reluctance to take in Indochinese refugees.⁴² Consistent with Japan's history, newcomers have elicited ever more

39. All English translations of the Immigration Act are from *Immigration Control and Refugee Recognition Act (Provisional Translation)*, in SHUTSUNYÜKOKUKANRI-GAIKOKUJIN TÖROKU JITSUMU ROPPÖ [IMMIGRATION CONTROL AND ALIEN REGISTRATION: LEGAL CODE IN PRACTICE] 1 (1999) [hereinafter IMMIGRATION CONTROL: LEGAL CODE IN PRACTICE].

40. Law No. 126 enabled these former colonial subjects to remain in Japan "without a status of residence" until their status was determined by law, if they had resided continuously in Japan from or prior to September 2, 1945. Potsdamu Sengen no Judaku ni Tomonai Hassuru Meirei ni Kansuru Ken ni Motozuku Gaimushō Kankei Shomeirei no Sochi ni Kansuru Hōritsu [Law Concerning Measures of Various Ministry of Foreign Affairs-Related Orders Based upon Matters Concerning Orders Issued in Conformity with the Acceptance of the Potsdam Declaration], Law No. 126 of 1952, art. 2(6), reprinted in ZAINICHI CHŌSEINJIN NO HŌTEKI CHII [THE LEGAL STATUS OF KOREANS RESIDING IN JAPAN] 226, 227 (Association Protecting the Human Rights of Resident Koreans ed., 1964). If former colonial subjects had entered Japan after September 2, 1945, lived in Japan continuously since then, and possessed alien registration cards, they could remain in Japan for six months from the effective date of the law, which was the same date that the peace treaty went into effect: April 28, 1952. *Id.* art. 2(1)(3) & Addendum, at 226-27.

41. On June 22, 1965, Japan and South Korea concluded the Agreement on the Legal Status and Treatment of Nationals of the Republic of Korea Residing in Japan. It went into effect on January 17, 1966. It covered South Korean citizens who resided in Japan before the end of World War II and most of their descendants. YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW 142 n.81 (1998) (citing 584 U.N.T.S. 3). A 1981 supplementary immigration measure concerned former Taiwanese subjects and North Korean loyalists who had declined permanent residency under the 1965 Agreement. Finally, a special law enacted in 1991 covered all Korean and Taiwanese residents. *Id.* at 142-44; SHŌTARŌ TAKEUCHI, SHUTSUNYÜKOKU KANRI GYŌSEIRON [ADMINISTRATION OF IMMIGRATION CONTROL] 182-83 (1995).

42. For a history of Japan's policies towards Indochinese refugees, see OFFICE OF THE CABINET COALITION REGARDING INDOCHINESE REFUGEE POLICY, INDOSHINA NANMIN UKEIRE NO AYUMI TO TENBŌ [THE PATH TO AND PROSPECTS FOR ACCEPTANCE OF INDOCHINESE REFUGEES] 11-19 (1996). At first, if Indochinese refugees arrived in port on a foreign-registered vessel, the government permitted them to land only if a third country had already decided to accept them. Otherwise, before allowing the ship to land, the Japanese government waited for the country where the vessel was registered to indicate that it would accept the refugees. *Id.* at 15. In sporadic cases, refugees were forced to wait on board while the vessel's country of registration decided whether to receive them. *Id.* at 16.

During this early period, the government permitted, at most, only temporary stays in Japan. It justified its position by stating, "Japan's population density is extremely high; it has not accepted immigrants or foreign workers; it has not affirmatively accepted refugees." *Id.* at 17. Of course, the government's second justification overlooks the substantial numbers of Koreans who worked, voluntarily and under coercion, in Japan during its colonial rule over Korea (1910-1945). See Keizo Yamawaki, *Foreign Workers in Japan: A Historical Perspective*, in JAPAN AND GLOBAL MIGRATION 38, 38 tbl. 2.1 (Mike Douglas and Glenda S. Roberts eds., 2000). In terms of legal status, as colonial subjects with Japanese citizenship, Koreans were not technically foreigners. However, even within its empire, the Japanese government distinguished between *naichijin* (literally, persons of the inner territory) and *gaichijin* (persons of the outer territory, such as Korea). *Id.* at 39.

strict efforts on the part of the government to seal Japan's borders and remove them. The crux of the newcomers' immigration dilemmas lies in the government's refusal to create an immigration residency status for unskilled workers. At the same time, the government has grown slightly more lenient toward those who have married or have a child with a Japanese citizen.

A. Legislation and Other Agreements

The rapid increase of male migrant workers in the late 1980s triggered a national debate over the acceptance of unskilled foreign labor. As the strength of the bubble economy diminished their ability to attract employees, small and medium-sized companies faced an increasingly desperate situation.⁴³ Although employers placed help-wanted advertisements offering relatively high wages, they received few calls, and the positions remained largely unfilled.⁴⁴ Migrant workers readily found jobs in this environment.⁴⁵ Business,⁴⁶ public opinion,⁴⁷

In a Cabinet understanding dated April 28, 1978, the government enabled Indochinese refugees to settle in Japan under certain conditions. In 1978 and 1979, respectively, it permitted only one family of three persons and another family of two persons to settle in Japan. The government gives two reasons for the extremely low figures. First, most refugees sought settlement in other countries, such as the United States or Canada. Second, the Japanese government did not adequately develop a system for promoting settlement (such as providing Japanese language instruction and assisting with job searches). Over time, the government reported a gradual loosening of the conditions on settlement. OFFICE OF THE CABINET COALITION REGARDING INDOCHINESE REFUGEE POLICY, *supra*, at 18.

43. According to a private investigation firm, in the period from January through September 1989, 95 companies "failed" as a result of labor shortages. This was a three-fold increase over the previous year. Companies failed for two main reasons. First, unable to secure employees, companies fell behind deadline in completing contracts or were unable to undertake a sufficient amount of work. Second, companies paid unsustainably high wages to attract employees. In a survey of 1,500 business customers of credit associations across the country, 40.1% of small and medium-sized businesses complained of labor shortages. *Kotashi 100 Ken Koeru [This Year Expected to Exceed 100 Cases]*, ASAHI SHIMBUN, Oct. 24, 1989, at 9.

44. See, e.g., *id.*

45. Asahi Shimbun reported the story of one small construction company owned and operated by a wife-and-husband team. Until 1987, they hired only Japanese employees. In the spring of 1987, the labor shortage forced them to hire two Filipinos. Up to six Filipinos worked for them at various times. To communicate with his employees, the husband studied Tagalog. By mid-1988, all of their employees had left, and they placed several advertisements in various magazines and newspapers. No one responded. In May 1989, they turned in desperation to a labor broker with mafia connections. They continue to pay the broker 10,000 yen (\$100) for each worker's daily wage, and the broker pays each worker 5,800 yen (\$58) a day. They also provide dormitory accommodations, utilities, and rice free of charge. *Tōsan Osore Fuhō Shūrōsha Tanomi [Fear of Bankruptcy Drives Reliance on Illegal Workers]*, ASAHI SHIMBUN, Jan. 17, 1990, at 17. See also "*Tanjun Rōdō*" ni Toppakō [Breakthrough on the Issue of "Unskilled Labor"], ASAHI SHIMBUN, Nov. 12, 1989, at 31 (reporting on a severe labor shortage in the fishing industry, causing boat captains to hire foreign unskilled laborers as crew members).

46. Small and medium-sized enterprises, the backbone of the Japanese economy, were unsurprisingly in favor of loosening the Immigration Act to permit the hiring of unskilled labor. *Gaikokujin Tanjun Rōdōsha no Ukeire: Keizaikai mo Sanpi Ryōron [Acceptance of Foreign Unskilled Laborers: Pros and Cons from the World of Economics]*, ASAHI SHIMBUN, Aug. 10, 1988, at 26. See also *Fear of Bankruptcy Drives Reliance on Illegal Workers*, *supra* note 45.

Other business entities favored entry of unskilled labor under certain conditions. See 60 *Man-nin Ukeire Minkan Soshiki Setsuritsu wo [Accept 600,000 Persons and Establish a Private Organization]*, ASAHI SHIMBUN, Dec. 15, 1989, at 3 (reporting on the Tokyo Chamber of Commerce's proposal for an upper limit of 600,000 unskilled foreign workers to work for two-year terms); *Jōkentsuki de no Ukeire Teigen [Proposal to Accept with Conditions Attached]*, ASAHI SHIMBUN,

and even the government⁴⁸ split over whether to legalize the entry of unskilled labor. Both the government and the private sector assembled a flurry of committees to consider the issue.⁴⁹

Mar. 29, 1989 (stating the Japan Association of Corporate Executives' plan would limit unskilled foreigners to a one- or two-year stay, create an organization to accept the workers, and require employers to provide a study program). Japan's international responsibility as an economic power and a forecasted labor shortage also motivated a private industry group, including the Industrial Bank of Japan, to favor legalization of unskilled workers with various caveats. *Gaikokujin Tanjun Rōdōsha Sekkyokuteki: Ukeire Teigen* [Foreign Unskilled Workers: Proposal for Affirmative Acceptance], ASAHI SHIMBUN, Dec. 14, 1988, at 11 (proposing several conditions, including the equal application of labor, pension, and social protection laws, and the establishment of an oversight organization through donations from employers who hire foreigners).

In 1989, Tokyo Tomin Bank conducted a questionnaire survey of its business customers in the Tokyo metropolitan area. Of the roughly 500 respondents, 59.1% favored acceptance of foreign workers with conditions, and 17.7% favored unconditional acceptance of foreign workers. The participants identified the seriousness of the labor shortage as the number one reason for allowing foreigners to work in Japan (66%). Japan's international obligation as an advanced nation came in second (41.9%). Only 16.8% of those surveyed were in favor of the status quo. *Tanjun Rōdō ni mo Gaikokujin Rōdōryoku wo 8 Wari* [80% Favor the Use of Foreigners for Unskilled Labor], ASAHI SHIMBUN, Jul. 21, 1989, at 11.

47. According to a 1987 Ministry of Justice public opinion survey, 64.5% of respondents disfavored the entry of male foreign workers, but 46.6% supported the official entry of unskilled workers into Japan. Thirty-three percent of the respondents supported the status quo. Asahi Shimbun evaluated the results as indicating a positive public opinion towards opening the labor market. "Mitomeru" ga Hansū [Half "Approve" of Legalizing Unskilled Workers], ASAHI SHIMBUN, Dec. 6, 1987, at 3 (relying on an interview survey of 1,000 residents in 12 large cities).

48. The Economic Planning Agency was one of the lone governmental bodies to publicly encourage the government to initiate a program for legal acceptance of unskilled foreigners. *Gaikoku kara no Tanjun Rōdōsha: Jōkentsuki de Yōnin wo* [Accept Foreign Unskilled Workers with Conditions Attached], ASAHI SHIMBUN, May 3, 1989, at 3. The Minister of Construction urged the government to conclude agreements with other nations and form a single foreign-worker accepting organization. The head of the Cabinet Secretariat later referred the Construction Minister's proposal to the Foreign Worker Problem Coalition of Related Ministries and Agencies for further discussion. *Tanjun Rōdōsha Ukeire Kyōhi wo Seifu ga Kakunin* [Government Confirms Rejection of Accepting Unskilled Workers], ASAHI SHIMBUN, Oct. 20, 1989, at 2. At an informal cabinet meeting on foreign workers, the Foreign Minister, referring to the current "era of internationalization," stated that the government must formulate a policy to accept unskilled workers in some form. The Transportation Minister and head of General Affairs Agency voiced similar opinions. The Ministers of Finance and Justice and the head of the National Public Security Committee, on the other hand, opposed accepting unskilled workers. *Kakuryō ni mo Sanpi Ryō ron* [Pro and Con Positions Also Among Cabinet Members], ASAHI SHIMBUN, Dec. 12, 1989 (evening edition), at 2.

49. The government's central committee for examining policy vis-à-vis foreign workers—the Foreign Worker Problem Coalition of Related Ministries and Agencies—is composed of 17 ministries and agencies. It was formed under the authority of the Prime Minister's Office in May 1983. *Tanjun Rōdō Mitomenu* [Unskilled Labor Not Approved], ASAHI SHIMBUN, Oct. 18, 1989, at 1; *Gaikokujin no Fuhō Shūrō: Kisei Kyōka Hatsugen Kakugi de Aitsugu* [Illegal Foreign Workers: A Succession of Pronouncements in the Cabinet Council on Strengthening Regulations], ASAHI SHIMBUN, Apr. 21, 1993, at 3; Tetsuo Yamasaki, *Nihon no Gaikokujin Seisaku no Jitsujō* [The Current State of Japan's Policy Regarding Foreigners], in *NIHON TO DOITSU NO GAIKOKUJIN RŌDŌSHA: SHIMPOJUMU* [JAPAN'S AND GERMANY'S FOREIGNER WORKERS: SYMPOSIUM] 137, 160 (Kazuaki Tezuka et al. eds., 1991). The Prime Minister also convened other informal groups. See, e.g., *Pro and Con Positions Also Among Cabinet Members*, *supra* note 48 (reporting on the first meeting of an informal Cabinet group convened by the Prime Minister to address the problem of foreign workers).

The Ministry of Labor initiated a Foreign Workers Problem Research Group on December 12, 1987 and a Foreign Worker Problem Investigation Group in April 1988. *Gaikokujin Tanjun Rōdō Yakusei he: Kōyō Kyokasei wo Teishō* [Employment Permission System Proposed], ASAHI SHIMBUN, Mar. 27, 1988, at 3; *Acceptance of Foreign Unskilled Laborers: Pros and Cons from the World of Economics*, *supra* note 46.

Ultimately, the opponents of unskilled workers prevailed.⁵⁰ The experiences of the former West Germany and other European countries with guest workers weighed heavily in the minds of many people in the government bureaucracy and business elite.⁵¹ The most frequently voiced objections concerned a potential decline in wages and working conditions, discriminatory stereotypes of foreigners as bottom-tier labor, increased unemployment of Japanese, potential international friction based upon unemployment of foreigners, the difficulty of encouraging foreign workers to return to their home countries, and social instability.⁵² The Japan Immigration Association predicted increased societal costs for social welfare and foreign children's education.⁵³ The Enterprise Vitality Research Institute alleged that the introduction of low-wage, unskilled workers would interfere with efforts to reform Japan's industrial structure.⁵⁴ Two of Japan's large labor unions⁵⁵ and many business groups such as Nikkeiren (Japan Federation of Employers Associations),⁵⁶ the Japan Chamber of Commerce, and the Kansai Executives Association⁵⁷ also opposed the introduction of unskilled foreign workers into the Japanese economy.

50. See *Tanjun Rōdō Mitomenu Hōshin Shōchō Renraku Kaigi mo Kakunin* [Ministry-Agency Coalition Also Confirms the Policy Against Accepting Unskilled Labor], *ASAHI SHIMBUN*, Oct. 18, 1989 (evening edition), at 2 (noting some of the business and government members of the 17-member ministry-agency Coalition had favored acceptance); *Government Confirms Rejection of Accepting Unskilled Workers*, *supra* note 48.

51. See, e.g., *Tanjun Rōdō no Gaikokujin Ukeire ha Shinchō ni* [Acceptance of Foreigners for Unskilled Work Should Be Examined Carefully], *ASAHI SHIMBUN*, Mar. 11, 1987, at 9 (warning that the acceptance of unskilled foreign workers might obstruct friendly foreign relations, as had occurred between Turkey and West Germany); *Gaikokujin Tanjun Rōdōsha Ukeire Kakudai Sezu* [No Expansion of Acceptance of Foreigner Unskilled Workers], *ASAHI SHIMBUN*, Sept. 23, 1989, at 3 (reporting on the Minister of Labor's retraction of his statement in support of acceptance of foreigners capable of high-level unskilled labor, based upon the difficulties caused by such policies in West Germany and other countries).

52. *Gaikokujin no Tanjun Rōdōryoku: Ukeire Shinchō ni* [Foreign Unskilled Workers: Examine Acceptance Cautiously], *ASAHI SHIMBUN*, Feb. 20, 1988, at 11. Keio University economics professor Haruo Shimada suggested the foreseeability of "ghettos" of low-wage foreigners arising across Japan. Haruo Shimada, *Gaijin Tanjun Rōdōryoku no Anina Dōnyū wa Shakai Masatsu Umu Osore* [Permitting Easy Introduction of Foreign Unskilled Labor May Give Rise to Social Friction], *ASAHI SHIMBUN*, Apr. 17, 1988, at 14.

53. *Tanjun Rōdō ni ha Shinchō* [Caution Regarding Unskilled Labor], *ASAHI SHIMBUN*, May 24, 1988, at 3.

54. *Zunō Rōdōsha wa Kakudai wo Tanjun Rōdōsha wa Shinchō ni* [Increase Entry of Skilled Workers and Cautiously Consider Entry of Unskilled Workers], *ASAHI SHIMBUN*, Jul. 21, 1988, at 9. Suggested alternatives for coping with the labor shortage included the employment of elderly, female, and handicapped Japanese, the improvement of working conditions, and the modernization of industry. *Tanjun Rōdōsha Ukeire Sankōnin ga "Hantai" Hyōmei* [Testifiers Express "Opposition" to Acceptance of Unskilled Workers], *ASAHI SHIMBUN*, Nov. 15, 1989, at 30.

55. *Labor Side Negative about Acceptance of Foreign Unskilled Labor*, *supra* note 28. The Federation of All Japan Labor Unions (*Rengō*) and the General Council of Trade Unions of Japan (*Sōhyō*) announced their opposition to the entry of unskilled foreign workers in 1988. *Id.*

56. See *Tanjun Rōdōsha wa Konnan* [Accepting Unskilled Workers Is Difficult], *ASAHI SHIMBUN*, Sept. 2, 1988, at 8; *Tanjun Rōdōsha no Ukeire Hantai* [Opposed to Acceptance of Unskilled Workers], *ASAHI SHIMBUN*, Sept. 13, 1989, at 9 (reiterating the opposition of Keidanren (Federation of Economic Organizations) to accepting unskilled foreign workers and urging industry to slow the pace of construction rather than hire foreigners).

57. *Acceptance of Foreign Unskilled Laborers: Pros and Cons from the World of Economics*, *supra* note 46.

Out of this ferment of debate came revisions to the Immigration Control and Refugee Recognition Act ("Immigration Act").⁵⁸ Approved on December 15, 1989 and effective June 1, 1990, broad changes to the Immigration Act introduced sanctions against employers who knowingly hire foreigners without proper visas, and against anyone who helps such workers obtain jobs.⁵⁹ The sanctions, contained in Article 73-2, were drafted with reference to similar sanctions in the U.S., former West Germany, France, and other countries.⁶⁰ The Act's existing criminal penalties against illegal entry and landing and against undocumented work⁶¹ had done little to deter the tide of newcomers. The new sanctions call for fines of up to two million yen (\$20,000) and/or a potential term of imprisonment of less than three years.

The new Act also subdivided and expanded the list of visa categories (or, in formal parlance, "statuses of residence") from 16 to 27 categories.⁶² Although a status of residence for unskilled workers remained noticeably absent, one administrative shift attracted considerable attention: it permits second or third generation descendants of Japanese citizens to receive long-term resident (*teijūsha*) visas.⁶³ Since long-term residents are permitted to work, this policy change has had tremendous significance for the labor market. In light of the events preceding the shift, evidence suggests the new Act represents a transparent attempt to fulfill the demand for unskilled labor without compromising official policy against accepting such workers and, at the same time, without sacrificing the nation's myth of racial homogeneity.⁶⁴

58. The Immigration Control and Refugee Recognition Act originated with the Immigration Control Order promulgated on October 4, 1951 during the Allied Powers' Occupation of Japan. On the day the peace treaty between Japan and the Allied Powers went into effect, the Ordinance became the "Immigration Control Act." In 1981, the government revised the Act, adding refugee recognition procedures. It renamed the law the "Immigration Control and Refugee Recognition Act." The Immigration Act provides for statuses of residence that may be broadly grouped into three categories: permanent resident, statuses permitting work, and statuses not permitting work. The Act does not have a provision allowing foreigners to enter Japan on immigrant visas. Rather, foreigners must first enter Japan on one of the time-limited statuses of residence; after entry, they may apply for permanent residency. Kazuaki Tezuka, *GAIKOKUJIN TO HŌ* [FOREIGNERS AND THE LAW] 26 (2d ed. 1999).

59. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 157.

60. See, e.g., Yasushi Kurata, *Nyūkan Hō Kaiseian: Fuhō Shūrō Jochōzai no Kentō* [Immigration Control Act Reform Bill: Examination of the Crime of Promoting Illegal Employment], 694 HANREI TAIMUZU 40, 54 (June 1989). Kurata is identified as both a counsellor of the Justice Ministry's Criminal Affairs Bureau and a prosecutor attached to the Immigration Control Bureau. He takes pains to explain why English law, with its relatively weak sanctions, is not a reference point for Japan's Immigration Act reform. Under English law, those who facilitate undocumented activities and unlawful overstaying are "merely" punished with imprisonment of six months or less and a fine of £2,000 or less. *Id.*

61. Immigration Act, *supra* note 4, arts. 70, 72-73.

62. See JAPAN IMMIGRATION ASSOCIATION, A GUIDE TO ENTRY, RESIDENCE AND REGISTRATION PROCEDURES IN JAPAN FOR FOREIGN NATIONALS 28-39 (5th ed. 1998) [hereinafter A GUIDE TO ENTRY, RESIDENCE AND REGISTRATION PROCEDURES].

63. Ministry of Justice, Public Notice No. 132 of 1990 (partially revised Oct. 21, 1991), in RYŌICHI YAMADA & TADAMASA KUROKI, WAKARIYASUI NYŪKAN HŌ [EASY TO UNDERSTAND IMMIGRATION ACT] 31, 31-32 (Yuhikaku Livret No. 26, 4th ed. 1997).

64. See, e.g., Keiko Yamanaka, "I Will Go Home, But When?": Labor Migration and Circular Diaspora Formation by Japanese Brazilians in Japan, in JAPAN AND GLOBAL MIGRATION 123, 133

The desire of Japanese Brazilians to work in Japan increased during the 1970s.⁶⁵ In the 1980s, Japanese Brazilian politicians lobbied the Japanese government and the party in power, the Liberal Democratic Party ("LDP"), to establish a status of residence for Japanese descendants who did not have Japanese citizenship.⁶⁶ The lobbying coincided with the rapid rise in Japan's domestic demand for unskilled labor. As a result of the confluence of interests, "[b]y late 1989, the idea of admission of *Nikkeijin* [persons of Japanese descent] under a special visa category had gained wide support among policymakers and the business community."⁶⁷ According to an article in an LDP monthly publication, the party's committee on foreign worker problems approved legalizing the entry of *Nikkeijin* for precisely the dual purpose of "'ameliorat[ing] the present acute labor shortage'" while preserving "'Japan's homogeneous ethnic composition.'" *Nikkeijin*, "'as relatives of the Japanese, would be able to assimilate into Japanese society regardless of nationality and language.'"⁶⁸ In contrast, "if Japan admitted many Asians with different cultures and customs than those of Japanese," this homogeneity might fall apart.⁶⁹

As a result of this one change in policy, substantial Japanese Latino communities mushroomed in industrial zones, becoming concentrated in manual labor occupations. In 1987, South Americans constituted a mere 0.5% of all registered foreigners in Japan. The figure exploded in 1990, reaching a total of 19%, or 284,691 persons, in 1997. The majority of Japanese Latinos comes from Brazil, and Brazilians accounted for 15.7% of the total registered foreign population in 1997.⁷⁰ Most of the Latinos have either a long-term resident visa (139,554 persons in 1998) or status as a spouse or child of a Japanese national (113,340 persons in 1998).⁷¹

(Mike Douglass and Glenda S. Roberts eds., 2000) [hereinafter Yamanaka, "*I Will go Home, But When?*"] (characterizing the revision as a means to avert the criticism of politically influential small factory owners and to uphold the "conservative agenda of maintaining ethnic and social homogeneity"). Yamanaka, a sociologist, has conducted field research in Japan and Brazil and has written on immigrant labor in Japan, particularly as it relates to Japanese Brazilians.

65. Between 1908 and 1989, 260,358 Japanese emigrated to Brazil. See *id.* at 123, 127-29, 132 tbl. 6.2, 147 n.3, 148 n.6 (citations omitted). However, with Brazil's economic instability in the 1970s and 1980s, many Japanese Brazilians sought to migrate to Japan.

66. Keiko Yamanaka, *Return Migration of Japanese Brazilians to Japan: The Nikkeijin as Ethnic Minority and Political Construct*, 5 *DIASPORA* 65, 74-76 (1996) [hereinafter Yamanaka, *Return Migration of Japanese Brazilians to Japan*]. Whereas first- and second-generation Japanese Brazilians who maintained their Japanese citizenship returned to Japan with relative ease, other second- and third-generation Japanese Brazilians did not have Japanese citizenship and could not easily enter Japan until the 1989 revision of the Immigration Act. Many of them lacked Japanese citizenship due to Japan's Nationality Law. Until 1985, the law required parents seeking Japanese citizenship for their newborn child to register their child with the government within 14 days of birth. Many parents were unable to do this from overseas. Yamanaka, "*I Will Go Home, But When?*" *supra* note 64, at 132 (citation omitted).

67. Yamanaka, *Return Migration of Japanese Brazilians to Japan*, *supra* note 66, at 77.

68. *Id.* at 76 (quoting Toshihiko Mojima, *Susumetai Nikkeijin no Tokubetsu Ukeire* [Toward the Special Admission of the Nikkeijin], *GEKKAN JIYU MINSHU*, Oct. 15, 1989, at 98-99).

69. *Id.*

70. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 176.

71. See Immigration Control Bureau, HEISEI 10 NENMATSU GENZAI NI OKERU GAIKOKUJIN TOROKUSHA TOKEI NI TSUITE [REGARDING ALIEN REGISTRANT STATISTICS AT THE CLOSE OF 1998] 4

In 1997, the Diet again revised the Immigration Act. At the end of the previous year, interceptions of ships smuggling foreigners into Japan rose markedly,⁷² drawing media attention and raising alarm bells within the government. The number of unlawful sea and air entrants caught for violating the Immigration Act rose steadily, from 4,663 in 1995 to 4,827 in 1996. In 1997, the number of apprehensions jumped to 7,117.⁷³ Concern over the phenomenon led to passage of revisions on May 8, 1998, with implementation on June 8, 1998.⁷⁴ Most of the new provisions punish specific acts related to organizing and assisting groups seeking to enter in secrecy or via the use of falsified documents. They also broaden other aspects of existing law.⁷⁵

Two years later, on August 18, 1999, the Diet tightened the Immigration Act in two areas.⁷⁶ Further revisions reportedly became necessary when the 1997 revisions failed to reduce the number of unlawful entrants, and overstayers allegedly committed a series of crimes.⁷⁷ Prior to the revision, the law already contained a provision punishing the act of unlawful entry into Japan.⁷⁸ However, this provision, Article 70, is subject to a three-year statute of limitations.⁷⁹

(1999) (139,554 of a total of 274,442 South Americans have long-term resident visas, and 113,340 South Americans possess status as the spouse or child of a Japanese national).

72. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 125. According to one theory, prior to the close of 1996, smugglers required payment up front. When installment payment plans subsequently became possible, many more foreigners began to enter Japan aboard watercraft. Emiko Miki, *Gaikokujin no Jiken ni Kanshin wo Motte itadaku tame ni* [In Order to Raise Concern for Foreigners' Cases], 153 DAMPŌ [LAWYERS' GROUP FOR FREEDOM NEWS] 61-2 (1998). The weakened economic situation in Asia, which spiraled into a full-blown crisis by mid-1997, may also have spurred the rise in secret entrants into Japan.

73. 1997 STATISTICS ON IMMIGRATION CONTROL, *supra* note 7, at 68, 101.

74. Shutsunyūkoku Kanri Oyobi Nanmin Nintei Hō no Ichibu wo Kaisei suru Hōritsu [Law Revising Part of the Immigration Control and Refugee Recognition Act], Law No. 57 of 1998.

75. In the past, those assisting illegal entrants faced possible punishment of a term of imprisonment of up to 18 months and a fine of 150,000 yen (\$1,500). The new criminal laws related to assisting in the entry of illegal immigrants set much stiffer penalties. For example, a person who directs aliens "under his control or charge" to enter or land illegally in Japan is subject to a term of imprisonment of under five years and/or a fine of under 3,000,000 yen (\$30,000). Immigration Act, *supra* note 4, art. 74(1). If the person intends to make a profit from her illegal activities, the term of imprisonment ranges from one to 10 years, and the fine may be set at less than 10,000,000 yen (\$100,000). *Id.* art. 74(2). Articles 74-2 through 74-6 criminalize various aspects of enabling illegal aliens to enter Japan, such as the preparation of transport vessels.

76. Shutsunyūkoku Kanri Oyobi Nanmin Nintei Hō no Ichibu wo Kaisei suru Hōritsu [Law Revising Part of the Immigration Control and Refugee Recognition Act], Law No. 135 of 1999. A third major amendment concerns reentry permits. Foreigners residing in Japan must obtain reentry permits if they plan to travel abroad. Under the current law, a reentry permit remains valid for one year. The revised law extends the validity period to three years. It benefits permanent residents who live abroad by requiring them to return to Japan only once every three years, rather than every year, to renew their reentry permits.

77. Kokusai Jinryū Editorial Board, *Shutsunyūkoku Kanri Oyobi Nanmin Nintei Hō no Ichibu wo Kaisei Suru Hōritsuan Oyobi Gaikokujin Tōroku Hō no Ichibu wo Kaisei suru Hōritsuan no Gaiyō* [Outline of the Bill to Revise the Immigration Control and Refugee Recognition Act in Part and the Bill to Revise the Alien Registration Law in Part], 145 KOKUSAI JINRYŪ 18 (June 1999). Japan Immigration Association, the non-governmental arm of the Immigration Control Bureau, edits KOKUSAI JINRYŪ in cooperation with the Bureau. It publishes the magazine to enable "continuous exchange of opinion between its readers and the Immigration Control Bureau." *Id.* at 58.

78. Immigration Act, *supra* note 4, arts. 70(1) to 70(3).

79. KEIJI SOSHŌ HŌ [CRIMINAL PROCEDURE CODE], art. 250(5).

After the expiration of the three-year period, a foreigner who entered Japan illegally was no longer subject to the penal provisions of Article 70. The 1999 revisions criminalized, for the first time, an illegal entrant's *residence* in Japan. Now, illegal entrants face fines or imprisonment *at any time* for the act of unlawfully residing in Japan. Another revision to the Act extended the wait period before an involuntary deportee may reenter Japan from one year to five years.⁸⁰

In addition to modifying the Immigration Act, the government has also suspended reciprocal visa exemption agreements with Bangladesh, Pakistan, and Iran.⁸¹ Such agreements eliminate the need to obtain a visa prior to departure for a member country. Nationals of the signatories receive a temporary visitor visa upon entry into any other signatory's territory. The visa exemption became an avenue for a steady stream of migrant workers from the three countries, who then overstayed their visas. The Japanese government cut off this hassle-free route to entering Japan by "temporarily suspending" the agreements with Bangladesh and Pakistan in January 1989, and with Iran in April 1992.⁸² The suspensions, which are still in effect, abruptly reduced the entry of these nationals into Japan.⁸³ Malaysia and Peru also have visa exemption agreements with Japan, but since June 1, 1993 and July 1995, respectively, the Japanese government has taken measures to "encourage" nationals of the two countries to apply for visas in advance of travel.⁸⁴

B. Enforcement

Enforcing the Immigration Act is akin to grasping a balloon: take hold of one part and the air inside bulges out elsewhere. The enhancement of enforce-

80. Immigration Act, *supra* note 4, arts. 5(1), 5(9).

81. A list of countries that have concluded visa exemption agreements with Japan is provided in A GUIDE TO ENTRY, RESIDENCE AND REGISTRATION PROCEDURES, *supra* note 62, at 54-55. Singapore, Malaysia, and Brunei are the only other Asian countries maintaining ongoing visa exemption agreements with Japan.

82. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 123.

83. Compared with 1988 figures, the number of Bangladeshis and Pakistanis entering Japan in 1989 decreased dramatically, by 76.4% and 64.8%, respectively. JAPAN IMMIGRATION ASSOCIATION, SHUTSUNYÜKOKU KANRI KANKEI TÖKEI GAIYÖ [1989 STATISTICS ON IMMIGRATION CONTROL] 2, 9 (1990). From May 1992 to January 1998, the Bangladeshi overstayer population shrank from 8,103 to 5,581, and the number of Pakistani overstayers dropped from 8,001 to 4,688.

The number of Iranians had more than doubled in two years, from 17,050 entrants in 1989 to 47,976 in 1991. After suspension of the visa exemption agreement, the number of Iranian entrants dropped to 15,415 in 1992, a 67.9% decrease from 1991. During the following year, only 4,389 Iranians entered Japan, a 71.5% decrease compared to 1992. From 1993 to 1997, the annual number of Iranian entrants hovered in the 3,000 to 4,000 range. JAPAN IMMIGRATION ASSOCIATION, SHUTSUNYÜKOKU KANRI KANKEI TÖKEI GAIYÖ 1993 [1993 STATISTICS ON IMMIGRATION CONTROL] 14 (1994) [hereinafter 1993 STATISTICS ON IMMIGRATION CONTROL]; 1997 STATISTICS ON IMMIGRATION CONTROL, *supra* note 7, at 14.

84. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 123; 1993 STATISTICS ON IMMIGRATION CONTROL, *supra* note 83, at 43, 83. Under the policy of "encouragement," the Ministry of Foreign Affairs and the Japanese consulate inform citizens of the target country that they must either obtain a visa prior to departure or risk not being allowed to land in Japan. If nationals of Malaysia or Peru land without a visa, they are "strictly inspected." Interview with Shoko Sasaki, Residency Section, Deputy Director, Immigration Control Bureau, Ministry of Justice, in Tokyo, Japan (May 25, 2000).

ment mechanisms has driven illegal entrants towards more sophisticated and costly methods of evading or deceiving the Immigration Control Bureau. Migrants willing to pay high fees attract criminal organizations, creating a full-fledged industry in falsified documents, sham marriages, and human smuggling. Continuing the spiral, the government targets the brokers and their methods, resulting in more creative and cunning duplicity.⁸⁵

During the prosperous bubble era, the government applied the Immigration Act with a lax hand, and police patrolling areas well known for high concentrations of foreign workers, such as Kotobuki-cho in Yokohama, often looked the other way.⁸⁶ The tacit recognition of the presence of undocumented workers changed during Japan's extended economic slump. Many of the small- and medium-sized companies that had hired low-wage newcomers either closed operations or lost business, resulting in a decline in the demand for foreign labor.⁸⁷ Although no reliable figures currently exist, unemployment among newcomers has risen.⁸⁸ Beginning in the early 1990s, the Immigration Control Bureau boosted its enforcement efforts at points of entry into Japan, applied more rigorous scrutiny to visa and visa-related applications, and more actively conducted arrests of undocumented persons. The government increased the ranks of immigration-related government employees from 1,753 in 1980 to 2,512 in 1998, with most of the increase seen in the period from 1993 to 1998. During that time, more than 100 positions were added annually. The number of screening officers nearly doubled, and the cadre of guards rose by nearly 50 percent.⁸⁹

85. Foreigners are increasingly turning to "professionals" for assistance in entering Japan. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 133. Serious cases involving domestic and overseas broker organizations, sham marriages, and the use of falsified travel documents are on the rise. *Id.* at 155. The "professionals" include gangs, which are increasingly involved in the marriage broker business. According to its own survey of 298 cases from November 1996 to February 1997, the Immigration Control Bureau concluded that the contract period for fake marriages is commonly three to five years. The Japanese "spouse" is paid from one to two million yen (\$10,000 to \$20,000), and the overwhelming pattern is of foreign women contracting with Japanese men. *Id.* at 110-11.

86. According to journalist Rey Ventura's account of his experience in the mid-1980s as an undocumented laborer in Kotobuki-cho, law enforcement officers would conduct arrest raids in response to crimes committed in the area or neighbors' complaints about noise. See REY VENTURA, UNDERGROUND IN JAPAN 115 (James Fenton ed., 1992). Occasionally, an individual police officer would question a foreign worker, which sometimes led to arrest and, presumably, deportation. *Id.* at 144, 151-55. Although the police could have swept the well-known street corners where foreigners and Japanese alike congregated in the early morning to await day-labor employers, such a sweep did not occur during Ventura's roughly one year of living in Kotobuki-cho. *Id.* at 132.

87. The number of small- and medium-sized business bankruptcies rose from close to 6,000 in 1990 to over 10,000 in 1991. Business failures hovered in the range of 14,000 to 15,000 per annum from 1992 to 1996, rising to a 10-year high of 16,293 cases in 1997. SMALL- AND MEDIUM-SIZED ENTERPRISE AGENCY, CHŪSHŌ KIGYŌ HAKUSHO [SMALL- AND MEDIUM-SIZED ENTERPRISE WHITE PAPER] 34 (1998).

88. See, e.g., Keiko Yamanaka, *New Immigration Policy and Unskilled Foreign Workers in Japan*, 66 PACIFIC AFFAIRS 72, 84 (1993) [hereinafter Yamanaka, *New Immigration Policy*] (noting unemployment has risen among foreign workers since 1992) (citation omitted).

89. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 4, 197, 198. A Bureau official noted that the number of Immigration Control Bureau personnel has grown more than that of other arms of government. Interview with Shoko Sasaki, *supra* note 84.

The Bureau set up several new organizations, such as a branch office and a mobile seizure team at Kansai International Airport in 1994. To uncover brokers and conduct mobile arrests, it established special investigation teams of immigration guards in Tokyo Regional Immigration Control Bureau in 1993, in Osaka Regional Immigration Control Bureau in 1994, and in Nagoya Regional Immigration Control Bureau in 1995. Since 1996 and 1997, respectively, newly created sections in the Tokyo Bureau and the Osaka Bureau have performed detailed analyses of cases where foreigners, with the assistance of various organizations, enter under false pretenses. In 1997, a Special Measures Team for Serious Cases arose within Tokyo's Immigration Control Bureau. It specializes in investigating and conducting arrests in cases involving brokers and false documents.⁹⁰

Collaboration with other parts of the government has grown stronger and more formalized than in the past. In 1992, the Ministries of Justice and Labor and the National Police Agency formed two working groups, the Meeting on Countermeasures Regarding Illegally Working Foreigners and the Meeting of Bureau Chiefs Regarding Countermeasures Against Illegally Working Foreigners. The groups aim to facilitate the regular exchange of information and to discuss concrete plans such as undertaking joint arrest actions.⁹¹ Similar meetings also occur among the regional offices of the three entities.⁹² Examples of coordinated efforts include the notorious sweeps in 1993 and 1994 of foreigners in Ueno and Yoyogi Parks, two public parks in Tokyo that were popular socializing spots for foreign workers.⁹³

The Bureau does not have jurisdiction over Japanese persons, and it therefore conducts joint apprehensions with police to ensure a smooth operation. The Ministry of Labor rarely participates in arrests, but may sometimes take action against employers in egregious cases.⁹⁴ In January 1998, the Ministry of Justice created an internal Headquarters for Promoting Concentrated Arrests of Illegally Staying Foreigners. With reportedly strong cooperation from related govern-

90. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 4, 155-56, 192-93.

91. *Id.* at 157.

92. Interview with Shoko Sasaki, *supra* note 84.

93. Foreign workers (primarily Iranians) from Tokyo and neighboring prefectures gathered on Sundays in one corner of Yoyogi Park beginning in the autumn of 1990. *Nichiyōbi no Tōkyō, Yoyogi Kōen* [Sunday at Tokyo's Yoyogi Park], ASAHI SHIMBUN, Oct. 3, 1992 (evening edition), at 3. The police estimate that at its peak in May 1992, as many as 8,000 foreigners gathered in the park on Sundays. The park served as an arena for foreigners to meet with friends and exchange information, particularly regarding job opportunities. One Asahi Shimbun journalist referred to the area as "Islam Square." Kenji Ogata, *Yoyogi Kōen no Iranjin* [Yoyogi Park's Iranians], 467 HŌGAKU SEMINĀR 10, 10-11 (Nov. 1993).

Law enforcement officers also targeted Iranians in their Ueno Park arrests of foreigners suspected of Immigration Act violations. In a little more than seven months (from April to early November 1993), Tokyo Immigration Control Bureau swept Ueno Park seven times, rounding up a total of 174 foreigners. *Iranjinra 24 Nin wo Shūyō* [24 Iranians and Others Detained], ASAHI SHIMBUN, Nov. 10, 1993 (evening edition), at 11. See also *Fuhō Taizai nado no Utagai Iranjinra 47 Nin Tekihatsu* [47 Iranians and Others Arrested on Suspicion of Illegal Residency and Other Charges], ASAHI SHIMBUN, June 21, 1994, at 26.

94. Interview with Shoko Sasaki, *supra* note 84.

ment bodies, particularly national and local police agencies, the Headquarters implemented large-scale, concentrated arrests, resulting in 2,617 arrests in the six-month period from January through June 1998.⁹⁵

Individual police officers also enforce the Immigration Act. Since the mid-1990s, police have reportedly stopped a growing number of foreigners, particularly Asians and Iranians, on the street. They demand to see the foreigners' passports or alien registration cards.⁹⁶ Police stopping newcomers for traffic violations also check their immigration status.⁹⁷ On occasion, the police warn employers not to hire undocumented workers.⁹⁸

The Immigration Control Bureau reports a strengthening in cooperation with foreign governments and related bodies.⁹⁹ Through regular meetings with the Ministry of Foreign Affairs and seminars with the immigration control bureaus of other countries, the Bureau builds cooperative relationships with sending countries and by-way countries. It believes its efforts have contributed to reducing the number of undocumented workers in Japan.¹⁰⁰

The Immigration Control Bureau has also actively pursued a process called "enlightening." To prevent the hiring of undocumented foreigners, it gives administrative guidance to employers regarding the Immigration Act. Since at least 1993, the Bureau has declared the month of June a "Foreign Worker Problem Enlightenment Month."¹⁰¹ All other related ministries and agencies also conduct enlightenment activities during June. As part of the annual campaign, the Bureau asks local governments, employer organizations, and other groups for cooperation in coping with undocumented workers. The Bureau gives

95. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 156.

96. See, e.g., Interview with M.N. Tipu, *supra* note 18; Interview with FLU, *supra* note 19. Under the Alien Registration Law, foreign residents must register at their local government offices. Those over the age of 16 must carry their alien registration card with them at all times and produce identification for law enforcement officers upon request. Gaikokujin Tōrōku Hō [Alien Registration Law], Law No. 152 of 1952, arts. 3, 13.

97. Small Group Discussion at the 1998 National Network in Solidarity with Migrant Workers' Activists' Conference in Atami, Japan (June 1998).

98. See, e.g., Yasuharu Shimada, *Jirei 4: Chōka Taizaisha he no Kaiko Yokoku Teate [Example 4: Dismissal-Notice Allowance for Overstayers]*, 341 GEKKAN MUSUBU 35 (May 1999) (reporting that after receiving repeated warnings from police not to employ overstayers, an employer fired three Iranian overstaying employees in May 1998); Interview with Junji Kase, Kōtō Community Union General Secretary, in Tokyo, Japan (Jan. 22, 1999) (noting difficulty of persuading employers to reinstate dismissed overstayers where the police or Immigration Control Bureau had contacted the employers).

99. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 155. Starting in 1987, the Immigration Control Bureau has sponsored annual conferences for the purpose of exchanging information and opinions among the immigration control bureaus of various nations. Although entitled, "Southeast Asian Immigration Control Seminar," countries outside of Southeast Asia, such as the United States and Canada, have also attended the conferences. *Id.* at 215.

100. *Id.* at 157.

101. Subcomm. on the Illegal Resident Issue, Foreign Worker Problem Coalition of Related Ministries & Agencies, Report 22 (1993) [hereinafter Subcomm. on the Illegal Resident Issue, Report].

presentations to industry groups and other organizations, warning employers not to violate the prohibition against hiring undocumented workers.¹⁰²

Although it is difficult to judge the overall success of the government's initiatives, the number of arrests and deportations has certainly risen since the 1980s. In 1983, 4,768 foreigners underwent deportation proceedings. Their numbers nearly quintupled to 22,626 in 1989, reaching an all-time high of 70,404 in 1993.¹⁰³ Part of the stunning increase in deportations during the early 1990s stemmed from fear of the 1990 revisions and misinformation about their content. The changes drove a significant number of undocumented persons to turn themselves in to the Immigration Control Bureau.¹⁰⁴ Beginning in 1993, the number of deportation cases declined annually, down to 49,566 in 1997.¹⁰⁵ Whether the decrease can be attributed to the government, rather than the economy, remains unclear. The Immigration Control Bureau itself ascribes the decline to a combination of enforcement efforts, suspension of visa exemption agreements, and a weak economy.¹⁰⁶ Misinformation was once again behind a recent rise in voluntary submissions for deportation. According to rumors, over-stayers, if arrested, would either go to jail for three years or face hefty fines under the Immigration Act revisions that went into effect on February 18, 2000.¹⁰⁷

The Immigration Act requires all public servants to report persons believed to be deportable to the Immigration Bureau,¹⁰⁸ but adherence to the rule varies greatly. To take one example, the Ministry of Justice's Human Rights Bureau has an understanding with the Immigration Control Bureau regarding undocumented foreigners who seek advice from the Ministry's human rights counseling service. Counselors do not report such foreigners to the immigration authorities.¹⁰⁹ In another example, newcomer support groups have negotiated with local government offices and Labor Standards Offices, urging them not to report undocumented persons. Although a growing number of local governments have agreed not to notify Immigration Control, some have reported undocumented foreigners nonetheless.¹¹⁰ A local government's alien registration bureau is the

102. Interview with Shoko Sasaki, *supra* note 84.

103. SHIMADA, JAPAN'S "GUEST WORKERS," *supra* note 9, at 24 (citing Immigration Control Bureau statistics); IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 129.

104. See SHIMADA, JAPAN'S "GUEST WORKERS," *supra* note 9, at 25. See also IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 143 (noting fear of severe punishment pursuant to strengthened measures in the 1989 revisions caused a succession of voluntary submissions to the Immigration Bureau).

105. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 128-29.

106. *Id.* at 123, 146, 155.

107. See *Dema de Kikoku Rasshu* [Rush to Return Home Based upon False Rumors], ASAHI SHIMBUN, Dec. 26, 1999 (evening edition), at 19.

108. Immigration Act, *supra* note 4, art. 62(2).

109. LEGAL AFFAIRS COMM., LEGAL AFFAIRS COMM. RECORD NO. 2, at 8 (116 H.R. Sess. 1989) (statement of Kinichi Takahashi, Human Rights Bureau Chief, Ministry of Labor). The human rights counseling service for foreigners opened its doors in August 1988 in Tokyo. *Id.*

110. Tomomi Yōfu, *Gaikokujin no Kekkō, Kodomo, Kazoku* [Foreigners' Marriage, Children, and Families], 47 JIYŪ TO SEIGI 104, 105 (May 1996) (noting that Rights of Immigrants Network in

most likely body to give notice if an undocumented foreigner attempts to register.¹¹¹

As for enforcement vis-à-vis employers, the government administration interprets Article 73-2's prohibition against hiring or helping undocumented workers obtain jobs as punishing only bad-faith employers and intermediaries. Generally, the employer or broker must exhibit some degree of intent to have a foreigner work unlawfully or, alternatively, knowledge that the foreigner is not permitted to work in Japan. The employer or broker must actively encourage foreigners to engage in unauthorized labor, and it must hold a position of power over them.¹¹² Consequently, hiring an undocumented person to stock a store with goods or using, on subcontract, a foreigner whose visa status does not permit employment do not, standing alone, constitute acts sufficient to find a violation of Article 73-2.¹¹³ Moreover, in the case of an intermediary, one incident does not constitute a violation of the article. Instead, an intermediary faces legal sanctions only when it repeatedly helps foreigners perform unauthorized work.¹¹⁴

In comparison with the estimated number of overstayers and the untold thousands of illegal entrants working in Japan, arrest statistics for violations of Article 73-2 are low. They suggest a lack of vigorous law enforcement. Although one Immigration Control Bureau official acknowledges that tens of thousands of employers may hire undocumented workers, she identifies brokers as the primary target of the sanctions. A lack of sufficient personnel also makes it impractical for immigration officials to sweep through all workplaces.¹¹⁵ The number of actual arrests for violations of Article 73-2 rose from 41 cases (54 persons) in 1990¹¹⁶ to a peak of 692 cases (777 persons) in 1993.¹¹⁷ During the following four years, the arrest figures fluctuated, hitting a low of 326 cases (432 persons) in 1995. In an attempt to control employers and gangs, the Japa-

Kansai, the Foreign Spouses' Group, and other citizens' groups negotiate with local governments to persuade them not to notify the Immigration Control Bureau).

111. Interview with Shoko Sasaki, *supra* note 84. It may seem contrary to common sense for an undocumented foreigner to register with the government. However, in order to access government-run health insurance programs and other benefits, aliens must often register themselves. The situation presents a powerful incentive to risk detection. *See id.*

112. IMMIGRATION CONTROL: LEGAL CODE IN PRACTICE, *supra* note 39, cmt. at 131-32.

113. HIDENORI SAKANAKA & TOSHIO SAITÔ, SHUTSUNYÜKOKU KANRI OYOBI NANMIN NINTEI HÔ CHIKUJÔ KAISETSU [ARTICLE-BY-ARTICLE COMMENTARY TO THE IMMIGRATION CONTROL AND REFUGEE RECOGNITION ACT] 825 (1997).

114. IMMIGRATION CONTROL: LEGAL CODE IN PRACTICE, *supra* note 39, cmt. at 132.

115. Interview with Shoko Sasaki, *supra* note 84. She rejected the suggestion that immigration officials are lax in enforcement against employers in order to preserve the economy.

116. The statistics for 1990 may be particularly low since Article 73-2 went into effect on June 1, 1990. Shutsunyûkoku Kanri Oyobi Nanmin Nintei Hô no Ichibu wo Kaisei suru Hôritsu [Law Revising Part of the Immigration Control and Refugee Recognition Act], Law No. 79 of 1989 (promulgating Article 73-2); SHIMADA, JAPAN'S "GUEST WORKERS," *supra* note 9, at 61 (noting 1989 revisions went into effect on June 1, 1990).

117. YAMADA & KUROKI, *supra* note 63, at 142.

nese police also report using labor laws such as the Employment Security Law. As with enforcement of Article 73-2, however, arrest statistics are low.¹¹⁸

C. Deportation and Detention

The increase in arrests of newcomers for Immigration Act violations has strained the capacity of Japan's detention system. Incidents of alleged abuse of detainees at the hands of immigration officers began to surface in 1994. On December 23, a former Immigration Bureau officer went public with allegations of a regular practice of physical abuse of foreign detainees within the Tokyo Immigration Control Bureau detention facility in Kita Ward.¹¹⁹ Earlier that year, a group of lawyers and activists formed the Immigration Review Taskforce to investigate the administration of the immigration system and to publicize its findings.¹²⁰

The Taskforce criticizes the absence of procedural protections and standards in the laws concerning arrest and detention. For example, under current regulations, if an officer has "sufficient reason" to believe people will vanish before the issuance of written detention orders, the officer may arrest them without a written order.¹²¹ Authorities may hold a suspected violator for an initial period of 30 days and, if the Immigration Bureau obtains an extension, an additional 30 days. If no order of deportation actually issues, the authorities must release the suspect after the expiration of the 60-day period. Foreigners whom the immigration officials find deportable may remain in jail indefinitely; there are no time limits on their detention.¹²² Along with highlighting such shortcomings of the legal regime, the Taskforce has published a collection of testimonials by foreigners formerly held in detention and deported.¹²³ The foreigners' experiences outline a host of alleged legal violations and mistreatment of detainees at the hands of immigration officers, police, and detention facility personnel.

118. KEISATSU HAKUSHO [POLICE WHITE PAPER] 266-67 (Nat'l Police Agency ed., 1998). In 1993, police conducted 130 hiring-related arrests (114 cases) of foreigners pursuant to labor and employment laws. Since then, the figures have gradually declined to 30 cases (23 persons) in 1997. *Id.* at 267.

119. "Nyūkan Shokuin no Bōryoku Nichijōteki" to Shōgen [Testimony Given that "Violence by Immigration Staff Members Is a Daily Occurrence"], ASAHI SHIMBUN, Dec. 24, 1994, at 22. See also Tohru Takahashi, *Violence Against Female Detainees by Immigration Control Bureau Officers*, in NGOs' REPORT ON THE SITUATION OF FOREIGN MIGRANT WOMEN IN JAPAN AND STRATEGIES FOR IMPROVEMENT 44, 45-46, 48-53 (Migrant Women Worker's Research & Action Comm. ed., 1995) (containing an excerpt of the former officer's journal and a table listing alleged incidents of abuse). Foreign female detainees have also made allegations of sexual abuse. See *id.*

120. Interview with Tohru Takahashi, Member of the Immigration Review Taskforce, in Yokohama, Japan (Dec. 9, 1998).

121. Immigration Act, *supra* note 4, art. 43.

122. Article 52 of the Immigration Act requires that a deportee be deported "without delay." *Id.* art. 52(3). However, if the person cannot be immediately returned to her country, then she may be detained "until such time as deportation becomes possible." *Id.* art. 52(5).

123. NYŪKAN MONDAI CHŌSAKAI [IMMIGRATION REVIEW TASKFORCE], KYŌSEI SŌKAN SARETA GAIKOKUJIN NO SHŌGEN '95-'97: TEKIATSU TO NYŪKAN DE NO SHŪYŌ [TESTIMONY OF FOREIGNERS FORCIBLY REPATRIATED '95-'97: ARREST AND DETENTION AT IMMIGRATION CONTROL] (1997). From 1995 to 1997, Taskforce members conducted a total of 63 interviews in the Philippines, Korea, Thailand, and Peru. The members also interviewed former deportees who had returned to Japan. *Id.*

In November 1997, Amnesty International issued a report, "Japan: The Ill-Treatment of Foreigners in Detention." The publication cast a spotlight on reports that, in many cases, authorities fail "to inform detainees of their rights to legal representation or to the services of interpreters." It also accused detention facilities of denying repeated requests for medical treatment and of providing inadequate treatment to the few inmates who received it. It found detainees are often subject to physical violence and ethnic or national origin discrimination at the hands of government officials, without means for adequate redress.¹²⁴

In November 1998, the United Nations Human Rights Committee expressed concern "about allegations of violence and sexual harassment of persons detained pending immigration procedures, including harsh conditions of detention, the use of handcuffs, and detention in isolation rooms. Persons held in immigration detention centres may remain there for periods of up to six months and, in some cases, even up to two years."¹²⁵ The Committee echoed other concerns set forth in Amnesty's report, such as the lack of training for the judiciary regarding the International Covenant on Civil and Political Rights and the "substitute prison system," in which the police may both hold and investigate a suspect in detention.¹²⁶

Perhaps in response to the welter of domestic and international criticism leveled against it, the Immigration Control Bureau recently acknowledged a need to establish regulations giving more consideration to detainees' human rights. At the same time, however, it also emphasized the authority of the detention facility chief and guards. The Bureau revised the Rules on Treatment of Detainees on August 18, 1998.¹²⁷ The rules' statement of purpose now sets forth that the rules are to "continue to respect the human rights [of detainees] and undertake appropriate treatment."¹²⁸ Several other changes provide additional protections for detainees,¹²⁹ but it remains to be seen whether practices within detention facilities actually change to comport with the spirit of the revisions.

Responding to growth in the detainee population, the Bureau opened new detention facilities in rapid succession. In December 1993, the Eastern Japan Immigration Control Center opened in Ushiku City, Tochigi Prefecture, with a

124. AMNESTY INTERNATIONAL, JAPAN: THE ILL-TREATMENT OF FOREIGNERS IN DETENTION 3 (1997).

125. CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT: CONCLUDING OBSERVATIONS OF THE HUMAN RIGHTS COMMITTEE—JAPAN, U.N. GAOR, Hum. Rts. Comm., 64th Sess., 1726-1727th mtgs. ¶19, U.N. Doc. CCPR/C/79/Add.102 (1998). As a signatory to the International Covenant on Civil and Political Rights, Japan is required to submit a report to the Committee every four years regarding its compliance with the Covenant.

126. *Id.* ¶¶ 32-33.

127. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 161 (noting the revisions went into effect on September 1, 1998).

128. Hishiyōsha Shogū Kisoku [Rules on Treatment of Detainees], Ministry of Justice Order No. 38 of 1998, art. 1.

129. One new regulation calls for the facility chief and others to listen to detainees' opinions regarding their treatment and to take other measures to ensure the propriety of their treatment. *Id.* art. 2(2). With regard to female detainees, the chief must have female guards or other female staff persons handle their treatment. *Id.* art. 40(2).

capacity of 300 persons. In November 1995, the Western Japan Immigration Control Center opened in Osaka with space for 250 detainees. The largest facility, Ōmura Immigration Control Center in Nagasaki Prefecture, opened in September 1996 with space for 800 detainees.¹³⁰ Despite the increased capacity, the Bureau admits that certain detention facilities must unavoidably hold a large number of detainees on an ongoing basis.¹³¹

1. *Challenges to the System*

Victims of alleged abuse are engaged in ongoing court challenges against the government. At present, no published decisions address detainees' claims against the government. According to Amnesty's report, it is highly unlikely Japanese courts will find that detention officers have acted unreasonably or unlawfully.¹³² Tadanori Onitsuka, co-founder of the Taskforce and LAFLR, is the lead attorney in two such cases, both involving Iranians. In one suit, the plaintiff alleges immigration officials beat and kicked him while his hands were handcuffed behind his back. After the beating, he was placed in a tiny isolation cell with two other Iranians for 15 days. Handcuffed the entire time, he had to eat his meals "like a dog." He suffered internal hemorrhaging in his lower back, in addition to other injuries.¹³³ Onitsuka's second case, described in the Amnesty report, involves a detainee who died under suspicious circumstances in the Kita Ward Immigration Detention Center in Tokyo on August 11, 1997. Although a doctor's report identifies the cause of death as a beating, the Immigration Bureau rejects the doctor's findings. It asserts that while being escorted to a room, the decedent fell, hit his head on the floor, and died from the resultant injuries.¹³⁴ Both cases are pending.

Foreigners have become more adept at using legal mechanisms to challenge findings of deportability. Under present deportation procedures, a foreigner facing deportation has two opportunities to lodge an administrative objection. The first is an oral hearing by a special inquiry officer; it is filed in response to an immigration inspector's finding of deportability.¹³⁵ If the special inquiry officer affirms the determination of deportability, the accused may submit a second objection to the Justice Minister.¹³⁶ By 1997, the number of foreigners filing

130. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 193. Prior to opening new facilities, the two existing detention centers in Yokohama City (near Tokyo) and Ōmura (in Nagasaki Prefecture) had a combined capacity of 337 persons. Both centers were subsequently transferred and consolidated into the recently opened facilities. Detainees may also be held in local facilities. *Id.* at 194.

131. *Id.* at 155.

132. See AMNESTY INTERNATIONAL, *supra* note 124, at 9 (noting that securing evidence is a major obstacle for plaintiffs and that courts are "reluctant to accept the testimony of victims against that of detention officials even when other prisoners claimed to have witnessed the incident").

133. NYŪKAN BŌKŌ JIKEN HIGAISHA AMUJADISAN NO SAIBAN WO SASAERU KAI [GROUP SUPPORTING THE LAWSUIT OF AMJADI, A VICTIM OF IMMIGRATION VIOLENCE], AMUJADISAN WA KIZETSUSU RU MADE NAGURARETA [AMJADI WAS BEATEN UNTIL HE LOST CONSCIOUSNESS] 1-2 (1998).

134. AMNESTY INTERNATIONAL, *supra* note 124, at 27 (describing the case of Mousavi Abarbekouh Mir Hossein).

135. Immigration Act, *supra* note 4, art. 48.

136. *Id.* art. 49.

both types of objections had increased steadily, even though the number of cases handled by immigration screening officers began to decline in 1993.¹³⁷ The increase in filings has taxed the Bureau's capacity to handle cases. The Bureau faces other problems as well, including the increasing complexity of cases, the struggle to secure interpreters, and the difficulty of determining the veracity of asylum claims.¹³⁸

The increase in objections reveals a growing familiarity with deportation procedures on the part of newcomers. The time period for filing both types of objections is very short: it lasts only three days from the time the foreigner receives notification of the finding of deportability.¹³⁹ Thus, if foreigners are unaware of the rules, they may easily lose the opportunity to lodge an objection. The Immigration Control Bureau acknowledges that the increase in the filing of objections may stem from the increase in marriages of foreigners with Japanese citizens or newcomers' development of other ties to Japanese society. Additionally, both foreigners "and those connected with them" (presumably their friends, relatives, and supporters) advocate foreigners' rights more strongly than in the past.¹⁴⁰

2. Development of Exceptions

The Bureau's general aim is to deport people as quickly as possible.¹⁴¹ During the early years of newcomer migration, even if an undocumented newcomer had a pending unpaid wages court case at the time of her arrest for violating the Immigration Act, the Bureau was likely to deport her. Often, the deportation effectively terminated the deportee's unpaid wage litigation. Recently, a shift in the Immigration Bureau's attitude has broadened the possibility of postponing deportation in cases where the deportee is undergoing medical treatment, testifying as a witness in a criminal case, or litigating a claim. Granting a postponement remains entirely within the Immigration Bureau's discretion. However, in the Tokyo area, lawyers and activists are fairly confident the Bureau will grant postponement requests.¹⁴² A Bureau official attributes the development of exceptions to greater consideration for humanitarian concerns in recent years.¹⁴³

137. The number of oral hearing cases has risen from 681 per year in 1992 to 1,750 in 1997. Objections filed with the Justice Minister have increased from 559 per year in 1992 to 1,581 in 1997. Oral hearings constituted 1% of all immigration screening cases in 1992, but by 1997, they accounted for 3.5 percent. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 143.

138. *Id.*

139. Immigration Act, *supra* note 4, arts. 48(1) & 49(1).

140. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 143.

141. Interview with Shoko Sasaki, *supra* note 84.

142. See, e.g., Interview with Masaki Yamada, *supra* note 34.

143. Interview with Shoko Sasaki, *supra* note 84. Asked why the Bureau has recently given more consideration to humanitarian concerns, she responded that she believes it is a matter of the passage of time. *Id.*

D. Marriage and Children

As newcomers stay in Japan for increasingly longer periods of time, two major consequences of their presence are the growing number of marriages between migrants and Japanese, and a foreign "baby boom."¹⁴⁴ Within a five-year period, the annual number of foreigner-Japanese marriages more than doubled, from 12,181 in 1985 to 25,626 in 1990. During the 1990s, the annual figures for international marriages zigzagged upward to 28,251 in 1997.¹⁴⁵ The number of foreigners approved each year for visas as spouses of Japanese citizens correspondingly rose from 7,857 in 1994 to 18,013 in 1997.¹⁴⁶

The increase in international marriages has placed pressure on the immigration control system and impacted local governments. Relevant issues include clarifying procedures for registering marriages and for allowing undocumented foreigners to obtain spouse visas; defining "spouse" for purposes of spouse visa renewals; and responding to applications for immigration status from divorced or widowed foreign spouses and foreign single parents with part-Japanese children.

1. The Marriage Registration and Visa Process

The first hurdle facing a Japanese-foreigner couple consists of registering the marriage in the Japanese spouse's family registry. Local government offices maintain and administer family registries, which record and give legal effect to all significant life events, including birth, adoption, marriage, divorce, and death. The government's acceptance of the registration constitutes legal recognition of the marriage and is a necessary precondition to receiving a spouse visa.¹⁴⁷ Initially, the rise in international marriages between newcomers and Japanese citizens caught local government offices unprepared. Officials disagreed on the required documentation. Confusion reigned as to whether undocumented foreigners could register their marriages with Japanese citizens. Undocumented spouses risked arrest and deportation if they registered their marriages, and fear of being reported to Immigration Control continues to deter some foreign-Japanese couples from registering their marital unions.¹⁴⁸

Procedures for marriage registration are now more settled. In addition to the marriage registration form, foreigners must also submit proof that they are

144. Ri, *supra* note 6, at 80.

145. Nobuyuki Koyama, *Tōkei kara Mita Saikin no Kokusai Kekkon no Jōkyō* [Recent Situation of International Marriages as Seen Through Statistics], 141 KOKUSAI JINRYŪ 17, 20 (Feb. 1999) [hereinafter Koyama, *Recent Situation of International Marriages*] (citing Health and Welfare Minister's Office, Statistical Information Bureau, Statistics on Population Movement).

146. *Id.* at 17. Japanese men are three times more likely than Japanese women to marry a foreigner, but the number of Japanese women marrying foreigners is increasing. *Id.* at 18.

147. See Taimie Bryant, *For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan*, 39 UCLA L. REV. 109, 111-12 (1997). For discussion of the historical background and controversies surrounding the family registration system, see *id.* at 113-65.

148. Yōfu, *supra* note 110, at 105.

single and of marriageable age.¹⁴⁹ A Japanese-undocumented foreigner couple may register their marriage. However, some local government bureaucrats refuse to accept such marriage registration where the foreign spouse lacks immigration status or has failed to register pursuant to the Alien Registration Law.¹⁵⁰

Once the marriage is properly registered, the foreign spouse may start the lengthy process of applying for a spouse visa. In the early years of newcomer migration, undocumented spouses were required to return to their home countries to clear their unlawful status. In short, they had to subject themselves to deportation proceedings. Once in their home country, they applied for a spouse visa. If foreigners are deported as “involuntary” deportees, they are subject to a waiting period before they may reenter Japan, even if they are married to Japanese citizens.¹⁵¹ Moreover, their reentry is subject to the discretion of the Justice Minister.¹⁵²

During the past few years, an increasing number of undocumented spouses have remained in Japan under a grant of special permission for residency. As the number of visa overstayers marrying Japanese has grown, the Minister of Justice has granted more applications for special permission to stay.¹⁵³ Some local government officials still encourage undocumented spouses to return to their home countries to apply for spouse visas. They do not inform newcomers of the option to apply for special permission and thereby avoid deportation.¹⁵⁴

As with reentry, the decision to grant special permission rests within the Justice Minister’s broad discretion.¹⁵⁵ If the Justice Minister denies special permission, the foreigner may file an objection by lodging an administrative lawsuit. During the administrative adjudication process, the foreigner remains subject to detention and deportation. Moreover, while waiting for the grant of

149. Kazuyuki Azusawa, *Gaikokujin no Jinken no Genzai [The Present State of Foreigners’ Human Rights]*, 47 JYŪ TO SEIGI 98 (May 1996).

150. Yōfu, *supra* note 110, at 105. Some local government offices refuse to accept marriage registration forms, falsely stating that undocumented foreigners cannot submit them. They may also delay formal acceptance for two to three months while they call the Legal Affairs Bureau of the Ministry of Justice for instructions on accepting the marriage registration. Azusawa, *supra* note 149, at 98.

151. Immigration Act, *supra* note 4, arts. 5(1), 5(9).

152. Yōfu, *supra* note 110, at 105.

153. Masao Niwa, “Nyūkama” no Kodomo to Sono Kazoku to Hōseido [“Newcomer” Children and Their Families and the Legal System], in TOWARERU TABUNKA KYŌSEI [MULTICULTURAL CO-EXISTENCE UNDER EXAMINATION] 60, 66 (1998); see also Yōfu, *supra* note 110, at 106. Article 50 of the Immigration Act covers special permission for residency. Until 1994, grants of special permission hovered at approximately 500 cases per annum. By 1997, the figure had almost tripled to 1,406. The increase in cases also reflects the growing diversity of the newcomer population. Whereas Koreans accounted for nearly 80% of special permission grants in the past, by 1997, their proportion had fallen to 17 percent. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 146, 148.

154. Azusawa, *supra* note 149, at 98.

155. Article 50(1) of the Immigration Act reads as follows: “The Minister of Justice may, even if he finds that the objection filed [against a finding of deportability] is groundless. . . , give the suspect special permission to stay in Japan if: (1) He has obtained permission for permanent residence; (2) He has had in the past a permanent domicile in Japan as a Japanese national; or (3) The Minister of Justice finds grounds for giving special permission to stay, other than the previous two sub-paragraphs.”

special permission, the foreign spouse is not legally permitted to work.¹⁵⁶ Once the spouse has obtained special permission (which commonly takes well over one year),¹⁵⁷ she receives a long-term resident visa for a period of either one year or three years.¹⁵⁸ She can then apply for a spouse visa.

2. Court Challenges to Denials of Visa Renewals

An emerging body of case law concerns the renewal of spouse visas. Articles 2-2 and 7 and Annexed Tables I and II of the Immigration Act constitute the common statutory core of such cases. Article 2-2, governing status of residence, states that "[a]n alien may reside in Japan only under the status of residence determined by the landing permission, the acquisition of status of residence or by the permission of any change thereof"¹⁵⁹ It directs the reader to Annexed Tables I and II for a listing of the 27 statuses of residence.¹⁶⁰ Table I covers 23 statuses, such as diplomat, entertainer, skilled labor, temporary visitor, and trainee. In Table I, the statuses are listed in the left-hand column, and the corresponding "[a]ctivities authorized to engage in" are listed in the right-hand column.¹⁶¹

Table II lists the remaining four statuses: permanent resident, spouse or child of a Japanese national, spouse or child of a permanent resident, and long term resident. In Table II's right-hand column, the "[p]ersonal relationship or status on which the residence is authorized" is described in simple terms. For "Spouse or Child of Japanese National," the relationship or status is designated as "[t]he Spouses [sic] of Japanese nationals, the children adopted by Japanese nationals . . . or those born as the children of Japanese nationals."¹⁶² Article 2-2 further states that those residing in Japan with a status listed in Table I "may engage" in the activities set forth in the right-hand column. Those with a status specified in Table II "may engage in the activities of a person with the civil status or position described in the right-hand column corresponding to that status."¹⁶³

156. Yōfu, *supra* note 110, at 106.

157. *Id.* (ascribing the lengthy delay to understaffing at the Immigration Control Bureau). See also interview with FLU, *supra* note 19 (stating the process takes up to two years). According to Azusawa, the Foreign Spouses Association, a lawyers' group started in June 1992, successfully pushed for faster processing. Its efforts resulted in a wait period of roughly one year, but as a result of the aforementioned understaffing and efforts to detect sham marriages, the time period has once again stretched up to three years. Azusawa, *supra* note 149, at 99.

158. The implementing regulations to the Immigration Act set forth options for the time periods of the various visa categories. Shutsunyūkoku Kanri Oyobi Nanmin Nintei Hō Shikō Kisoku [Regulations Implementing the Immigration Control and Refugee Recognition Act], Ministry of Justice Order No. 54 of 1981 [hereinafter Implementing Regulations], art. 3 & Annexed Table II; *Zairyū Kikan no Minaoshi Oyobi Kijun Shōrei nado no Kaisei* [Reconsideration of Residency Terms and Revisions of the Ministerial Ordinance Setting Forth Criteria], 148 KOKUSAI JINRYŪ 59, 60 (Sept. 1999) (announcing elimination of the six-month long-term visa period as of October 1, 1999).

159. Immigration Act, *supra* note 4, art. 2-2(1).

160. *Id.* art. 2-2(2).

161. *Id.* Annexed Table I.

162. *Id.* Annexed Table II.

163. *Id.* art. 2-2(2).

Article 7 covers the immigration inspector's examination of applications for status of residence. In addition to examining the validity of the foreigner's passport and visa, the inspector must also check that the foreigner's "[a]ctivities . . . in Japan [as] stated in the application [are] not . . . false, and . . . fall within one of the activities described in the right-hand column of Annexed Table I . . . or [within one of] the activities of a person with the civil status or position described in the right-hand column of Annexed Table II."¹⁶⁴

Neither the Immigration Act nor its accompanying regulations define the word "spouse" or the activities of a spouse. To qualify as a spouse of a Japanese national, the immigration authorities maintain that proof of a legally valid marriage alone is insufficient. In the cases discussed below, the Justice Ministry—without explaining its rationale—has chosen to rely on Article 752 of the Civil Code to supply the definition of spousal activities: "Husband and wife shall live together, and shall co-operate and aid each other."¹⁶⁵ If a couple separates or the Japanese spouse files for divorce, administrators often deny renewals of and changes in status to spouse visas. Newcomers have brought several court challenges against the Justice Minister regarding the grant of spouse visas.¹⁶⁶

The Supreme Court has yet to speak on the issue, and the lower courts remain divided. Thus far, no court has adopted the Justice Minister's strict interpretation, which requires a couple to actually live together, cooperate, and support each other. Instead, the courts take one of two approaches. Courts following the first approach hold the existence of a valid marriage alone qualifies a newcomer for a spouse visa. In a compromise between the positions of the Justice Minister and the plaintiffs, courts adhering to the second approach hold that the Immigration Act requires more than a legally valid marriage. However, even if the couple lives apart and does not aid each other, the foreigner may still qualify as a spouse of a Japanese national. To date, most courts have taken the second approach, although they vary in their application of the standard.

a. Valid Marriage Alone Sufficient

On March 22, 1993, the Tokyo District Court held that the existence of a legally valid marriage is enough to establish a spousal relationship for purposes of the Immigration Act.¹⁶⁷ Plaintiff, a Chinese citizen, married a Japanese woman in 1985. He entered Japan in October 1986 on a spouse visa. In April 1987, the couple began to live separately. From the time of his entry into Japan, the husband applied for and received renewals of his spouse visa, but on January

164. *Id.* art. 7.

165. Minpō [Civil Co.], Law no. 89 or 1896 (Books I-III) and Law no. 9 of 1898 (Books IV-V), art. 752. The translation of Article 752 comes from BASIC JAPANESE LAWS 154 (Hiroshi Oda ed., 1997).

166. The standard of review commonly reads as follows: "[W]here the Minister's decision completely lacks a factual foundation as a result of misconstruing important facts, or where the decision is notably inadequate in light of common sense as a result of a clear lack of rationality in evaluation of the facts, then the decision has exceeded the bounds of [the Minister's] discretion or is an abuse of discretion, and should be interpreted as unlawful." 43 SHŌMU GEPPŌ 1450, 1469 (n.d.) (Tokyo High Ct., May 30, 1996) (citing to 32 MINSHŪ 1223 (n.d.) (S. Ct. *en banc* Oct. 4, 1978)).

167. 1467 HANREI JIHŌ 38 (Nov. 1993) (Tokyo Dist. Ct., Mar. 22, 1993).

19, 1990, the Justice Minister changed his status to a 90-day "preparation for departure" visa. In July 1990, his residency status changed again, this time to a 90-day short-term stay visa. In August 1990, his wife filed suit in district court to have their marriage invalidated. Due to the pending lawsuit, Plaintiff received several renewals of his 90-day short-term visa. On October 22, 1991, he defeated his wife's invalidation suit on appeal.

The following year, on February 19, 1992, the Justice Minister denied his application for another visa renewal. The Minister gave two reasons for the denial. First, since the pendency of the lawsuit was the basis for the visa renewals, now that the litigation was concluded, the Minister determined that Plaintiff no longer had a reason to remain in Japan. The Minister did not address the fact that the invalidation suit had concluded in Plaintiff's favor. Second, Plaintiff's marriage had fallen apart, and he did not live with his wife. According to the Minister, he therefore failed to qualify for a spouse visa.¹⁶⁸ Dissatisfied with the Minister's determination, Plaintiff filed suit.

The district court noted that Annexed Table II does not add any conditions other than that the foreigner be the spouse of a Japanese national. Article 7 also contains no special conditions. The Immigration Act's Implementing Regulations require a foreign spouse to submit to an inspector only proof of marriage, proof of one spouse's occupation and income, and proof that the Japanese spouse lives in Japan.¹⁶⁹ In light of the above laws and regulations, the court held that, to qualify as the spouse of a Japanese national, the Immigration Act merely requires a person to have a legally valid marriage.¹⁷⁰

Whereas the Justice Minister based his definition of "spouse" on Article 752 of the Civil Code, the district court commented that even if a marriage did not fulfill any element of Article 752, it might still consider the husband or wife to be a spouse.¹⁷¹ Although Plaintiff's wife filed for divorce on April 17, 1992, the court noted that the outcome of the proceedings could not be predicted, and that it is "extremely difficult to judge whether the marital relationship is genuine or not."¹⁷² The court reasoned that a denial of Plaintiff's visa renewal would "rob" him of the opportunity to contest the divorce and to fulfill his marital obligations under Article 752. Since the existence of a legal marriage was sufficient to qualify him as a spouse under the Immigration Act, denying renewal of his term of residency constituted an abuse of discretion.¹⁷³

On appeal, the Tokyo High Court affirmed the lower court ruling on the same grounds. The court surmised the Minister switched the husband's visa status from spouse to short-term stay because the pending marriage invalidation suit might have resulted in the loss of his spouse status. Once the husband prevailed in the invalidation suit, the Justice Minister should have either

168. *Id.* at 38.

169. Implementing Regulations, *supra* note 158, art. 6 & Annexed Table III.

170. 1467 HANREI JIHŌ at 40 (Tokyo Dist. Ct., Mar. 22, 1993).

171. *Id.* at 40-41.

172. *Id.* at 41.

173. *Id.*

changed the husband's visa status back to "spouse of a Japanese national" or approved renewal of his short-term stay visa. By neither rehabilitating his spousal residency status nor renewing his short-term residency status, the Minister erred in the exercise of his discretion. Determining whether a marriage has failed involves delicate matters, and the court therefore recommended careful deliberation of judicial decisions on spouse visa applications, with consideration given to the results of lawsuits concerning the marital relationship.¹⁷⁴

In its appeal to the Supreme Court, the Justice Minister did not raise the issue of the definition of "spouse" for immigration purposes. The Supreme Court affirmed the appellate decision, noting that the Minister's act of changing the foreign spouse's status to short-term stay took away his chance to apply for a change of status to spouse of a Japanese national.¹⁷⁵

b. Spousal Activities Required

On May 30, 1996, a different three-judge panel of the Tokyo High Court adopted an intermediate position, requiring more than mere legal validity of a marriage, but far less than fulfillment of the three conditions listed in Article 752.¹⁷⁶ The case involved a Chinese citizen who entered Japan on a student visa in August 1988 and subsequently received several visa renewals. She married a Japanese citizen and registered the marriage with the municipal government in May 1990. She successfully applied for a spouse visa. Beginning in October 1991, her relations with her husband started to deteriorate. Although he no longer slept in their apartment every night, he gave her money every month for living expenses. At some point between the autumn of 1992 and early 1993, he stopped paying her living expenses and, on April 1, 1993, changed his resident registration address to his former apartment. She succeeded in a suit filed in Tokyo Family Court and began receiving "marital expense" payments in November 1993. She hopes to revive the marriage, and her husband, although unwilling to reconcile, has not yet initiated divorce proceedings.¹⁷⁷ The Justice Minister denied her most recent application for a spouse visa renewal. She filed suit to reverse the denial as an abuse of administrative discretion.

The appellate court affirmed the district court's decision to overturn the denial, but on different grounds. Whereas the district court required nothing more than the existence of a legally valid marriage,¹⁷⁸ the appeals court adopted a stricter standard. In its view, the Act and regulations emphasize the content of the activities a foreigner may undertake, granting residence status based upon

174. Tokyo High Ct. Op. of 1993, reprinted in BENGOSHI NI YORU GAIKOKUJIN JINKEN KYŪSAI JITSUREI [FOREIGNERS' HUMAN RIGHTS ASSISTANCE CASES BY ATTORNEYS] 46, 50-51 (Tokyo Bar Association's Foreigners' Human Rights Assistance Center Steering Comm. ed., 2d ed. 1998).

175. 1578 HANREI JIHŌ 53, 54 (Nov. 1996) (S. Ct., Jul. 2, 1996).

176. 43 SHŌMU GEPPŌ 1450 (n.d.) (Tokyo High Ct., May 30, 1996).

177. 1501 HANREI JIHŌ 90, 94-95 (Oct. 1994) (Tokyo Dist. Ct., Apr. 28, 1994).

178. *Id.* at 95.

such activities.¹⁷⁹ Hence, to reside in Japan as a spouse of a Japanese national, legal marital status alone is insufficient. Although no immigration regulation or law defines spousal activities, the court interpreted the Immigration Act as requiring the content of such activities to be determined in accordance with "common sense" (*shakai tsūnen*).¹⁸⁰

Even if spouses are not fulfilling any of Article 752's three marital obligations at the time the foreign spouse seeks a visa renewal, the court held that the foreign spouse may still qualify for a spouse visa. If the marriage has a prospect of reviving and has not been reduced to a hollow shell, then the foreign spouse has the potential to engage in spousal activities. Thus, conferring spousal status upon the foreign spouse does not interfere with the legislative intent of the Immigration Act.¹⁸¹

Applying its ruling to the facts of the case, the court decided the marriage had not definitively collapsed at the time the Minister denied Plaintiff's application for a visa renewal. Rather, her husband had not completely stopped living with her and, until shortly before the denial of her application, had paid her living expenses. Assuming a certain period of time should elapse before judging whether a marriage has failed and in light of the above facts, the court held that Plaintiff qualified for spousal residency status.¹⁸² The Justice Minister had abused his discretion in denying her visa renewal application.¹⁸³

179. 43 SHŌMU GEPPŌ at 1466-67 (Tokyo High Ct., May 30, 1996) (reaching its conclusion based upon its review of Articles 2-2 and 7 of the Immigration Act and Article 6 and Annexed Table III of the Implementing Regulations).

180. *Id.* at 1467.

181. *Id.* at 1467-68.

182. *Id.* at 1468.

183. *Id.* at 1469-70. As with the Tokyo High Court, the Osaka High Court requires more than a legally valid marriage, but less than satisfaction of the three obligations listed in Article 752 of the Civil Code. In one case, the Osaka High Court adopted a very broad interpretation of those who may qualify as a spouse for visa purposes. 15 MIGRANTS' NET 7 (1999) (Osaka High Ct., Dec. 25, 1998).

There, the court set forth three conditions under which the foreign spouse may still qualify for a spouse visa, even if the marriage appears to have failed: (1) the foreign spouse does not agree to divorce, (2) the Japanese spouse has clearly caused the marriage to fail, and (3) the Japanese spouse's divorce suit seems unlikely to succeed. *Id.* at 9. If the foreign spouse were forced to leave Japan under such conditions, the court noted that the marital relationship would grow more estranged and the foreign spouse would have difficulty asserting her legal rights. Moreover, the foreign spouse would, in reality, be unable to contest a divorce suit from overseas and to participate in a determination of parental rights or a division of assets. *Id.*

The case concerned a Japanese husband who had no problems with his foreign wife other than coping with her jealousy. He eventually left her and moved in with another woman, with whom he fathered two children. He refused his wife's requests that he return to her. Since she promised to divorce him once she received a three-year spouse visa, he cooperated in her visa renewal applications on several occasions by filing false statements with the immigration authorities. The court held that she did not actually intend to divorce him. Since she would lose the chance of restoring her marriage if forced to return to Thailand, she had promised to divorce solely to gain his cooperation in her visa renewal process. *Id.* at 10-11.

The Osaka High Court concluded that Plaintiff's marriage had not completely collapsed and that she still had the will and potential to undertake the activities of a spouse. The Justice Minister had failed to consider that even if her husband filed for divorce, he might not succeed since he is the party responsible for the breakdown in their marriage. (In Japan, if the "innocent" spouse refuses to consent to the divorce, courts do not readily grant it. See Nobuyoshi Toshitani, KAZOKU NO Hō

3. Divorce, Widowhood, and Out-of-Wedlock Children

The increase in foreigner-Japanese marriages has spawned a surge in “international” divorces¹⁸⁴ and widowed newcomers. Upon widowhood or divorce, the foreigner’s spouse visa is no longer renewable.¹⁸⁵ Many divorced and widowed foreigners, who may also have had children with their Japanese spouses, desire to remain in Japan, putting pressure on the immigration system. In addition, the newcomer baby boom has resulted in a pool of unmarried foreign parents who have children with Japanese citizens and seek to raise them in Japan. A formal visa category for “parent of a Japanese child” does not exist, and the immigration system’s general policy has been to deny residency to the foreign parent of a child born as a result of an “international” relationship.¹⁸⁶

In the past, the Justice Minister decided whether to grant residency status to such foreign mothers on a case-by-case basis, taking a totality of the circumstances approach.¹⁸⁷ A rise in the number of foreign single parents who desire to raise their partly Japanese children in Japan has led the Ministry to treat such cases in a unified manner nationwide.¹⁸⁸ On July 30, 1996, the Ministry of Justice made an unexpected shift in policy. It paved a narrow road for divorced, widowed, or otherwise single parents. The Ministry announced it would grant special permission for residency in cases where (1) the foreign parent has paren-

[FAMILY LAW] 83-86 (1996)). This would leave open the possibility for her to undertake spousal activities. Although the court acknowledged that she had filed for visa renewals based upon misrepresentations, it reiterated the unavoidable necessity of doing so in order to remain in Japan, to try to reunite with her husband, and to defend against a possible divorce suit. As a result, the court held that the Justice Minister abused his discretion in denying her application for a spouse visa. 15 MIGRANTS’ NET at 11-12 (Osaka High Ct., Dec. 25, 1998). The Justice Minister has appealed the case to the Supreme Court. Eri Shimao, *Zairyū Shikaku Henkō Shinsei Fukyōka Shobun Torikeshi Seikyū Kōsoshin Hanketsu* [Appellate Decision on Demand to Vacate Failure to Grant Visa Renewal], 15 MIGRANTS’ NET 6, 7 (1999).

In this case, the denial of her application for a spouse visa, rather than for a renewal, was at issue. After the Justice Minister denied her a renewal, she had applied for and received a short-term stay visa. She later filed to change her status of residence to “spouse.” The Minister’s denial of the request formed the basis for the litigation. 47 GYŌSAISHŪ 1197, 1207-08 (n.d.) (Osaka Dist. Ct., Dec. 18, 1996).

184. The number of international divorces has gradually increased in recent years, from 7,597 in 1993 to 9,149 in 1997. The international divorce rate resembles the divorce rate among Japanese-Japanese couples, which reached 28.6% in 1997. Koyama, *Recent Situation of International Marriages*, *supra* note 145, at 19.

185. As a result, foreign spouses may choose to endure abusive treatment at the hands of their Japanese spouses, rather than divorce them, in order to maintain their visa status. Niwa, *supra* note 153, at 64; Yōfu, *supra* note 110, at 107-08 (outlining various types of spousal mistreatment).

186. Manabu Hatakeyama, *Nihonjin no Jisshi wo Fuyō suru Gaikokujin Oya no Toriatsumakai ni Tsuite* [Regarding the Treatment of Foreign Parents Caring for a Child Whose Other Parent Is Japanese], 113 KOKUSAI JINRYŪ 30 (Oct. 1996). The term commonly used to describe the child is “actual child of a Japanese person” (*nihonjin no jisshi*). The government has a general policy against granting residency to siblings of a Japanese person. *Id.* Hatakeyama is identified as a chief investigator in the Residency Section of the Immigration Control Bureau.

187. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 99; Hatakeyama, *supra* note 186, at 30.

188. Hatakeyama, *supra* note 186, at 31; IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 99.

tal authority over an unmarried minor, (2) she actually takes care of the child,¹⁸⁹ and (3) the child either has Japanese citizenship or a Japanese father¹⁹⁰ who has formally recognized the child as his own.¹⁹¹ Upon receiving special permission, the foreign parent receives a long-term resident visa, enabling the child to lead a "stable life" in Japan.¹⁹²

The Ministry applies the three criteria strictly. If the Japanese father refuses to recognize the child, or the mother loses her parental authority over the child in a divorce suit, special permission becomes extremely difficult to obtain. Ultimately, both the parent and the child may face deportation upon the expiration of the parent's current visa.¹⁹³ If the child receives paternal recognition, the child may receive a visa under the category of spouse or child of a Japanese national, even if the child was born out of wedlock or outside of Japan.¹⁹⁴ Although an undocumented parent may apply for special permission, the Ministry applies stricter scrutiny to such cases, looking to additional factors such as the parent's conduct during her stay in Japan and the family's circumstances.¹⁹⁵ The parent may renew her long-term resident status unless she has abandoned or no longer cares for the child. Even if the child attains majority or marries, all is not lost for the parent. If the parent has "sincerely" raised the child or meets other criteria based on her record in Japan, she may be permitted to reside in Japan.¹⁹⁶

An emerging pattern enables even divorced spouses without children to receive long-term visas, so long as they have lived in Japan for an extended period of time.¹⁹⁷ Shinichiro Nakajima of Kumustaka-Living Together with Foreigners Group reports on a case he handled involving a Filipina who lived in Japan for over 10 years, divorcing after eight years of marriage to her Japanese husband. Nakajima helped the woman file her application for a long-term resident visa, but he had reservations about her chances for success. In addition to

189. If the parent and child live apart, the parent cannot claim to care for the child. If the parent does not have the means to support the family and must receive welfare assistance for a period of time, she may still remain eligible for special permission, as long as she cares for the child. Hatakeyama, *supra* note 186, at 31.

190. A child born to a Japanese mother is automatically granted Japanese citizenship upon birth, so maternal recognition is not an issue. Immigration Act, *supra* note 4, art. 2(2); RYŌICHI YAMADA & FUMIAKI TSUCHIYA, WAKARIYASUI KOKUSEKI HŌ [EASY TO UNDERSTAND NATIONALITY LAW] 16-17 (Yuhikaku Livret No. 7, 3d ed. 1999).

191. Hatakeyama, *supra* note 186, at 30; Niwa, *supra* note 153, at 64-65. Although in principle foreign fathers are also eligible, they have difficulty obtaining special permission for residency under this policy. *Id.* at 67.

192. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 99; Hatakeyama, *supra* note 186, at 31.

193. Niwa, *supra* note 153, at 67.

194. Similarly situated children of permanent residents and special permanent residents may also receive visas under the category of a spouse or child of a permanent resident. However, such children must be born in Japan and live in Japan after birth to qualify. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 109.

195. Hatakeyama, *supra* note 186, at 32. See also Niwa, *supra* note 153, at 67 (reporting that if the parent is undocumented, the Justice Minister considers the circumstances as a whole, rather than applying the three-part standard outlined above).

196. Hatakeyama, *supra* note 186, at 32.

197. Yōfu, *supra* note 110, at 107.

working as a bar hostess—a profession commonly viewed with disfavor—she had no children with her former husband. Within four months of receiving the application, however, the Immigration Control Bureau granted her a one-year, long-term resident visa.¹⁹⁸

As for applications for permanent residency, the Immigration Act specifies only one vague criterion for the spouse or child of a Japanese citizen, permanent resident, or special permanent resident: “permanent residence [must] be in accordance with the interests of Japan.”¹⁹⁹ The decision to grant permanent residency is within the Justice Minister’s discretion.²⁰⁰ At least officially, the Immigration Control Bureau has announced that spouses are eligible for permanent residency status after only three years of living in Japan.²⁰¹ In practice, however, spouses must reside in Japan for far longer than three years before receiving permanent residency. According to one experienced advocate, foreign spouses of Japanese citizens have a better chance of becoming permanent residents after seven or eight years of marriage than they did in the past.²⁰² Obtaining citizenship via naturalization also remains a possibility for foreign spouses.²⁰³

198. Shinichiro Nakajima, *Jirei 1: Rikongo, Haigūsha nado Biza kara Teijūsha Biza he no Henkō ga Mitomerareru* [Example 1: Grant of Change in Visa Status from Spousal Visa to Long-Term Visa Following Divorce], 341 GEKKAN MUSUBU 19 (May 1999).

199. Immigration Act, *supra* note 4, art. 22(2). With the exception of spouses and children of a Japanese citizen, permanent resident, or special permanent resident, all other applicants must satisfy two additional criteria: (1) proof of good behavior and conduct and (2) the ability to support themselves. *Id.*

200. Immigration Act, *supra* note 4, Annexed Table II (describing permanent residents as “[t]hose who are permitted for permanent residence by the Minister of Justice”).

201. Nobuyuki Koyama, *Zairyūshikaku “Eijūsha” ni Tsuite* [Regarding the “Permanent Resident” Status of Residence], 138 KOKUSAI JINRYŪ 25, 26 (Nov. 1998). Koyama is identified as the chief clerk in charge of permanent residency matters for the Immigration Control Bureau’s Entry and Residency Section. *Cf.* YAMADA & KUROKI, *supra* note 63, at 89 (identifying roughly 20 years or more of continuous residence as one basis for receiving permanent residency status if one is not a spouse or child of a Japanese citizen, permanent resident, or special permanent resident).

202. Interview with Tomonao Kawada, *supra* note 19.

203. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 110, 111 n.16. The usual criteria for receiving citizenship via naturalization consist of the following conditions: (1) possessing an address in Japan for more than five continuous years, (2) being over 20 years old and in full possession of one’s mental faculties, (3) exhibiting good behavior, (4) having the ability to support oneself, (5) not already possessing Japanese citizenship or forfeiting one’s former citizenship upon obtaining Japanese citizenship, and (6) not planning or advocating the overthrow of the government, or belonging to any organization that plans or advocates such action. Kokuseki Hō [Nationality Law], Law No. 147 of 1950, art. 5. Foreign spouses may become naturalized in less than five years if, at the time of naturalization, they possess an address in Japan and have possessed it for more than three continuous years. Foreign spouses are also eligible for naturalization if they have been married for three years and have possessed an address in Japan continuously for more than one year. *Id.* art. 7.

IV.
LABORA. *Boon for Employers*

Newcomers have provided an essential pool of labor, particularly for the construction, manufacturing, and service sectors. During the bubble economy years of acute labor shortage, small and medium-sized companies could not attract sufficient numbers of young Japanese to work in so-called “3D” (dirty, difficult, and dangerous) jobs. Business owners worried their inability to fill customers’ orders would precipitate the failure of their companies.²⁰⁴ Hence, they welcomed the influx of migrants.

Moreover, migrant workers accept lower pay and endure worse working conditions than Japanese workers. The newcomers whom I met seemed resigned to the fact that they are often paid less—sometimes far less—than Japanese employees engaged in less difficult work. Foreign construction workers, for instance, receive 30% to 80% of the regular rate for Japanese workers (10,000 yen (\$100) per day is typical pay for a foreign worker).²⁰⁵ Also, replicating the discrimination within Japanese society, employers pay female foreigners less than male foreigners doing the same work.²⁰⁶

Even after the collapse of the bubble economy in late 1991, newcomers remain a vital, albeit weakened, force in construction and manufacturing. According to one expert, more newcomers are shifting away from construction and manufacturing and into the services sector.²⁰⁷ Although unemployment among Japanese has risen steadily since the early 1990s, young Japanese still shy away from 3D jobs, and newcomers continue to make up a lower-priced labor pool than their Japanese counterparts. An Immigration Control Bureau official acknowledged that undocumented workers enter industries still experiencing labor shortages.²⁰⁸

204. Satoshi Murata, *Gaikokujin ga Kōmutta Saigai ni yoru Songai Baishō no Kokunai Oyobi Kokuzaiteki Kenri Hoshō* [Guarantee of Domestic and International Rights to Damage Awards for Injuries Suffered by Foreigners], 771 HANREI TAIMUZU 17 (Feb. 1992) [hereinafter Murata, *Guarantee of Domestic and International Rights*].

205. Interview with Maria Hirama, Solidarity Center for Migrants, Korea Desk Staff Member, in Kawasaki, Japan (Jan. 24, 2000) (noting foreign construction workers receive one-third to one-half of the wages of Japanese construction workers); Interview with Shinsaku Uchida, President of Keihin Kōgyō, a small construction firm in Yokohama City, in Yokohama, Japan (May 1, 2000) (stating construction companies pay foreign workers 80% of Japanese workers’ wages). See also Terasawa, *supra* note 35, at 224 (estimating average wage of foreign workers at 30% to 70% of Japanese workers’ wages).

206. See, e.g., Keiko Yamanaka & Eunice Koga, *Nikkei Burajirujin no Nihon Ryūnyū no Keizoku to Idō no Shakaika* [Migration Systems of Japanese Brazilians in Japan: The Continued Flow and Socialization of Migration], 33 LŪ KENKYŪ [IMMIGRATION STUDIES] 55, 62, 63 (Apr. 1996) (stating that for the same work, Japanese Brazilian women receive 20% to 30% less in hourly pay than Japanese Brazilian men).

207. Hiroshi Komai, Keynote Presentation at the APFS 10th Anniversary Symposium in Tokyo, Japan (Jan. 26, 1998). Komai is a professor of sociology at Tsukuba University and has written and edited numerous publications on newcomer issues.

208. Interview with Shoko Sasaki, *supra* note 84.

B. Treatment of Newcomer Workers: Clarification of the Scope of Labor Laws

Employers' treatment—or rather, mistreatment—of newcomer workers has rippled through the legal and administrative regimes governing labor issues. From the infancy of the newcomer migration, migrant workers have faced multiple employment problems. The most pressing issues include unpaid wages, unjust dismissals, and workplace accidents.²⁰⁹ Although it may seem obvious in retrospect, in the mid-1980s, confusion reigned as to whether visa overstayers and others similarly situated were eligible for Japan's labor law protections. The labor laws themselves do not address the immigration status of workers.

In 1988, the Ministry of Labor stepped in, issuing a notice affirming that the panoply of labor statutes encompasses all workers, regardless of their visa status.²¹⁰ As noted above, enforcement of labor laws may conflict with government employees' legal obligation, under Article 62 of the Immigration Act, to notify the Immigration Control Bureau of persons believed to be deportable.²¹¹ During a discussion in the House of Representatives' Legal Affairs Committee in 1989, the Assistant Vice-Minister of Labor explained that the labor administration provides information to the immigration control authority only if necessary, and only in the case of "extremely important, serious violations."²¹² Public officials admit that the Ministry has notified immigration authorities pursuant to Article 62, but they refuse to provide an estimate of the number of such cases.²¹³ Reporting immigration violations would, in effect, "close the path for complaints and advice concerning unpaid wages and other matters of foreigners suspected of working illegally." It would hinder "the original purpose of the labor standards administration to advance and protect the labor conditions of workers."²¹⁴

With the burst of the economic bubble, newcomers' workplace problems have grown in number and complexity. Unpaid wages cases have become increasingly widespread, particularly unpaid overtime wages. NGOs report a rise in the average amount of unpaid wage claims, which indicates workers are not

209. Interviewees and written materials routinely list these workplace issues as the top three problems facing low-wage newcomer workers. See, e.g., Kamiko, *supra* note 33, at 89.

210. Ministry of Labor, Labor Standards Bureau Chief and Employment Security Bureau Chief, Circular Notice of Jan. 26, 1988, *quoted in* LEGAL AFFAIRS COMM. RECORD No. 2, *supra* note 109 (statement of Seiichi Inaba, Member of Legal Affairs Comm.).

211. See *supra* note 108 and accompanying text.

212. LEGAL AFFAIRS COMM. RECORD No. 2, *supra* note 109, at 9 (statement of Kinshi Itō, Assistant Vice-Minister of Labor). The Ministry of Labor issued a notice on October 31, 1989 entitled *Fuhō Taizai Gaikokujin wo Hōchi Suru Koto ga Rōdō Kijun Gyōsei to Shite Mondai ga Aru Bāi ni ha Tsūhō Suru* [Notify in Cases Where Neglecting an Illegally Residing Foreigner Is a Problem for the Administration of Labor Standards]. Masaomi Kaneko, *Gaikokujin to Fukushi* [Foreigners and Welfare], in *JURISUTO (FUKUSHI WO HAJIMERU [CREATING WELFARE])* 205, 209 n.6 (spec. ed. 1995) (citing Ministry of Labor, Labor Standards Bureau, Inspection Section, Circular Notice No. 41, Oct. 31, 1989). Kaneko is identified as Assistant Chief of the Planning Section in the Labor Administration Office of Tokyo City's Labor and Economic Affairs Bureau.

213. Interview with Katsuyuki Awamura & Yuko Tsukasaki, *supra* note 8.

214. LEGAL AFFAIRS COMM. RECORD No. 2, *supra* note 109, at 9 (statement of Kinshi Itō, Assistant Vice-Minister of Labor).

getting paid for longer periods of time than previously.²¹⁵ Due to the scarcity of job opportunities, foreign employees continue to work, even if they do not receive compensation. They hope—sometimes in vain—that their employers will fulfill their promises to pay. In more prosperous times, if an unpaid worker sought the help of an NGO, the NGO and the worker usually reached a compromise with the employer. Now, however, employers themselves face an economically perilous situation, and they disfavor settlement.²¹⁶

Dismissal cases have multiplied strikingly in recent years. Throughout the economic downturn, foreign workers have been the first to be fired or replaced. Addressing the situation of *Nikkeijin*, one scholar calls the legalization of their entry into Japan a guest worker system that “functions as a shock absorber or adjustment valve between peaks and troughs of the economy, so that Japanese workers’ jobs and their wages remain secure during recessions.”²¹⁷

When laying off or firing foreigners, employers frequently violate legal requirements. Few dismissals comport with the law requiring that workers receive a minimum of 30-days notice or pro-rata payment in lieu of notice.²¹⁸ Frequently, the employer gives the worker neither notice nor payment. Additionally, terminations often fail to comply with the legal doctrine of “abusive dismissal,” which limits an employer’s ability to dismiss its workers.²¹⁹ Under the abusive dismissal doctrine, even if a company wishes to dismiss workers as part of a restructuring plan, it must generally satisfy four criteria. First, it must show its need for a personnel reduction stems from business necessity. Second, it must prove it made efforts to avoid the dismissals, such as offering to transfer employees to other undertakings or subsidiaries, issuing temporary layoffs, reducing the number of working hours, or requesting employees to voluntarily retire. Third, the company must apply fair and reasonable standards in selecting the dismissed employees. Finally, it must undertake appropriate procedures in dismissing the workers.²²⁰

In general, the 30-day notice requirement and the abusive dismissal doctrine apply only if the employee has a contract without a fixed term of employment. Many companies hire newcomers either without discussing terms of employment or on short-term contracts subject to repeated renewal.²²¹ The le-

215. For example, Kanagawa City Union has handled cases in which one worker claimed unpaid wages of three million yen (\$30,000) and several workers sought to recover seven million yen (\$70,000) in back pay. Abe, *supra* note 30, at 15. Abe works as a staff member at the union.

216. Other issues also complicate the resolution of wage disputes. Many employers do not provide pay statements or keep proper records, and providing proof of hours worked and wages paid may therefore prove particularly difficult. See Interview with Satoshi Murayama, Kanagawa City Union General Secretary, in Kawasaki, Japan (July 9, 1998).

217. Yamanaka, “*I Will Go Home, But When?*” *supra* note 64, at 140.

218. Rōdō Kijun Hō [Labor Standards Law], Law No. 49 of 1950, art. 20.

219. Satoshi Murata, *Gaikokujin no Rōdō Kankyō wo Meguru Hōritsu Mondai* [Legal Problems Concerning Foreigners’ Work Environment], 47 JYŪ TO SEIGI 96, 99 (May 1996) [hereinafter Murata, *Legal Problems Concerning Foreigners’ Work Environment*].

220. SUGENO, *supra* note 31, at 401-10.

221. See, e.g., Dantei Nakahodo, Remarks at Sol’s May Day for Migrant Workers in Kawasaki, Japan (May 2, 1999). Nakahodo reported that he and his spouse had worked for an employer for approximately eight years under a series of six-month contracts. In 1998, the company changed the

gal protections apply to the former group and may also apply to the latter group of newcomers.²²²

Workplace injury is a serious issue for foreigners. Many migrant workers perform dangerous and physically demanding work. Common labor accidents include falling from scaffolding, slipping, getting hit by falling objects at construction sites, and severing fingers in machinery. Accidents typically occur when the employer fails to give adequate safety training, improperly supervises foreign employees, or neglects to attach legally required safety mechanisms to machines.²²³

Japan has a labor accident insurance system that provides various benefits for injured workers, including coverage of all medical expenses, 80% of an employee's wages while she is unable to work, and disability compensation in the case of permanent injury.²²⁴ The system depends, however, upon the employer reporting the accident to the Labor Standards Inspection Office. At present, only a fraction of the estimated number of injured foreign workers have insurance claims filed on their behalf.²²⁵ An employer is most likely to assist the worker and file a claim in cases of severe injury, such as a severed body part or head wound. In cases involving less serious injuries, employers commonly try to resolve the situation without recourse to the insurance system.²²⁶ Many small or medium-sized company owners avoid filing claims in an effort to prevent their accident insurance premiums from rising. In the case of undocumented workers, they may also wish to avoid the employer sanctions prescribed in the

contract term to three months, dismissing them at its expiration. With the intervention of Kanagawa City Union, Nakahodo and his wife were eventually reinstated.

222. See SUGENO, *supra* note 31, at 400-01 n.# (noting that repeated renewal of a fixed-term contract may convert it into a contract without a fixed period).

223. See Murata, *Guarantee of Domestic and International Rights*, *supra* note 204.

224. A permanent injury is classified according to a 14-grade scale, and the corresponding multiplier is the basis for calculating disability compensation. For an explanation of the labor accident insurance system, see SUGENO, *supra* note 31, at 317-34.

225. Masaomi Kaneko compares the number of foreign and Japanese workers' compensation cases. In 1991, he counted 221 cases in which foreigners received workplace accident insurance benefits. That same year, 1.92% of Japanese employees suffered an injury at work. Kaneko assumes 500,000 foreigners worked in Japan during 1991, which is within reason. Thus, if 1.92% of foreign workers experienced an injury, then there should have been 9,600 cases, not 221. Moreover, foreigners frequently work in the most dangerous workplaces; it is extremely unlikely that they would have fewer workplace accidents than their Japanese counterparts. Kaneko, *supra* note 212, at 205, 208. However, some foreigners may be erroneously counted in the statistics as Japanese employees. According to Satoshi Murayama, General Secretary of Kanagawa City Union, employers who file claims will frequently substitute a fake Japanese name for the injured foreign employee's true name, presumably to conceal their employment of foreigners. Interview with Satoshi Murayama, *supra* note 216.

226. The employer covers medical bills and, at best, pays the employee a small additional amount if she must be absent from work. For example, in a Kanagawa City Union case, a Korean worker suffered injuries on two separate occasions while using a sheet-metal press machine. With the injury to her thumb, the employer reportedly paid her medical expenses but did not apply for workers' compensation or allow her time for recuperation. The worker also claims that the employer misrepresented the cause of her accident to the hospital, identifying a car door, and not machinery, as the cause of the injury. In a second injury—this time to her index finger—the worker required three months' hospitalization. Her employer applied for accident insurance benefits, but it allegedly misrepresented the cause of the accident once again. Abe, *supra* note 30, at 16-17.

Immigration Act.²²⁷ For larger manufacturing companies, filing an insurance claim may cause the Labor Standards Office to issue a directive ordering the company to make costly modifications to its machinery.

Even if the employer does file an accident insurance claim, it may do so only to line its own pockets. Labor accident insurance benefits are paid via bank transfer. If an employee does not have a bank account, the employer fills in its own account information, with the expectation it will give the transferred monies to the injured worker. Not infrequently, however, the employer keeps all or part of the insurance benefits for itself.²²⁸

C. Calculation of Labor Accident Damages for Undocumented Employees

Undocumented newcomers have spawned a twist in the law on calculation of damages in labor accident cases, garnering the imprimatur of a Supreme Court precedent in the *Kaishinsha* case. *Kaishinsha* is one of the few Supreme Court cases involving an undocumented litigant. It may be the only Supreme Court ruling on an issue in which a litigant's undocumented status operates as the deciding factor.

Among legal experts, compensatory damage calculation for workplace and traffic accidents involving foreigners emerged as a fervent topic of debate in the early 1990s.²²⁹ Under Japanese law, injured employees may recover labor accident insurance benefits and, under the Civil Code, bring lawsuits against their employers.²³⁰ According to the prevailing "difference in amount" theory (*sagaku setsu*), compensatory damages should equal the amount the injured person would have earned if the accident had not occurred. Where an employee has a permanent disability resulting from an accident, the accepted formula consists of multiplying her average daily wage, the percentage of resulting lost work

227. Kaneko, *supra* note 212, at 205, 208.

228. Rather than putting faith in the employer, Manny Rosales accompanies workers to the bank and helps them open their own accounts. Interview with Manny Rosales, *supra* note 27.

229. See, e.g., 806 HANREI TAIMUZU 181, 182 (Apr. 1993) (Tokyo Dist. Ct., Sept. 24, 1992) (listing literature on point in prefatory comment to the case). The Japan Traffic Law Society devoted its 1992 symposium to the topic of compensation for foreign workers in traffic accidents. *Gaikokujin Rōdōsha he no Kōsū Jiko Baishō* [Traffic Accident Compensation for Foreign Workers], 21 KŌTŪ HŌ KENKYŪ 17 (1992).

230. For a discussion of non-statutory compensation, see SUGENO, *supra* note 31, at 335-45. Sugeno explains the three possible Civil Code bases for a civil suit: (1) ordinary tort law negligence (Articles 709, 715); (2) "responsibility of an owner or occupier for defects in the construction or maintenance of a structure on land" (Article 717); and (3) "non-performance of an obligation in a contractual relationship" (Article 415). Courts have interpreted the contractual relationship between the employer and employee as embodying a duty of care for an employee's safety. It is the principal ground used in workers' lawsuits for damages. *Id.* at 335-36 (citations omitted).

Under the Industrial Safety and Health Law, employers owe a duty to consider employees' safety. *Rōdō Anzen Eisei Hō* [Industrial Safety and Health Law], Law No. 57 of 1972, art. 3. Also, an employer may be criminally prosecuted for death or harm that an employee incurs through the employer's negligence. *Keiji Hō* [Criminal Law], Law No. 45 of 1908, art. 211. However, Satoshi Murata, a well-known advocate for foreign workers, knows of no such criminal cases. He offers three explanations for the lack of prosecutions: (1) illegal employees' fear of being arrested, (2) employers' denial of negligence, and (3) the difficulties faced by injured foreigners or their families in bringing attention to a violation of the duty of care. Murata, *Legal Problems Concerning Foreigners' Work Environment*, *supra* note 219, at 101-02.

ability, and the period of time from the completion of her medical treatment (*shōjō kotei*)²³¹ until she reaches age 67.²³² The final disability compensation award takes into account the injured party's contributory negligence. Additionally, insurance benefits that are considered compensation for financial loss are offset against the total compensatory damage award.

In the fields of labor and traffic accident liability, court decisions and academic commentary routinely review three possible wage standards for foreigners: (1) actual wages earned in Japan, (2) the corresponding wage level in the foreigner's home country, or (3) a blend of Japanese and home country wages.²³³ Prior to the Supreme Court's decision, the majority of lower courts favored a mixed approach, using both Japanese and home country wages.²³⁴ Only one published appellate court ruling applied Japanese wages for the entire period (until age 67).²³⁵ It held that Article 14 of the Constitution, protecting equality under the law, requires applying the Japanese wage standard to foreigners.²³⁶

In *Kaishinsha*, the Supreme Court affirmed the approach adopted by the majority of lower courts.²³⁷ Plaintiff-appellant, Bobby Maqsood, is a Pakistani citizen who entered Japan on a short-term tourist visa on November 28, 1988. The following day, co-defendant-appellee *Kaishinsha*, a bookbinding company, hired Maqsood and continued his employment after the expiration of his visa.²³⁸ On March 30, 1990, Maqsood severed his right index finger in a machine that

231. See NAOSHI TAKASAKI, *JIDŌSHA JIKO NO SEKININ TO BAISHŌ* [RESPONSIBILITY AND COMPENSATION OF AUTOMOBILE ACCIDENTS] 200 (1982) (defining the term *shōjō kotei* as "the completion of all medical treatment of injuries").

232. Murata, *Guarantee of Domestic and International Rights*, *supra* note 204, at 19 (setting forth formula). Courts generally consider age 67 as the ceiling on a person's potential working life. See TAKASAKI, *supra* note 231, at 251. All cases discussed herein employ the age-67 ceiling.

233. For court cases, see decisions discussed *infra*. For academic commentary, see, e.g., Tōkyō Chisai Minji Dainijūnanabu (*Minjikōtsūbu*) ni Okeru Minji Kōtsūjiken no Shori ni Tsuite (*ichi*) [*Disposition of Civil Traffic Accident Cases in Tokyo District Court, Civil Section 27 (Civil Traffic Accident Section) (One)*], 86 SHIHŌ KENKYŪJO RONSHŪ 23, 59 (1991); Naohito Asano, *Fuhō Zanryū Gaikokujin Rōdōsha no Ishitsurieki, Isharyō* [Illegally Overstaying, Foreigner Workers' Compensatory Damages and Damages for Pain and Suffering], 152 JURISUTO (KŌTSŪ JIKO HANREI HYAKUSEN) [100 TRAFFIC ACCIDENT JUDICIAL PRECEDENTS] 134, 135 (4th ed. 1999); Kazuo Fujimura, *Nihon de no Shūnyū de Keisan subeki ka Honkoku no Chingin Suijun ni Yoru beki ka Sore ga Mondai da* [Whether to Calculate According to Income in Japan, or Use the Home Country Wage Standard Is the Problem], 486 HŌGAKU SEMINĀ 62, 63 (June 1995).

234. See, e.g., 1479 HANREI JIHŌ 146, 148 (Mar. 1994) (Tokyo Dist. Ct., Hachiōji Branch, Nov. 25, 1992) (calculating a disability compensation award by using Japanese wages for two years and Iranian wages for the remaining period until age 67); 1479 HANREI JIHŌ 146, 151 (Mar. 1994) (Tokyo Dist. Ct., Aug. 31, 1993) (granting a disability compensation award based upon Japanese wage for three years and Ghanaian wages for the remaining period until age 67, after holding that the difference in the standard of living between Japan and Ghana is one factor in calculating damages for pain and suffering).

The earliest known undocumented foreigner case involved a Korean secret entrant injured in a traffic accident. At the time of the court's decision, Plaintiff had already been deported to South Korea. Disability damages were thus calculated under the assumption that Plaintiff would work in Korea. 9 KŌMIN 1111, 1116 (Mar. 1977) (Tokyo Dist. Ct., Aug. 19, 1976).

235. 1406 HANREI JIHŌ 28 (Mar. 1992) (Takamatsu High Ct., June 25, 1991).

236. *Id.* at 31.

237. 934 HANREI TAIMUZU 216 (May 1997) (S. Ct., Jan. 28, 1997).

238. *Id.* at 219.

lacked a safety mechanism. Kaishinsha's president, the other co-defendant appellee, had not given him instructions on how to operate the machine safely.²³⁹

From March 31 to April 30, Maqsood frequently went to the hospital for treatment. On April 30, he received a doctor's letter stating his wound had healed.²⁴⁰ Beginning on April 19, he worked for a different bookbinding company for several months.²⁴¹ Maqsood received accident insurance benefits²⁴² and also filed a civil suit in June 1990. He claimed the company had breached its duty to provide for his safety and alleged the president had breached his duty of care toward his employees.

The district court found both defendants had failed their duties to Maqsood and awarded him damages for lost working time due to the accident,²⁴³ his disability, and mental suffering.²⁴⁴ As for disability compensation, the court

239. 806 HANREI TAIMUZU 181, 183-84 (Apr. 1993) (Tokyo Dist. Ct., Sept. 24, 1992). Maqsood had experience with the machine, but he had never used it to make the particular style of pamphlet ordered by Kaishinsha's president. *Id.*

240. *Id.* at 184.

241. 934 HANREI TAIMUZU at 219 (S. Ct., Jan. 28, 1997). He quit the second bookbinding company on August 23, 1990. *Id.*

242. In terms of labor accident insurance benefits, Plaintiff received 132,972 yen (\$1,329.72) to compensate for time off from work due to the accident and 1,644,725 yen (\$16,447.25) to compensate for his disability. 806 HANREI TAIMUZU at 183 (Tokyo Dist. Ct., Sept. 24, 1992).

243. As to the determination of damages for the time he was unable to work, the court used his actual wages and set the period from March 31 to April 18. *Id.* at 184.

244. Where the injured plaintiff is an undocumented foreigner, some commentators and lower courts, including the *Kaishinsha* district court, have raised a threshold issue of whether a foreigner without working papers may sue for damages. See 9 KÖMIN 1111, 1116 (Mar. 1977) (Tokyo Dist. Ct., Aug. 19, 1976); 806 HANREI TAIMUZU at 184 (Tokyo Dist. Ct., Sept. 24, 1992) (*Kaishinsha*); Fujimura, *supra* note 233, at 63. The Supreme Court did not consider this issue.

In cases involving injuries to undocumented workers, the main inquiry is whether the nature of the plaintiff's work violates public order and morals. If the nature of the work itself did not violate public order and morals, the court may give a damage award to the injured worker. See Fujimura, *supra* note 233, at 63 (stating that if the content of the work performed does not violate public order and morals, then the illegal worker is entitled to legal protections); 9 KÖMIN at 1116 (Tokyo Dist. Ct., Aug. 19, 1976) (holding that where work itself did not violate public order and morals, the court could not deny the right to demand compensation for wages lost as result of the accident). So far, no published cases have interpreted a foreigner's work as violating public order and morals or as barring a damage award. Indeed, it is unlikely that a foreigner whose work does clearly violate public order and morals (such as a seller of illicit telephone cards or a drug dealer) would pursue a court case for fear of criminal prosecution.

Unlike other courts that had addressed the issue of compensatory damages for injured undocumented foreigners, the *Kaishinsha* district court added a further consideration: does the foreigner's method of entry into Japan have a "high level" of illegality? It distinguished Plaintiff's entry from an illegal, "secret entrance," ultimately approving of giving Plaintiff a damage award. 806 HANREI TAIMUZU at 184 (Tokyo Dist. Ct., Sept. 24, 1992). In fact, no published case has refused to award damages to a secret entrant because of the means by which she entered the country.

The case of a pre-college student visa holder raised a related issue of whether a visa holder who performs work without legal authorization is entitled to legal protection. (Foreigners with student visas may work part-time to pay their school and living expenses, but only if they apply for and receive permission to work from the Immigration Control Bureau.) There, the defendants argued that the plaintiff, who had worked without permission, was not entitled to any legal protections or any compensation for lost wages due to the traffic accident. The district court looked to several factors, including the purpose of the ordinance limiting foreign students' ability to work, the extent to which the unlawful act was subject to societal censure, the impact upon ordinary business, and the fairness between the parties. Since it was not clear that Plaintiff worked to earn an income (as opposed to covering his expenses), the court held that the part-time work was not strongly illegal or

held that as an undocumented worker subject to deportation, Plaintiff would probably remain in Japan for only three more years. For the three-year period, starting from August 24, the day after he quit the second bookbinding company,²⁴⁵ the court applied his actual wages earned at the company and, for his remaining years until age 67, Pakistan's wage standard. In response, Plaintiff argued that Article 14 of the Constitution requires equal treatment of foreign and Japanese workers. According to the court, however, compensatory damages cover the difference between the projected wages earned if the accident had not occurred and the actual wages earned after the accident. The issue of future income is a factual determination, unrelated to "whether the victim is a foreigner or not."²⁴⁶

To determine Pakistani wages, the district court looked to Maqsood's education and work background, finding him equivalent to a semi-skilled to skilled worker in Pakistan. It also noted that prior to entering Japan, Maqsood earned the equivalent of 30,000 to 40,000 yen (\$300 to 400) per month as a steelworker in Pakistan. The district court used 30,000 yen as the monthly wage Maqsood would have earned in Pakistan. The court assessed his lost work ability at 20 percent.²⁴⁷ His disability compensation totaled 2,222,622 yen (\$22,226.22), which, when added to his damages for lost working time, yielded a total compensatory damage award of 2,343,050 yen (\$23,430.50). The court set his contributory negligence at 30%²⁴⁸ and reduced his compensation award to

unethical. It pointed out that the employment contract between the plaintiff and his employer was valid as a matter of private law, and that it would be inequitable to allow Defendants to deprive Plaintiff of his pay, through the traffic accident, without providing him with compensation. The court awarded compensation for lost wages. 1409 HANREI JIHŌ 84, 87-88 (Apr. 1992) (Tokyo Dist. Ct., Apr. 26, 1991).

245. One commentator, Shinobu Nogawa, points out that this start date for payment of damages is unusual and suggests a possible rationale. In most cases, the start date is the day on which all medical treatment is completed. In this case, it would be April 30, the day Maqsood received the doctor's letter. However, without explanation, the district court set damages to run starting from August 24, the day after Maqsood left the second company. Nogawa believes the court did so to prevent a decrease in his compensatory damage award. If the period ran from April 30, then the wages earned on his second job would be subtracted from the damage award. Since the second company paid higher wages than did Kaishinsha, approximately four months' worth of damages would be cut from his award. Shinobu Nogawa, *Fuhō Shūrō Gaikokujin no Rōsai Minso ni Okeru Isshitsu Rieki no Santei Kijun: Kaishinsha Jiken [Standard for Calculating Compensatory Damages in Labor Accident Civil Suit of Illegally Working Foreigner: Kaishinsha Case]*, 1053 JURISUTO 120, 123 (Oct. 1994). Nogawa is identified as an assistant professor at Tokyo Gakugei University.

246. 806 HANREI TAIMUZU 181, 185 (Apr. 1993) (Tokyo Dist. Ct., Sept. 24, 1992). Maqsood also claimed that even assuming he returns to Pakistan, many Pakistanis work abroad. Additionally, if he were to work in a third country, he would earn more than his Japanese income. The court rejected this contention for lack of evidence. *Id.*

247. The court considered various factors in coming to its determination, including Plaintiff's disability and work circumstances after his injury healed. *Id.*

248. According to the district court, anyone working the machine could easily recognize that her hand might be caught if placed under the raised part of the machine during the depression of the foot pedal. Maqsood had overlooked the danger. In light of his inattentiveness, the facts leading to the accident, the conditions of the workplace at the time of the accident, and the level of Defendants' violation of their duties, the court came up with the 30% figure. *Id.* But Shinobu Nogawa criticizes the 30% figure as too high in light of the fact that Maqsood "is a foreigner and there is almost no evidence that until then, he had received guidance in how to perform the work and operate the machine safely. . . ." Nogawa, *supra* note 245, at 123.

1,640,135 yen (\$16,401.35). It then determined that 1,777,697 yen of Maqsood's workers' accident insurance benefits were disbursed as compensation for his financial losses. Offsetting the insurance benefits against his compensatory damages completely eliminated Maqsood's compensatory damage award. Finally, the district court set damages for pain and suffering at 2,500,000 yen (\$25,000), which, after the reduction for contributory negligence, resulted in an award of 1,750,000 yen (\$17,500). The district court spent a scant paragraph setting the basis for the award, vaguely stating that in light of the whole situation, including Maqsood's course of medical treatment, 2,500,000 yen would compensate him for his mental suffering.²⁴⁹ The court also awarded him attorneys' fees.

On appeal, Plaintiff contested all three of the damage calculations, with emphasis on the calculation of compensatory damages for his disability. Defendants filed a counter-appeal.²⁵⁰ The High Court affirmed the lower court decision, dismissing both the appeal and counter-appeal.²⁵¹ Maqsood then brought the case to the Supreme Court.²⁵²

249. 806 HANREI TAIMUZU at 185 (Tokyo Dist. Ct., Sept. 24, 1992).

250. In addition to contesting the disability compensation, Plaintiff presented the following arguments. First, he contended the time period for calculating rest-period damages should consist of the 30 days from the accident until Kaishinsha dismissed him. Second, he urged the court to increase his damages for pain and suffering in light of his inability to communicate in Japanese and his lack of personal support in Japan. Third, he characterized his contributory negligence as non-existent or small, given his inexperience with the particular operation required, the language barrier, and other factors. Finally, he reasoned that the "specially provided" monies from workplace accident insurance are disbursed as labor welfare, not as compensation and, as a result, that the district court should not have offset those monies against his compensatory damage award. 844 HANREI TAIMUZU 209, 209-10 (July 1994) (Tokyo High Ct., Aug. 31, 1993).

In their counter-appeal, Defendants argued the court should calculate compensatory damages using only the home country wage. In addition, they contended the court should set Maqsood's lost work ability at 10%, not 20%, and they calculated the average Pakistani daily wage at 350 yen (\$2.82 at 124 yen to one dollar, the rate used by the district court). Defendant-appellees further denounced the damage award for pain and suffering as unfairly high, given Pakistan's relatively low cost of living and wage standard, and they called for its reduction. Lastly, they calculated Plaintiff's contributory negligence at over 80%, since the machine he operated allegedly did not pose a danger to him and could be operated by a novice. *Id.* at 210-11.

251. Maqsood raised a new version of an argument presented to the district court: Pakistan has a policy of encouraging its nationals to work abroad in order to increase its foreign currency receipts; thus, even if he returned to Pakistan, he would likely work overseas again. The appellate court rejected his claim, stating that even if Pakistan had such a policy, each economically developed country must follow its own policy regarding the acceptance of migrant workers. As for Japan, a short-term visa overstayer will eventually be subject to deportation, and the court refused to entertain arguments based upon an assumption that an overstayer may ignore the legal system and reside in Japan indefinitely. Moreover, it noted that European nations have recently begun tightening controls on foreigners entering for economic purposes, reducing the credibility of Maqsood's argument. *Id.* at 211-12.

252. While the calculation of compensatory damages occupied the centerpiece of the appeal, Maqsood also raised his previous arguments regarding rest-period damage calculation, damages for pain and suffering, contributory negligence, and offset of "specially provided" insurance benefit funds. Appellant's Brief on Final Appeal, 934 HANREI TAIMUZU 220, 221-22 (May 1997). The employer sought to file a counter-appeal, but the Supreme Court rejected it for failure to submit the required letter of counter-appeal to the High Court within the allotted time period. 934 HANREI TAIMUZU 220 (S. Ct., Jan. 28, 1997).

At the outset of its decision, the Supreme Court stated compensatory damages "must be calculated based upon the circumstances of the injured party's future income," in addition to other factors.²⁵³ As a concrete factual determination, "there is no reason for differences in this method of compensatory damage calculation according to whether the injured party is a Japanese person or not."²⁵⁴ To estimate the future income of a foreigner temporarily residing in Japan, a court must forecast with substantial probability the length of time she will remain in Japan, where she will go afterwards, and where she will work.²⁵⁵ The Court set forth a multi-factor balancing test to determine the number of years a foreigner may work in Japan. Elements of the test include the individual's purpose in coming to Japan, her intentions at the time of the accident, her residency status, her past record and future probability of receiving renewals of the residency period, and her circumstances at work.²⁵⁶

As with the lower courts, the Supreme Court emphasized the unlikelihood of an overstayer's ability to work in Japan long-term, unless her residence and ability to work are legalized. It rejected the possibility that Maqsood would one day obtain legal residence in Japan for lack of sufficient supporting evidence. After reviewing the facts, the Court affirmed the lower court's wage calculation, including its use of the mixed wage approach.²⁵⁷ The Court overturned one aspect of the appellate court's decision,²⁵⁸ but affirmed it in all other aspects.²⁵⁹

253. *Id.* at 218.

254. *Id.*

255. At least one court found a foreign plaintiff likely to remain in Japan for the long-term. A Nagoya District Court case, decided on December 16, 1992, involved a Chinese citizen who was injured in a traffic accident while on a short-term visa. She eventually changed her status to "engineer" and received renewals of her visa every year. She lived with her husband, who also had a status of residence. In addition, both of their children were in Japan: one attended school, and the other was working. Based on the circumstances, the court determined she had a high probability of residing in Japan for a long period of time. It therefore used a Japanese wage standard to calculate her disability compensation. 1001 JIDŌSHA HOKEN JOURNAL 2, 2-3 (May 1993) (Nagoya Dist. Ct., Dec. 16, 1992).

256. 934 HANREI TAIMUZU at 218 (S. Ct., Jan. 28, 1997).

257. *Id.* at 219. The hybrid approach of using a mixture of Japanese and home country wages can result in a bizarre impartiality for a court of law. In one Tokyo District Court case, the plaintiff had returned to Iran four months after his labor accident. 1479 HANREI JIHŌ 146, 147 (Mar. 1994) (Tokyo Dist. Ct., Hachioji Branch, Nov. 25, 1992). The court nonetheless awarded the first two years of disability compensation according to his Japanese wages. It based its decision on its recognition that "if he had not been injured, then even after his short-term visa expired, Plaintiff—who had hoped to stay in Japan for as long as possible—had a high probability of continuing to work in Japan, the same as many Iranian workers." *Id.* at 148. The court assumed that after two more years in Japan, Plaintiff would likely be deported or, as a married person, return to his home country. For the rest of his disability compensation period, the court applied an Iranian wage standard. *Id.* at 148-49.

In its opinion, the court noted the high unemployment rate in Iran, and it pointed out that disabled persons have more difficulty finding work in Iran than in Japan. Moreover, Plaintiff had been mostly unemployed since his return to Iran. These facts may have persuaded the district court to be more generous in its calculation of Plaintiff's disability compensation. Factoring in Plaintiff's contributory negligence, the court used 45% of his Japanese wages for the first two years and 55% of estimated Iranian wages for the remaining period until he reached age 67. In effect, the court awarded him an extra 10% for the damages calculated according to Iranian wages. *Id.*

258. Pursuant to regulations governing special payments in the case of labor accidents, Maqsood had received special payments for lost time and disability. Rōdōsha Saigai Hoshō Hoken

D. Administrative Responses to Growth in the Foreign Worker Population

In the mid- to late-1980s, a surge of foreigners with complaints against their employers strained the language capabilities of the various local Labor Standards Offices. At the time, none of the offices had any interpreters on staff. In 1989, the Ministry of Labor experimented with the opening of Foreigner Consultation Corners at four sites: Tokyo, Osaka, Kanazawa Prefecture, and Aichi Prefecture. The Corners lie within prefectural-level Labor Standards Offices and are staffed with specially hired bilingual speakers. As of 1999, the once experimental initiative had blossomed into 33 Consultation Corners. Although staff members generally speak only English and Japanese, Corners located in regions with high numbers of Japanese Latinos have staff who also speak Portuguese or Spanish.²⁶⁰ With the exception of the Consultation Corners, the Ministry does not specifically seek to hire bilingual employees.²⁶¹ Moreover, although labor standards inspectors visit companies to check for compliance with labor laws, inspection units are understaffed in relation to the number of companies in need of inspection. One Ministry official estimated a company faces an official inspection no more than once every five to ten years.²⁶²

In 1993, the Labor Ministry established a Foreigners' Employment Policy Section within its Employment Security Bureau.²⁶³ The section's mandate is to clarify the actual employment conditions of foreigners. Under a program instituted in 1993, employers must submit an annual report on the working conditions of their foreign employees to their local Public Employment Security Office.²⁶⁴ In 1998, 19,204 companies reported on the conditions of 189,814 foreign employees. The Foreigners' Employment Policy Section gathers the data for the stated goals of adjusting the demand for and supply of foreign workers, and promoting the appropriate management of foreign workers.²⁶⁵ It also

Tokubetsu Shikyūkin Shikyū Kisoku [Regulations Regarding Special Payments of Workers' Accident Insurance], Minister of Labor Ordinance No. 30 of 1974. Whereas the district and appellate courts had deducted the special payments from his damage award, the Supreme Court concluded that the special payments constitute a form of labor welfare, not compensation for an injured worker's losses. Thus, the payments are not subject to offset against a damage award. Maqsood's 1,640,135-yen compensatory damage award exceeded the 1,423,910-yen paid in insurance benefits, leaving him with a 216,225 yen (\$2,162.25) compensatory damage claim against Kaishinsha and its president. 934 HANREI TAIMUZU at 219 (S. Ct., Jan. 28, 1997).

259. Without much elaboration, the Supreme Court affirmed the determination of where Maqsood would live in the future, his percentage of lost work ability, the ratio of his contributory negligence, and the amount of damages for pain and suffering. The Court rejected Maqsood's contention that he should be awarded more for his pain and suffering than a Japanese citizen would receive. However, it did not discuss the standards for calculating a foreigner's pain and suffering damages, other than to state that the calculation is, in principle, within the district court's discretion. *Id.*

260. Interview with Akemi Mizutani, Advisor for Foreign Workers, & Naoko Takahashi, Labor Conditions Dispute Supervisor, in Tokyo, Japan (Apr. 15, 1999). Both Mizutani and Takahashi work in the Inspection Section of the Tokyo Labor Standards Office.

261. Interview with Katsuyuki Awamura & Yuko Tsukasaki, *supra* note 8.

262. *Id.* (statement of Awamura).

263. Subcomm. on the Illegal Resident Issue, Report, *supra* note 101, at 23.

264. LABOR WHITE PAPER, *supra* note 12, at 39.

265. Subcomm. on the Illegal Resident Issue, Report, *supra* note 101, at 22.

oversees services to help foreigners find jobs, and it attempts to "enlighten" or advise employers on the proper employment of foreigners.²⁶⁶

E. Employers' Increased Knowledge of the Immigration Act

Employers have become increasingly aware of and savvy about the immigration law aspects of hiring newcomers. Until the migration of newcomers to Japan, employers had little reason to familiarize themselves with immigration law. During the early years of the newcomer wave, they seldom asked to see more than a job applicant's passport, and they rarely checked to see if the applicant's immigration status permitted her to work. With the national debates concerning newcomers and the proposed immigration law revisions of the late 1980s, many employers became conscious of restrictions on employing foreigners. In particular, the sanctions against employers' hiring of foreigners without permission to work deterred some employers from either hiring newcomers or retaining their existing newcomer labor force.²⁶⁷

For other employers, the difficulty and cost of securing Japanese laborers led them to rely on low-wage migrant labor.²⁶⁸ The benefits of hiring young, competent foreigners often outweighed the concern for sanctions.²⁶⁹ Some employers, keenly aware of their employees' vulnerability, exploited foreigners who lacked permission to work by forcing them to accept lower wages and other disadvantages. Instead of reducing the number of migrants in Japan, the employer sanctions have merely pushed migrants further underground.

Employers have deployed various subterfuges to dodge immigration law restrictions. One prime example is the Yamaguchi Sugar Refinery case.²⁷⁰ To cope with a shortage of workers in the early 1990s, the Yamaguchi Sugar Refinery planned to bring in foreigners under the "engineer" residency status. In 1991, during applicant interviews in the Philippines, company representatives told applicants that the company would give them the opportunity to train in

266. *Gaikokujin Rōdōsha no Genjō to Taisaku* [Current Situation of Foreign Workers and Policy] (printed material received during Interview with Katsuyuki Awamura & Yuko Tsukasaki, *supra* note 8, and on file with author).

267. See Keiko Yamanaka, *Illegal Immigration in Asia: Regional Patterns and a Case Study of Nepalese Workers in Japan*, in *ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK* 471, 490 (David W. Haines and Karen E. Rosenblum eds., 1999) [hereinafter Yamanaka, *Illegal Immigration in Asia*] (revealing that "many Japanese companies, threatened by criminal penalties, replaced illegal workers with legal *Nikkeijin* workers").

268. See, e.g., Takashi Oka, *PRYING OPEN THE DOOR: FOREIGN WORKERS IN JAPAN* 24 (Carnegie Endowment for Int'l Peace, Contemporary Issues Paper No. 2, 1994) (describing the hiring of foreign workers by a small-scale entrepreneur unable to find suitable Japanese employees).

269. One manufacturing company president who hired six Nepalese workers stated: "My Nepalese workers are smart and dedicated to their jobs. . . . They are much younger than my Japanese workers, who are in their fifties and sixties. Even though the law says I should not hire illegals, I see no reason to replace them. Because our products do not carry my company name, I do not have to worry about the company image. If I were caught by the police, the local newspaper would report it in only one line. That's all." Yamanaka, *Illegal Immigration in Asia*, *supra* note 267, at 491-92.

270. 618 RŌDŌ HANREI, 37 (Feb. 1993) (Tokyo Dist. Ct., July 7, 1992).

sugar refining engineering, pay a net monthly income of 300 U.S. dollars, and supply room, board, and processing fees.²⁷¹

Pursuant to a ministerial ordinance, foreigners must receive, at a minimum, the same salary as a Japanese engineer in order to obtain an engineer visa.²⁷² To comport with the ordinance, the company submitted a false declaration to Japan's Immigration Control Bureau, setting the engineers' gross monthly salary from 275,000 to 300,000 yen (\$2,068 to \$2,256, at 133 yen to one U.S. dollar, the exchange rate used by the court). Yamaguchi concluded a written contract with the Filipinos at the \$300 monthly wage and obtained their signatures on another contract form with blank wage columns. He later filled in a monthly wage of \$2,100 and submitted these contracts to the Philippines Embassy and the Philippines Overseas Employment Development Bureau.²⁷³

The Japanese government issued the engineer visas, and the Filipinos were given work as sugar refinery laborers upon their arrival in Japan. They were fired, as a disciplinary matter, for taking collective action against the company to demand training and the return of their passports.²⁷⁴ They filed a lawsuit for, *inter alia*, unpaid back wages based upon the \$2,100 monthly salary. Although the court dismissed their case in its entirety,²⁷⁵ it found Yamaguchi's action reprehensible: it "must be called an action with the intent, in essence, to obtain unskilled labor and cannot avoid societal and legal criticism as an Immigration Act violation."²⁷⁶

271. *Id.* at 37-38.

272. Shutsunyūkoku Kanri Oyobi Nanmin Nintei Hō Dainanajō Daiikkō Dainigō no Kijun wo Sadameru Shōrei [Ministerial Ordinance Setting the Standards of Immigration Control and Refugee Recognition Act, Article 7(1)(2)], Ministry of Justice Ordinance No. 16 of 1990 [hereinafter Ministry of Justice Ordinance No. 16 of 1990].

273. 618 RŌDŌ HANREI at 38 (Tokyo Dist. Ct., July 7, 1992).

274. The company allegedly held their passports to prevent them from moving to another company without permission. *Id.* at 39.

275. The crux of the court's decision rests upon its narrow interpretation of the employment contract. According to the court, the parties had concluded an employment contract, not a contract to provide training. The court recognized that Plaintiffs' collective refusals to work constituted strike actions, but went on to hold that the strikes were not legitimate efforts to demand improved wages or working conditions. Rather, they were attempts to force the employer to agree to a new, separate training contract. *Id.* It held that these attempts violated the employer's freedom of contract, and that the disciplinary dismissals constituted a lawful response to the workers' actions.

As for the disparity in wages between the two contracts, the court again rejected Plaintiffs' contention that they should be awarded the higher wage rate. The court held that the parties had agreed to a monthly wage of \$300. Since the second written contract was "made solely for the Philippines immigration procedures," the court "cannot recognize that an employment contract was concluded with a wage of \$2,100 monthly based upon the existence of the second contract." *Id.* at 40. The court did recognize, however, that the total amount provided to Plaintiffs not only fell below the wage declaration submitted to the Immigration Control Bureau, but also failed to satisfy the ministerial ordinance that their wages be comparable to that of a Japanese engineer. While condemning the employer's end-run around the Immigration Act, the court noted that this violation should be disposed of as an immigration matter and should not result in substituting \$2,100 as the contractual wage. *Id.* at 41.

276. *Id.* at 41.

F. The Trainee System

According to the Immigration Control Bureau, the foreign trainee system has experienced rapid development in recent years.²⁷⁷ The government developed the trainee system with the stated intent of facilitating know-how transfer from Japan to developing countries.²⁷⁸ But the timing of the government's heavy promotion of the trainee system and the creation of the Technical Intern Training Program suggest that the government's underlying motive was to establish a controlled, legal avenue for unskilled labor.²⁷⁹ One leading authority on training programs flatly concludes, "[T]he 'trainee' system has always been something of a charade."²⁸⁰ The government itself has been sensitive to the fact that many would perceive the intern program as a covert means to alleviate labor shortages.²⁸¹ By expanding the training system, the government enables low-wage foreign workers to enter Japan while maintaining its policy against creating an unskilled worker visa. Unlike the renewable long-term resident visa given to *Nikkeijin*, the training system is designed to prevent foreign trainees or interns from staying in Japan beyond their visa term. By making the host companies responsible for returning trainees to their home countries, the government avoids responsibility for the enforcement of visa term limits.

The Bureau pinpoints the origins of the trainee concept to Japan's industrial advancement overseas. During the 1960s and 1970s, Japanese companies with foreign ties invited employees from their foreign subsidiaries, affiliates, and business partners to come to Japan and gain technological experience and "know-how," with the expectation they would work more effectively upon their re-

277. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 69.

278. According to the Immigration Control Bureau, the trainee programs help educate people who will carry forth economic development in and thus contribute to the self-sufficiency of developing countries. The Bureau admits that the programs "also benefit the companies accepting [trainees]." *Id.* at 3, 71.

279. One ground for suspicion is that the Ministry of Health and Welfare's Advisory Council on Foreigners' Medical Care proposed strengthening the Technical Intern Training Program as one means of eliminating the problem of foreigners' unauthorized stays in Japan and, consequently, the problem of foreigners' medical care. See Gaikokujin ni Kakaru Iryō ni kan suru Kondankai [Advisory Council on Foreigners' Medical Care], Report 2, 15 (1995). Another ground for suspicion is that during the debates over unskilled foreign workers in the late 1980s, members of the private sector and the government bureaucracy proposed conditions for accepting unskilled labor that resemble the current structure of the trainee system in several respects. (The proposed conditions included time-limited stays in Japan, the establishment of a private organization to facilitate acceptance of unskilled workers, agreements with trainee-sending countries, and an employer-provided study program.) See, e.g., *supra* notes 46, 48.

280. SHIMADA, JAPAN'S "GUEST WORKERS," *supra* note 9, at 69. Shimada's comment was specifically directed at the trainee system, as opposed to the Technical Intern Training Program. The distinction between trainees and interns is discussed *infra*.

281. For example, in his *Basic Plan for Immigration Control*, the Justice Minister quotes from a government response to a query regarding the Technical Intern system: the system is "'from the perspective of international contribution and international cooperation, not from the viewpoint of filling the labor shortage.'" *Basic Plan for Immigration Control*, 78 KANPŌ 13 (spec. ed. June 1992) (quoting from Reply No. 2 [Dai 2 Tōshin] Concerning Administrative Reform). KANPŌ is the central government's official gazette.

turn.²⁸² A 1981 revision of the Immigration Act formalized the exchange by creating a trainee status of residence under the provision covering overseas students.²⁸³

The 1989 revision of the Act created a separate "trainee" status, and a ministerial ordinance clarified the standards for trainees.²⁸⁴ At first, the standards required companies accepting trainees to engage in relatively large-scale operations. They thus barred small- and medium-sized enterprises from participating in the program. In August 1990, the standards were relaxed, and small- and medium-sized businesses now have the opportunity to receive trainees under the auspices of a third party, such as a small enterprise association, agricultural cooperative, or chamber of commerce. The third party accepts the trainees and then posts them to member companies.²⁸⁵

In September 1991, Japan International Training Cooperation Organization (JITCO), a private foundation, was set up under the joint control of five government ministries: Justice, Foreign Affairs, International Trade and Industry, Labor, and Construction.²⁸⁶ JITCO's primary goals include the "promotion of the training of overseas trainees by private companies in Japan and provision of advice and assistance" regarding such issues as immigration procedures and health and safety precautions. "JITCO also undertakes to advise, support and ultimately to recommend to the Minister of Justice training programs for foreign nationals that are suitable according to the related laws."²⁸⁷

A classroom component constitutes a mandatory part of the trainee program. It must generally occupy at least one-third of the trainees' time. Classroom education includes topics such as Japanese language, safety education, and basic skills training.²⁸⁸ Although the trainee is forbidden to engage in work, she may in fact carry out work in the name of on-the-job training. In December 1992, via revisions to a ministerial ordinance and a ministerial notice, the Ministry reduced classroom time and increased the percentage of time a trainee may devote to on-the-job training.²⁸⁹

282. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 70.

283. Immigration Act, *supra* note 4, art. 4(1)(6)(2) (as amended by Shutsunyūkoku Kanri Oyobi Nanmin Nintei Hō no Ichibu wo Kaisei suru Hōritsu [Law Revising Part of the Immigration Control and Refugee Recognition Act], Law No. 85 of 1981).

284. Ministry of Justice Ordinance No. 16 of 1990, *supra* note 272.

285. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 71; AN OVERVIEW OF JITCO: PROVIDING INFORMATION TO SUPPORT AND PROMOTE TRAINING PROGRAMS IN JAPAN 6 (Japan Int'l Training Cooperation Org. 1997) [hereinafter AN OVERVIEW OF JITCO].

286. Fumi Fukami, "Kokusai Kōken" suru Kenshūsei Seido? [Trainee System Makes an "International Contribution"?], 341 GEKKAN MUSUBU 41 (May 1999).

287. AN OVERVIEW OF JITCO, *supra* note 285, at 4.

288. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 72-73.

289. If trainees receive four or more months of on-the-job training, or if they receive 160 hours or more of preliminary training prior to the start of their formal training, the classroom component may be reduced from one-third to one-fourth of the total training period. If trainees meet both the on-the-job training and preliminary training conditions, classroom training may be reduced to one-fifth of the total training period. AN OVERVIEW OF JITCO, *supra* note 285, at 9.

Officially proposed in December 1991,²⁹⁰ the Technical Intern Training Program (*ginō jissshu seido*) was launched in April 1993 as a complement to the existing trainee program.²⁹¹ Now, foreigners who have attained a certain level of skill as trainees may apply for a technical internship. If accepted, the foreigner works under an employment contract for the same company where she worked as a trainee. The intern becomes a full-fledged employee entitled to labor law protection, and her visa status shifts from “trainee” to “designated activities.” Like the trainee program, the Technical Intern Training Program aims to “heighten mastery of technical skills by giving the trainees a chance to practice them, upon the completion of the regular training, as protected by Japanese laws and regulations in a relationship of employment. . . .”²⁹² The total period of time for both the training and the technical internship is generally restricted to two years. Since April 1997, however, the Ministry has extended the period to three years for many job categories.²⁹³

The Justice Ministry puts a high priority on its training program initiatives. In its first “Basic Plan for Immigration Control,” issued in 1992, the Justice Minister listed only four issues of “urgent and high level importance.” Developing a policy on the acceptance of foreign trainees was one of them.²⁹⁴ From 1992 to 1994, the numbers of trainees entering Japan each year decreased, but since 1995, they have steadily increased.²⁹⁵ The annual number of new trainees has risen 36%, from 36,612 in 1994 to 49,797 in 1998.²⁹⁶ Both public and private organizations may accept trainees, and the numbers accepted by private industry have grown annually since 1995.²⁹⁷ By the end of 1997, an aggregate total of 14,280 persons had moved from the trainee program to the intern pro-

290. Advisory Council on Foreigners' Medical Care, *supra* note 279, app. 10, at 30 (Technical Intern Training Program proposed on December 12, 1991).

291. The Immigration Bureau characterizes the technical intern program as a shift, in part, from the previous framework for accepting foreigners, which had clearly demarcated “working foreigners” from “studying foreigners.” The program created a new distinction between “training through work as skills practice” and “training as learning.” IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 75.

292. AN OVERVIEW OF JITCO, *supra* note 285, at 10. See also IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 71, 74-75 (adding that the intern program facilitates both transfer of skills to developing countries and human resource development).

293. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 79. Both those in sending countries and those in Japanese organizations desired an extension of the two-year cap on training and internships. The Japanese companies purportedly deemed it necessary to lengthen the period so that the foreigners could acquire an even higher level of skill. *Id.* For the two-year program, the length of the technical internship must not exceed that of the training period by more than 1.5 times. With a three-year program, the training period is required to last longer than nine months. AN OVERVIEW OF JITCO, *supra* note 285, at 10.

294. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, app. 5, at 300. See also *id.* at 3.

295. *Id.* at 29.

296. Of the 49,797 persons, trainees from China (22,372) constituted 44.9 percent. In rank, Indonesia, Thailand, and the Philippines were the following three most frequent senders of trainees. JAPAN IMMIGRATION ASSOCIATION, SHUTSUNYŪKOKU KANRI KANKEI TŌKEI GAIYŌ 1998 [1998 STATISTICS ON IMMIGRATION CONTROL] 5, 17, 65 (1999).

297. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 71.

gram. Chinese have comprised more than half of the technical interns, followed by Indonesians, Vietnamese, Filipinos, and Thai. They generally work in the clothes manufacturing and construction fields.²⁹⁸ The Immigration Control Bureau expects the numbers of both trainees and interns to increase in coming years.²⁹⁹

Businesses have clamored for trainees and interns. Trainees have several advantages over traditional workers. Trainees may not perform activities for wage remuneration, and the labor laws therefore do not apply to them.³⁰⁰ Additionally, in lieu of wages, trainees receive a "trainee allowance" to compensate for actual living expenses.³⁰¹ Trainee allowance and intern wages are usually much lower than employee wages. The president of one small construction company paid his trainees 100,000 yen (\$1,000) and interns 170,000 yen (\$1,700) per month, whereas his Japanese employees received 300,000 to 340,000 yen (\$3,000 to \$3,400) per month.³⁰² The on-the-job training component resembles a *quid pro quo* of low-cost labor in exchange for training, assuming a company fulfills its obligations to the trainee.³⁰³ Recently, the government has permitted the agriculture, animal husbandry, and marine-products processing sectors, which suffer from labor shortages, to accept technical interns.³⁰⁴

Two types of problems have arisen from the training programs. First, a small number of trainees have pursued other job opportunities, disappeared from their host companies, and become overstayers.³⁰⁵ Second, companies and third-party associations have used trainees and interns as low-wage, manual laborers. They neglect the educational component of the trainee program,³⁰⁶ force train-

298. *Id.* at 79.

299. *Id.* at 69.

300. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 71; AN OVERVIEW OF JITCO, *supra* note 285, at 5.

301. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 71.

302. Interview with Hiroshi Morino, President of Morino Kōgyō, in Yokohama, Japan (May 16, 2000).

303. There are companies whose training programs fulfill the spirit of the training system. See, e.g., Daniel H. Foote, *Japan's "Foreign Workers" Policy: A View from the United States*, 7 GEO. IMMIGR. L.J. 707, 731 (1993). Foote notes his discussions with companies that run "rigorous training programs designed to enhance the skills of workers from Southeast Asia, who then were sent back to higher positions at the Japanese companies' subsidiaries in the trainees' home countries." *Id.* For companies with overseas subsidiaries, operating such a rigorous program makes sense since they will benefit from the trainees' improved skills once they return to the subsidiaries.

304. *Gaikokujin Rōdōsha Ukeire Kakudai he [Towards Expanding Acceptance of Foreign Workers]*, ASAHI SHIMBUN, Jan. 14, 2000, at 1. The Ministry of Justice had also considered allowing the hotel industry, which faces a similar shortage of workers, to take in technical interns. *Id.*

305. As of January 1, 1998, the number of overstaying trainees had reached 3,099, approximately 1% of the aggregate total of all trainees (numbering over 250,000 in all). *Id.* at 81.

306. When the president of a company called Keihin Kōgyō filled out the JITCO form, "Training (Not on-the-Job) Implementation Plan," for year 1995 to 1996, he listed the types of classroom-based training his company would provide each month. The total amount of training added up to 859 hours a year. The president forthrightly admitted, however, that such plans were merely for show, and that his construction company provided very little classroom education. Rather, the trainees and interns received training as they worked. Keihin Kōgyō stopped accepting trainees and interns in March 1999, when JITCO allegedly began pressuring the local third-party organization to

ees to work overtime and on holidays, assign work having no relation to skill-building or to trainees' prior work experience,³⁰⁷ and embezzle the trainee allowance and intern wages.³⁰⁸ According to one scholar's survey, conducted from 1989 to 1990, 72% of 597 companies had used their trainees as low-cost labor during the previous year.³⁰⁹ Indeed, cases of abuse of the trainee system came to the government's attention even before its heavy promotion of the system in the 1990s.³¹⁰

Trainees and technical interns have recently filed court challenges. The case of Nalinda Priyantha exemplifies the vulnerability of trainees.³¹¹ A third-party association had sent Priyantha, a Sri Lankan with a background in painting, sculpture, and engraving, to train in a stonecutting company. When he arrived at the company, Priyantha was assigned to manual labor tasks such as moving and polishing gravestones.³¹² He reportedly worked from 8AM to 9PM, did not receive the required classroom training, and received only half of his monthly trainee allowance of 100,000 yen (\$1,000). The company withheld the other half of his allowance until he completed the training program.³¹³ Priyantha applied for and passed the examinations to become a technical intern, but he refused to work for the same company. The third-party association allegedly sent him to a bedding manufacturing company, where he stayed only two months.³¹⁴

Through a citizens' group and a labor union, Priyantha contacted three organizations: JITCO, the company, and his local labor standards office. According to Priyantha, JITCO flatly refused to assist him with his claim for the unpaid training allowance, even though it has a consultation window to address problems. Similarly, in response to Priyantha's inquiries, the company told him

enforce training requirements. According to the president, actually fulfilling the training requirements would erode the financial benefit of receiving such low-wage labor. Interview with Shinsaku Uchida, *supra* note 205 ("Training (Not on-the-Job) Implementation Plan" on file with author).

307. In one case, a Chinese technical intern had come to Japan to learn metal casting technology. Instead, he was sent to work in an ironworks company, where his assigned task was cleaning stainless steel parts. *Ukeire Kōjō de Shōsan Chūdoku: Chūgokujin Jisshūsei ga Teiso* [Nitric Acid Poisoning at Factory that Accepts Foreign Workers: Chinese Intern Files Suit], ASAHI SHIMBUN, Jul. 21, 1995 (evening edition), at 15.

308. IMMIGRATION CONTROL: FOR SMOOTH INTERNATIONAL EXCHANGE IN THE 21ST CENTURY, *supra* note 3, at 81-82.

309. Hiroshi Komai, *Are Foreign Trainees in Japan Disguised Cheap Laborers?*, 20 MIGRATION WORLD 13-16 (1992), cited in Yamanaka, *New Immigration Policy*, *supra* note 88, at 80.

310. See, e.g., *Kishuku Shite Kenshū Jitsu ha Tanjun Rōdō* [Training and Lodging Was Actually Unskilled Labor], ASAHI SHIMBUN, Aug. 23, 1989 (evening edition), at 15. Upon investigation, the Ministry of Justice's Immigration Control Bureau and the Tokyo Regional Immigration Control Bureau found two companies had failed to create a written training plan and had not offered classroom training to trainees used as unskilled laborers. *Id.*

311. Fukami, *supra* note 286, at 41-44. Fukami is a member of the Foreign Trainee System Research Group, an NGO located in Utsunomiya City, Tochigi Prefecture. The NGO monitors the training programs.

312. *Id.* at 42.

313. Shinichi Yanagawa, *Firms Using Foreign Trainees as Illegal, Cheap Source of Labor*, DAILY YOMIURI, Aug. 11, 1999, at 10A.

314. *Jitsumu Kenshū ka Rōdō ka* [Practical Training or Labor?], JŌYŌ SHIMBUN, Sept. 26, 1999, at 1.

it would keep the unpaid allowance as a penalty for his departure. Finally, the labor standards office told Priyantha that since labor laws do not apply to trainees, it lacked jurisdiction over his case. Only if he could prove that he in fact worked would it accept the case. The labor standards office could not determine whether he performed work and thus refused to order the company to pay him. Since Priyantha could not obtain relief from the company, JITCO, or the labor standards office, he filed a civil lawsuit in February 1999 to recover 600,000 yen (\$6,000) for the unpaid portion of his trainee allowance.³¹⁵

Priyantha's case exhibits several of the weaknesses of the trainee and intern systems. First, it is easy for companies to abuse the system. In addition to withholding trainee allowances and intern wages, employers frequently require trainees and interns to hand over their passports. Second, if trainees or interns experience problems with their host companies, the system is not designed to help them—JITCO and the third-party associations usually fail to provide effective assistance. Finally, Labor Standards Inspection Offices are reluctant to accept trainee cases.

V.

CONCLUSION

A. *Observations*

The situation of newcomers in Japan calls to mind a comment regarding European guest worker programs: "we asked for workers, and we got human beings."³¹⁶ Newcomers represent a much-needed source of young, cheap, manual labor. The ramifications of their presence have spread through a broad gamut of policy areas.³¹⁷ In response to the influx of newcomers, the Japanese government has taken three approaches: (1) exclusion, (2) backdoor admission of unskilled foreign laborers, and (3) reluctant grants of permission for certain newcomers to stay in Japan. Through a patchwork of legislative revisions, shifts in administrative policy, and enhanced law enforcement measures, the government has attempted to create a "Fortress Japan." It seeks to discourage potential migrants from entering Japan, and to remove those already in Japan before they develop roots. The exclusion-oriented approach echoes the government's unabashedly discriminatory treatment of Korean and Taiwanese residents after World War II.³¹⁸

315. Fukami, *supra* note 286, at 43-44. One of the stonecutting company's other former trainees recently filed a similar lawsuit for unpaid training allowance. *Practical Training or Labor?* *supra* note 314.

316. Foote, *supra* note 303, at 745 (quoting Philip L. Martin, *EC-92 and Immigration Issues in Europe*, 14 *IN DEFENSE OF THE ALIEN* 31, 41 n.8 (Lydio F. Tomasi ed., 1992) (quoting Max Frisch)).

317. The impact of newcomers on Japan's medical care and education systems and the government's administration of nationality is covered in Shin, *supra* note 26.

318. Although the government subsequently remedied the legal status of Korean and Taiwanese residents and eliminated certain legislative barriers to accessing social services (*see, e.g., id.*; *supra* notes 40-42 and accompanying text), legal and societal discrimination against Korean Japanese continues to be a serious problem within Japanese society.

The arrival of newcomers has caused the government to raise its defenses once more. Whereas a line once separated nationals and foreigners, the government now draws a distinction between, on the one hand, undocumented and short-term visa holding residents and, on the other hand, those with more stable immigration statuses. The discrimination is based on fear—fear that the entry of a multiethnic, unskilled labor force will erode Japan's touted orderliness and homogeneity, bringing upon Japan the problems that more ethnically and culturally diverse nations, such as the U.S. and Germany, have encountered for decades.

Although discredited among liberal intellectual circles, the notion of *tanitsu minzoku kokka*—literally “one-race nation”—is firmly rooted in Japanese society. I have heard this term drop with an air of conspiratorial nonchalance from the lips of a government bureaucrat as she explained why foreigners cannot expect Japanese society to welcome them.³¹⁹ A high-level Immigration Control Bureau official states with assurance that Japan is a homogeneous society “without parallel in the world.” It is a nation of people whose “language is also the same; race is also the same; religion and customs are also the same.” As a result, he asserts, Japanese people reject heterogeneity.³²⁰ According to public officials, the government will maintain its policy against accepting unskilled labor.³²¹ The officials emphasize that, at least from 2000 to 2010, Japan will not suffer a significant labor shortage. Hence, it will not need to import foreign labor.³²²

The fear of foreigners contends with the pressing needs of small- and medium-sized companies for young unskilled workers. The labor shortage has resulted in a second type of government response: efforts to substitute the employment of undocumented foreigners with *Nikkeijin*, namely Japanese Latinos, and with foreign trainees and technical interns. The entry of second- and third-generation Japanese descendants, their spouses, and children has had unexpected repercussions on Japan. Contrary to the Liberal Democratic Party's expectations, the Japanese Latinos do not assimilate smoothly into Japanese society. Their cultural identity and customs are rooted in their Latin American home countries, and their non-Japanese speaking children have difficulty inte-

319. Interview with Akemi Mizutani & Naoko Takahashi, *supra* note 260 (statement of Takahashi).

320. Yamasaki, *supra* note 49, at 137, 139, 157, 160-61. Yamasaki identified himself as the Immigration Control Bureau's Registration Section Chief. From March 1988 through March 1990, he was the official in charge of overseeing the 1989 revisions to the Immigration Act.

321. Interview with Katsuyuki Awamura & Yuko Tsukasaki, *supra* note 8.

322. *Id.* According to Employment Security Bureau estimates, the growth of the labor force will peak at 68,560,000 in 2005 and decline slightly to 67,360,000 by 2010. A second Bureau chart indicates the population aged 30 to 54 years will decline only slightly from 1998 to 2010. On the basis of these estimates, a Ministry of Labor official predicts the government will not need to allow foreign workers to enter Japan. *Id.* (statement of Tsukasaki); “Labor Force Population Shift” graph and “Labor Force Population Shift By Age Bracket” chart (graph and chart provided by Tsukasaki and on file with author). However, according to the chart, the 15- to 29-year-old age bracket will suffer a 4 million-person decline, from 16,310,000 to 12,310,000, while the over-55 age bracket will jump 3.8 million, from 15,700,000 to 19,540,000. Thus, it is foreseeable that Japan will inevitably face a labor shortage if the Employment Security Bureau's estimates are accurate. *Id.*

grating into the school system. Concentrated in industrial zones, Japanese Latinos settle into miniature versions of their home countries, patronizing the ethnic groceries, restaurants, and other service providers targeted specifically at them. In contrast, the two training systems represent a more controllable way of importing unskilled labor.

The third type of government response—limited accommodation—involves its extension of labor law protections to undocumented workers and its recognition of certain foreigners' rights to legally reside in Japan. The first softening in the government's posture toward newcomers came, unsurprisingly, as a consequence of the blood ties between foreigners and their part-Japanese children. More recently, the Ministry of Justice granted legal status to overstayers *without* any blood relationship to a Japanese national. In September 1999, 21 visa overstayers, with the support of APFS, submitted themselves as a group to the Immigration Bureau. They sought to apply for special permission for residency. Although the Ministry has not clearly articulated its standards for granting special permission, past practice shows it rarely grants overstayers permission in the absence of extenuating circumstances, such as marriage to a Japanese citizen.³²³ The prospects for the 21 applicants, none of whom have familial ties with a Japanese citizen, looked bleak.

However, on February 2, 2000, the Justice Minister granted long-term resident visas to one Iranian family. It denied the application of a Burmese family. Although the families had similar profiles (both fathers entered Japan in 1990 and overstayed their visas, and both families had one child) the Iranian child was 15 years old, had lived in Japan for approximately eight years as of September 1999, and was a freshman in high school. The Burmese child, on the other hand, was a two-year-old attending nursery school.³²⁴ According to an unidentified source, "[i]n rejecting the [Burmese] family's request, the ministry judged that the two-year-old daughter is young enough to adapt to a new environment."³²⁵ The Burmese family has filed a lawsuit against the Justice Minister, seeking to void his decision.³²⁶

On February 9, Justice Minister Hideo Usui granted permission to two additional Iranian families, totaling nine persons, but rejected the applications of two single, Bangladeshi men.³²⁷ Again, the families have children in middle or

323. According to past administrative practice, the only other situation allowing for the receipt of special permission involves the family reunification of Koreans. Koreans who lived in Japan before World War II, returned home before or after the end of the war, and reentered Japan (secretly or otherwise) to see family have received special permission. Yaeko Takeoka, *Gaikokujin no Kodomo no Zairyū no Hogo* [Protection of Foreign Children's Residency Status], in *NIHON DE KURASU GAIKOKUJIN NO KODOMOTACHI: TEIŪKA JIDAI TO KODOMO NO KENRI* [FOREIGN CHILDREN LIVING IN JAPAN: ERA OF SETTLEMENT AND CHILDREN'S RIGHTS] 147, 153 (Japan Civil Liberties Union ed., 1997).

324. *Iranijin Kazoku ni Zairyūkyōka* [Permission to Reside Granted to Iranian Family], *ASAHI SHIMBUN*, Feb. 3, 2000, at 39.

325. *Landmark Decision Grants Residency to Iranian Family*, *JAPAN TIMES*, Feb. 3, 2000, at 1-2.

326. *Aratani 2 Kazoku Zairyū Kyōka* [Permission to Reside Granted to Two More Families], *ASAHI SHIMBUN*, Feb. 10, 2000, at 38.

327. *Id.*

high school and have lived in Japan for close to 10 years. Like the Burmese family, the two single men plan to challenge the Minister's determination in court.³²⁸ The remaining applicants—an Iranian family of four, including one twelve-year-old child—received permission on February 14.³²⁹ Thus, of the 21 applicants, only five were unsuccessful. The media suggested the applicants' overall success represented a true shift in policy. According to attorney Kensuke Ōnuki, however, the Justice Minister forced the grants of special permission upon his staff; government policy as a whole has not changed.³³⁰ But even if the experiences of the 16 successful applicants reflect a one-time exception, it still represents a striking departure from past practice.

As for a second group of 17 overstayers (five Iranian families) who submitted themselves to the Tokyo Regional Immigration Bureau on December 27, 1999, Justice Minister Usui granted special permission to one family with a child in middle school. He denied the other applications despite the fact that two families had daughters in the sixth grade. The girls had lived in Japan since approximately age two.³³¹ It is unclear whether to interpret the second group's results as tentative affirmation of a genuine policy shift towards granting permission to certain overstaying families or, if one takes Ōnuki's view, merely as a compromise between a relatively progressive Justice Minister and his reluctant staff. The policy on special permission for residency faces continued challenges: preparations are reportedly underway to form a third group.³³²

Although not enough case law has accumulated to support a firm prediction, the judicial arena may offer newcomers a tool for changing bureaucratic practices, especially with regard to issuing spouse visas. Japanese courts have a tendency to defer to administrative discretion. However, judges have displayed a willingness to go against the bureaucrats' positions by granting visa renewals to separated spouses. Courts have exhibited an extraordinary degree of sensitivity to the circumstances of foreign spouses. However, the Supreme Court has not yet spoken on the issue, and lower court opinions are not binding upon government ministries.

B. The Future

During the past 15 years, the government's response to newcomers suggests it will do little to promote the protection of newcomers' human rights or to facilitate broad societal acceptance of ethnic and cultural diversity, particularly with regard to unskilled foreign workers. The experiences of Koreans,

328. *Id.*

329. *Zairyū Kyōka Tsūchi Shūryō: Iranjin Kei 16 Nin ni* [Notification of Residence Permission Complete: 16 Iranians in Total], ASAHI SHIMBUN, Feb. 15, 2000, at 38.

330. Interview with Kensuke Ōnuki, Attorney, in Tokyo, Japan (June 12, 2000). To protect his source, Ōnuki would not reveal the name or position of the official who provided him with this information.

331. *Shutō Iranjin 4 Kazoku Mitomezu: Zairyū Tokubetsu Kyōka* [4 Iranian Families Denied Special Permission for Residency], ASAHI SHIMBUN, Jul. 1, 2000, at 38.

332. See *General Movement Obtaining Special Permission for Residence, THIS LAND IS* (Asian People's Friendship Society, Tokyo, Japan), May 15, 2000, at 5 (newsletter on file with author).

Taiwanese, aboriginal Ainu, and historically low-caste Burakumin stand as sober living examples of governmental and societal prejudice vis-à-vis perceived outsiders and minorities. Thus, while the government could, of course, do much to grapple more effectively and humanely with the newcomer migration, I will forebear from recommending changes in legislative or administrative policies.

Instead, I will proffer reasons to support a guarded optimism for the long-term prospects of newcomers in Japan. They include (1) the graying of society and low birth rate, (2) legislative and administrative shifts enabling the growth of grassroots activism and calls for government accountability, (3) the realistic attitude and tremendous dedication of NGOs and attorneys, (4) broader acceptance of international human rights norms and greater expectations of Japan as a member of an elite group of developed nations, and (5) the persistence of newcomer communities over time.

First, Japan's birth rate has fallen below the replacement rate,³³³ and a large segment of the population is aging out of the workforce. By 2050, Japan's total population is expected to decrease from 126 million to 105 million people.³³⁴ The Economic Planning Agency predicts that starting in 2005, Japan's work force population will shrink, decreasing by an estimated 400,000 persons by 2025.³³⁵ Even as Japan experiences a prolonged recession, a dearth of available young unskilled or low-skilled workers continues to plague the economy. The need for such labor will continue into the future, especially with the foreseeable increase of elderly Japanese in need of health care.³³⁶ Demographers estimate the number of elderly persons requiring care will nearly double, from 280,000 people in 2000 to 520,000 people in 2025.³³⁷

Thus far, the government has maintained that the acceptance of unskilled labor "should be considered carefully." According to a public official, this phrase is a mere circumlocution indicating the government continues to oppose the official entry of foreigners as unskilled workers.³³⁸ Despite such avowals, the issue of accepting foreign workers is resurfacing as a hot topic of debate. Even the Ministry of Justice's second Basic Plan for Immigration Control, issued in March 2000, suggests the government should consider developing a

333. In 1998, the average Japanese woman had 1.38 children, "one of the world's lowest" average birthrates. Calvin Sims, *Japan's Employers Are Giving Bonuses for Having Babies*, N.Y. TIMES, May 30, 2000, at <http://www.nytimes.com/library/world/asia/053000japan-birthrate.html> (last visited Apr. 1, 2001). Although the government is expanding the monthly subsidy program for families with young children, experts have pointed out the ineffectiveness of past initiatives to raise the birthrate. *Id.*

334. *Id.*

335. "Kaigo ni Gaikokujin" Giron Semaru ["Allowing Foreigners to Work in Health Care" Debate Is Drawing Near], ASAHI SHIMBUN, Jan. 14, 2000, at 3.

336. Asahi Shimbun gives two examples of hospitals that have each added over 20 Japanese Brazilian aides to their staffs since 1994. The article notes that their work involves heavy physical labor for low pay, and that their short-term contracts give them little job stability. *Nikkeijin ga Sasaeru Machi* [Communities Supported by Japanese Descendants], ASAHI SHIMBUN, Jan. 14, 2000, at 3.

337. *Id.*

338. Interview with Shoko Sasaki, *supra* note 84.

framework for accepting foreign workers.³³⁹ In November 1999, the head of the Japan Federation of Employers Associations and others asked the Prime Minister to create a "health care" status of residence and accept Asian workers under the new status.³⁴⁰ In front-page news, an advisory council to the Prime Minister's office even considered recommending that the government enable more foreigners to enter for work purposes in order to alleviate labor shortages resulting from the low birth rate.³⁴¹ In light of the preceding proposals, it is probable that the government will, of necessity, either expand visa categories to include less skilled workers or introduce a program to recruit foreign workers for nursing home, construction, and other low-paid jobs.

Second, recent developments may expand and enhance the efficacy of activism. The existing Non-Governmental Organization Law applies only to large-scale organizations, such as the Red Cross. In December 1998, however, the Non-Profit Organization Law ("NPO Law") went into effect,³⁴² enabling smaller groups to incorporate. The law is expected to encourage the growth of non-profit groups by making it easier for the groups to raise funds.³⁴³ Whereas an unincorporated group cannot open a bank account in its own name, incorporated organizations can open accounts in the name of the group, thus encouraging donations from otherwise wary benefactors. One obstacle remains—current tax codes do not permit tax deductions for donations to NGOs and NPOs.

The trend toward government deregulation has led to pressure to expand the legal profession. As the bureaucracy becomes less involved in companies' and individuals' affairs, businesses and others are turning to other avenues—such as attorneys and the court system—to protect their own interests.³⁴⁴ For a country with an advanced economy, Japan has few attorneys. Among a population of approximately 125 million people, they numbered only 18,264 as of March 1, 200.³⁴⁵ Previously, strict numerical limits on National Law Examina-

339. *Id.*

340. "Allowing Foreigners to Work in Health Care" Debate Is Drawing Near, *supra* note 335.

341. *Imin Ukeire Rōdōryoku Hōkyō* [Accept Immigrants to Reinforce the Labor Force], NIKON KEIZAI SHIMBUN, Apr. 14, 1999, at 1. On April 13, 1999, the Economic Council, an advisory organ to the Prime Minister, presented 15 policy issues that were to form the basis for its economic plan for the first decade of the 21st century. *Id.* However, the proposal to consider accepting foreign labor was dropped from the final report. Interview with Katsuyuki Awamura & Yuko Tsukasaki, *supra* note 8.

342. The law was enacted on March 25, 1998. Tokutei Hieiri Katsudō Sokushin Hō [Law to Promote Specific Non-Profit Activities], Law No. 7 of 1998.

343. Yoko Hayashi, Feminist Lawyering in Japan—A Personal View, Paper presented at the Conference on the Legal Profession in East Asia at Harvard Law School (Dec. 11-14, 1998), at 17 (paper on file with author). Hayashi is identified as an attorney-at-law.

344. Interview with Tetsuo Ohishi, Vice-Secretary of the Japan Legal Aid Association, in Tokyo, Japan (Feb. 1, 2000); Gotaro Ichiki & Tetsuo Ohishi, Current Issues for Legal Aid in Japan: Legal Aid System-Reform Perspective, at 1 (Jul. 15 1998) (paper on file with author) (noting that "[t]ogether with the advancement of deregulation and the shrinking of preventive functions by administrative sectors, . . . the roles and functions of the judiciary are expected to greatly increase in order to maintain the fairness and smoothness of social and economic activities"). Ichiki is identified as the Director of the Tokyo Branch of the Japan Legal Aid Association.

345. Bengoshi no Kazu [The Number of Attorneys], at <http://www.nichibenren.or.jp/member/index.htm> (last visited Apr. 1, 2001) (statistics from the Japan Federation of Bar Associations' website).

tion passers kept the number of lawyers at a minimum. Until 1992, at most 500 candidates were permitted to pass annually.³⁴⁶ Since then, however, the ceiling has been lifted, and one thousand people passed in 1999.³⁴⁷ The increase in lawyers may result in an increase in those who work on public interest cases.

The expansion of the legal aid system may also foster litigation on behalf of newcomers. On October 1, 2000, the Civil Legal Aid Act went into effect.³⁴⁸ Until then, the Legal Aid Association was funded primarily by the national bar association. It also received a supplemental budget from the government. In comparison with similar budgets in other advanced countries, the government contribution was miniscule.³⁴⁹ Under the new Act, the legal aid system will receive greater financial support from the government than previously. Article 2 of the Civil Legal Aid Act restricts foreigners eligible for legal aid to legal residents with an address in Japan.³⁵⁰ However, where foreigners succeed in court challenges to the Justice Ministry's determination of their visa status, those foreigners are eligible for legal aid as legal residents of Japan.³⁵¹ Thus, while Article 2 may reduce attorneys' zeal to file suits on behalf of undocumented newcomers, it may spur litigation on behalf of foreign spouses and other legal residents, in addition to challenges to visa determinations. Moreover, the passage of a Freedom of Information Act in 1999 may provide access to unpublicized regulations, the ability to demand explanations for administrative decisions on immigration matters, and more public feedback in the formulation of administrative regulations.³⁵² Such developments would enhance the advocacy capabilities of newcomers and their supporters.

A third factor auguring in favor of improved treatment of newcomers is the realistic attitudes of NGOs and attorneys. Among the attorneys and activists I have met, all clearly understand the entrenched nature of governmental (and societal) resistance to the acceptance of foreigners. They realize their desire to achieve fair treatment for newcomers is a long-term aspiration.³⁵³ Their tem-

346. LAWRENCE W. BEER and HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990*, 21 (1996) (citing data provided by Supreme Court Justice Itsuo Sonobe for 1991 and 1992).

347. Heisei 11 Nendo Shihō Shiken no Kekka ni Tsuite no Bunseki [Analysis of the National Law Examination Results for 1999], at <http://www.nichibenren.or.jp/siho-siken/data/heisei11.txt> (last visited Apr. 1, 2001).

348. Minji Hōritsu Fujo Hō [Civil Legal Aid Act], Law no. 55 of 2000.

349. In 1996, the Japanese government spent an average of two yen (\$0.02) per citizen for civil and criminal legal aid. In comparison, the U.S. government spent \$1.69 (169 yen) per citizen in 1994. *Soshō Hiyo Hojo, Kuni no Sekimu* [Assistance with Lawsuit Expenses Is the Government's Obligation], *NIHON KEIZAI SHIMBUN*, Jan. 24, 2000, at 38.

350. Minji Hōritsu Fujo Hō [Civil Legal Aid Act], Law no. 55 of 2000, *supra* note 348, at art. 2.

351. *Gaikokujin he no Enjo* [Assistance for Foreigners] (quoting Justice Minister Usui), at http://www.jlaa.or.jp/law_01.htm (last visited Apr. 1, 2001).

352. See Jōhō Kōkai Hō [Freedom of Information Act], Law No. 42 of 1999. The law was enacted on May 14, 1999. *Id.*

353. See, e.g., Interview with Maria Hirama, *supra* note 205; Conversation with Tadanori Onitsuka, Attorney and Co-founder of LAFLR and the Immigration Review Taskforce, in Tokyo, Japan (Dec. 27, 1999) (stating that he does not expect any fundamental shift in government policy during his lifetime).

pered approach indicates they have the stamina to endure many defeats and slow progress. Moreover, I found a truly impressive degree of dedication among volunteers, both Japanese and newcomers, and the semi-*pro bono* attorneys. Newcomers and their lawyers, often with NGO support, champion unfamiliar issues and unpopular causes. Their position at the forefront of those pushing the limits of the Japanese legal system seems to spur their commitment to their work.

Growing international acceptance of human rights norms provides another reason for optimism. As knowledge about international human rights law filters through Japanese society, NGOs grow more adept at utilizing human rights mechanisms, such as filing counterreports to the government's periodic reports to the U.N. Human Rights Commission on its compliance with various covenants. Japan has emerged as a leading global power, and it is encumbered with expectations that it behave accordingly. When Japan resisted accepting Vietnamese refugees in the late 1970s, it received a shower of international criticism.³⁵⁴ This type of pressure has had some effect on Japan's ratification of international human rights covenants, and it may deter the government from egregiously violating human rights in the future.

Finally, the sheer persistence of the newcomer population over time, in addition to its increasing integration into society, may eventually wear down government hostility. The Justice Minister's grants of special permission for residency to overstaying families with teenage children who speak only Japanese provides some basis for predicting the government will grow more accepting of even undocumented newcomers under certain conditions. The change may start with law-abiding families with children and come to include single foreigners.

As Ian Buruma, a long-time observer of Japan, has forecasted:

Unlike the Chinese and the Koreans, they [the newcomers] cannot physically blend into the general population. But like the Koreans and Chinese, many will inevitably produce children with Japanese women or men. Even though a large number will . . . end up going home, many others will not. So the very least that will happen as a consequence is that the most cherished and tenacious of many Japanese myths is finally destined to disappear; the belief, that is, that Japan, this country bred from Chinese, Koreans, Mongolians and many indigenous aboriginal tribes, is the last racially homogeneous nation in the world.³⁵⁵

Will meaningful change occur? And if so, how quickly? Even those Japanese who most strongly strive for fair treatment of newcomers do not expect government policies to liberalize, or ingrained social attitudes towards non-ethnically Japanese residents to change within their lifetimes. Yet, as the domestic population continues to decline, Japanese society will, of necessity, grow more ethnically diverse. Given the complex history of newcomers and oldcomers in Japan, this article cannot offer any concrete short-term predictions. But the reasons outlined above augur well for the long-term prospects of newcomers.

354. IWASAWA, *supra* note 41, at 6.

355. Ian Buruma, *Afterword* to REY VENTURA, *UNDERGROUND IN JAPAN 192-93* (James Fenton ed., 1992).