

**“We the *kokumin*”:
the Constitution, International Law and the Rights of Foreigners in Japan**

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I. INTRODUCTION

Compared to most other developed countries, Japan’s population exhibits a striking degree of ethnic homogeneity. The number of foreign national residents remains relatively small. Nonetheless, demographic changes and steadily rising immigration levels are gradually changing the face of Japanese society. The number of foreign nationals resident in Japan has tripled in the past three decades. In the early 1980s, foreign nationals represented around 0.7% of Japan’s population, rising to approximately 2% in 2014.

These changes present transitional challenges for a society unused to a large number of foreign residents. Predictably, there have been many legal challenges against laws and practices believed to discriminate against foreign nationals. These challenges have a mixed record of success. Recently, the Japanese Supreme Court has ruled that foreign nationals residing in Japan have no legal entitlement to public assistance payments, one part of Japan’s social welfare provision. Although foreigners have been receiving such payments for several decades, the Supreme Court’s judgment confirms this to derive from executive goodwill rather than legal entitlement.

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The decision has dismayed many in Japan's foreign community and has caused significant self-satisfaction among Japan's vocal far right. In reality, both the moral outrage and the manic glee are probably unwarranted. The decision was neither surprising nor legally flawed, and its concrete effects on foreigners in Japan are unlikely to be significant. Nonetheless, the case has implications for Japanese constitutional law and legal protection against discrimination in Japan. By analysing this case and the origins of the relevant legislation, it can be shown that some areas of Japanese law, including the Constitution, are haunted by the ghosts of nationalism and xenophobia. These sentiments were allowed to enter certain Japanese legal provisions in the immediate aftermath of Japan's defeat in the Second World War and have never been properly purged by legislative reform. This has implications for Japan's position with respect to its obligations under several instruments of public international law.

This article will first outline the public assistance legislation at stake in the case concerned. The judicial decisions in the court of first instance, at appeal level and finally in the Supreme Court will then be outlined and analysed. After summarising some of the criticisms the Supreme Court decision has attracted, this article will argue that the decision was nonetheless correct as a matter of law, paying particular attention to the legislative history of the statute in question and the Japanese Constitution. Finally the article will consider the consistency of the law as declared by the Supreme Court with several international legal instruments.

II. THE PUBLIC ASSISTANCE ACT 1950

The litigation in question concerned an application for public assistance under Japan's Public Assistance Act 1950 (hereinafter: PAA 1950).¹ This Act empowers and requires local authorities to distribute social welfare payments to those in financial need. Public assistance generally takes the form of cash payments for various purposes,² but can include some in-kind provision, such as medical care. As of July 2013, 1,581,000 households (2,159,000 people, approximately 1.7% of the Japanese population) were in receipt of some kind of support under the PAA 1950.³ Articles 1 and 2 of the PAA 1950 read as follows:

The purpose of this Act is for the State to guarantee a minimum standard of living as well as to promote self-support for all citizens [*kokumin*] who are living in poverty by provid-

1 *Seikatsu hogō-hō*, Law No. 144/1950, as amended by Law No. 53/2006; Engl. transl.: Japanese government's Japanese Law Translation Database System (as of 2009), available at <http://www.japaneselawtranslation.go.jp/law/detail/?fi=2&re=02&dn=1&yo=public+assistance&ia=03&x=0&y=0&ky=&page=1>.

2 Art. 11 PAA 1950.

3 National Institute of Population and Social Security Research, Social Security in Japan 2014, Chapter 6 Public Assistance, available at <http://www.ipss.go.jp/s-info/e/ssj2014/006.html>.

ing the necessary public assistance according to the level of poverty, based on the principles prescribed in Article 25 of the Constitution of Japan.⁴

All citizens [*kokumin*] may receive public assistance under this Act (hereinafter referred to as “public assistance”) in a nondiscriminatory and equal manner as long as they satisfy the requirements prescribed by this Act.⁵

The requirements mentioned in the text of the Act include a threshold of poverty. Applicants must submit to a means test to prove that they qualify for public assistance. Additionally, the Act provides for public assistance only for *kokumin*.⁶ Composed of the characters for “country” and “people”, this term is generally translated into English as “citizens”, as in the English translation reproduced above. On the face of the Act, therefore, it appears that the only potential recipients of public assistance are those of Japanese citizenship.

However, on 8 May 1954, the Japanese Ministry of Health issued the ‘Notice Regarding Providing Public Assistance to Non-Citizens in Hardship’ (hereinafter: the 1954 Notice). This was a practice directive to local authorities responsible for the provision of public assistance. It declared that, although the language of the Act applied only to Japanese nationals such that foreign national residents were ineligible for support, local authorities should award *de facto* public assistance to foreigners in poverty in the same way as support was awarded to Japanese nationals under the PAA 1950 itself.⁷ Consequently, since 1954, foreign nationals residing in Japan have been receiving *de facto* public assistance on satisfaction of the usual (albeit very demanding) means test. There does not appear to have been significant discrimination against foreign nationals in the handling of their applications or the award of funds.

In 1990 the 1954 Notice was revised so that support would subsequently only be awarded to certain categories of foreign nationals. These categories were generally those permitted to work unrestricted in Japan in the same way as Japanese citizens, i.e. permanent residents⁸ and their spouses, special permanent residents,⁹ long-term residents,¹⁰ and foreign spouses of Japanese nationals. Those with recognised refugee status were also included.

4 Art. 1 PAA 1950.

5 Art. 2 PAA 1950.

6 国民.

7 T. KIMURA, High court overturns ruling denying welfare payments to foreigners, in: Asahi Newspaper, 16 November 2011, available at http://ajw.asahi.com/article/behind_news/social_affairs/AJ201111160035.

8 永住者.

9 特別永住者, i.e. the Korean- and Chinese-ethnic population descended from those brought to Japan during the Imperial period.

10 定住者.

III. THE CLAIMANT AND THE DECISION AT FIRST INSTANCE

The case that eventually led to the Supreme Court decision in question was brought in 2009 by an elderly woman (82 at the time of the Supreme Court decision) of Chinese nationality living in Japan as a permanent resident. Although legally a Chinese national, the claimant had been born and raised in Japan, spoke only Japanese and had never so much as set foot in China. In December 2008 she applied to her local authority in Ōita City for public assistance. The authority rejected her application on the grounds that she had personal savings and consequently did not satisfy the means test.¹¹

The applicant challenged her rejection before the Ōita District Court. The resulting litigation appears to be the first time Japanese courts have had to consider the precise legal basis on which foreigners have been receiving public assistance payments. The local authority's refusal had nothing to do with the applicant's nationality. Public assistance was refused because she failed the means test applied in the same way to Japanese nationals and non-nationals alike. Nonetheless, the Ōita District Court declared that the claimant had no legal entitlement to public assistance or to an appeal in the event of rejection. Her lack of Japanese citizenship excluded her from the ambit of the PAA 1950 and she consequently had no standing to appeal the authority's decision not to award relief.

IV. THE APPEAL IN THE FUKUOKA HIGH COURT

The applicant submitted a renewed application for public assistance to the Ōita City authorities. This was granted on her satisfying a second means test.¹² Nonetheless, the applicant challenged the Ōita Court's ruling, hoping that a successful appeal would provoke a declaration that long-term foreign residents had a litigable right to public assistance payments equal to the rights of Japanese nationals.

Her hopes seemed to have been realised when the Fukuoka High Court overturned the decision of the Ōita District Court below and instructed the Ōita City government to rescind its original denial of relief.¹³ Hiroshi Koga, presiding judge in the Fukuoka High Court, held that "foreigners coming under a certain category are eligible for legal protection by applying *mutatis mutandis*, the Public Assistance [Act]."¹⁴

The Fukuoka High Court's reasoning was twofold. On the one hand it emphasised the legal effect of the 1954 Notice. On the other, it accorded domestic legal force to

11 T. NISHIYAMA, Supreme Court rules permanent residents ineligible for public assistance, in: *Asahi Newspaper*, 19 July 2014, available at http://ajw.asahi.com/article/behind_news/social_affairs/AJ201407190034.

12 NISHIYAMA, *supra* note 11.

13 KIMURA, *supra* note 7.

14 KIMURA, *supra* note 7.

various instruments of international law to which Japan had acceded since the enactment of the PAA in 1950:

By joining the [Convention Relating to the Status of Refugees¹⁵ (hereinafter: the Refugee Convention)], and from related Diet deliberations, the legislative and administrative arms of the government can be construed as having approved that the nation shoulders a degree of legal responsibility to provide public assistance and therefore afford to a certain group of foreigners the same level of public assistance as is accorded to their nationals. Therefore the status of a certain group of foreigners to receive the aforementioned treatment has been legally established.¹⁶

The High Court summarised the 1954 Notice in accordance with which local authorities had for over half a century been awarding funds to foreign nationals in the same way as to Japanese citizens. It further noted that, after ratification of the Refugee Convention, the Japanese government had deleted the nationality requirements from most of Japan's social welfare laws, such as those concerning the national pensions scheme, which subsequently became accessible to non-citizens resident in Japan. The High Court recalled how a representative of the Japanese government had informed the Japanese Lower House that similar revision of the PAA 1950 was unnecessary; Japan's public assistance law was, allegedly, not inconsistent with the obligations placed on Japan by the Refugee Convention¹⁷ because the 1954 Notice ensured foreign applicants for public assistance were being treated the same as Japanese nationals.¹⁸

The Supreme Court saw the government's undertaking to provide public assistance equally to certain non-citizens, demonstrated by the 1954 Notice and accession to treaties such as the Refugee Convention, as having put the award of public assistance to foreigners on a legal, rather than merely administrative, basis. Consequently certain foreign nationals now enjoyed legally enforceable rights to public assistance on satisfaction of the proscribed means test.

V. JUDGMENT OF THE SUPREME COURT

The decision of the Fukuoka High Court was destined to be short-lived. On final appeal, it was overturned by the Supreme Court's second petty bench in a decision of 18 July

15 Convention relating to the Status of Refugees, 1951.

16 "Ruling hinged on assistance law revamp: summary", in: The Japan Times News, 25 July 2014, available at <http://www.japantimes.co.jp/news/2014/07/25/national/crime-legal/ruling-hinged-on-assistance-law-revamp-summary/>. This article contains the first public English translation of the Supreme Court judgment.

17 Specifically Art. 23 Refugee Convention: "The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals."

18 *Supra* note 16.

2014.¹⁹ In contrast to the approach of the Fukuoka High Court below, the Supreme Court ascribed legal force only to the words of the PAA 1950 itself. The Court found that foreigners were necessarily excluded from the PAA 1950's public assistance regime by the statutory language, specifically the centrality of the term *kokumin*.

In reaching this conclusion, the Supreme Court analysed the Act's legislative history. Particularly, the Court drew a distinction between the wording of the PAA 1950 and its predecessor legislation, the Public Assistance Act of 1946 (hereinafter: PAA 1946).²⁰ Article 1 of the PAA 1946 contained no nationality criterion: "This law is aimed at protecting the lives of people in need equally, without discrimination or preferential treatment, thereby enhancing social welfare."²¹ On revision in 1950, the term *kokumin* was added to the opening Articles. The Supreme Court saw the insertion of the term *kokumin* in the 1950 Act as a legally meaningful amendment, which restricted the application of the PAA 1950 to Japanese nationals. *Kokumin*, the Supreme Court held, "is to be understood as meaning Japanese nationals and excluding foreigners."²²

The Supreme Court was unconvinced by the Fukuoka High Court's ruling that Japan's accession to the Refugee Convention had effected a change in the domestic law. It also had little time for the High Court's equating administrative practice (i.e. the 1954 Notice) with actual legal reform:

Even if public assistance has been in reality accorded to a certain group of foreigners as an administrative measure, this cannot be interpreted as meaning that the Public Assistance [Act] now applies to foreigners in the absence of legislative measures, such as revisions to its articles 1 and 2 [...]. Therefore, it is through an administrative measure (rather than a legislative measure) that foreigners have, to date, effectively been made eligible for public assistance. Neither the Public Assistance [Act] as it currently stands nor any other law can be construed as conferring on foreigners eligibility for assistance.

The 1954 Notice was thus dismissed as nothing more than an administrative instruction from the executive, incapable of changing the content or meaning of a statute enacted by the legislature:

Since the current law's enactment, no legal revision has been made to expand eligible persons to include a certain group of foreigners, and no other legal legislation exists to enable the application of the provisions for assistance accorded under the law to a certain group

19 *Supra* note 16.

20 *Seikatsu hogō-hō*, Law No. 17/1946.

21 Art. 1 PAA 1946.

22 I have departed here from The Japan Times' translation, which reads: "[*kokumin*] can be interpreted to mean Japanese nationals and exclude foreigners." I understand the Supreme Court to have been making a declarative ruling as to the term's meaning, the force of which is lost by the merely permissive language of the Japan Times translation. The Japanese original reads: 「国民」とは日本国民を意味するものであって、外国人はこれに含まれないものと解される。(Kokumin to wa nihon kokumin wo imi suru mono no de atte, gaikokujin wa kore ni fukumarenai mono to kai sareru.)

of foreigners. Therefore, there is no ground for the Public Assistance [Act] to be applied to foreigners.²³

VI. THE DECISION'S EFFECT ON FOREIGN NATIONALS RESIDENT IN JAPAN

Criticism of the decision has been swift, fierce and predictable. It has come from both Japan's growing foreign national population and from progressive, internationally-aware sections of indigenous Japanese society, embarrassed by a decision which denies foreign nationals a part of social welfare to which their taxes are nonetheless contributing in the same way as those of Japanese citizens. Many see the ruling as either reflecting or presaging increased hostility to foreign nationals from the Japanese authorities.²⁴ Some media commentators fear that local authorities will exploit the ruling in order to control the rising welfare bill associated with an ageing population by denying public welfare payments to foreign nationals.²⁵

Hisao Seto, the lawyer representing the claimant at the Supreme Court hearing, is one who anticipates this kind of cynical conduct from local authorities. Seto told Japan's Asahi newspaper: "If distribution of public assistance can be decided by the discretion of a local government, there is always the danger that the assistance could be cut off depending on policy."²⁶ Seto considered the judgment a "warning" to foreign nationals resident in Japan against settling long-term, since they would not have any legal guarantee of welfare support should they fall on hard times.²⁷

However, the impact on foreign nationals in terms of access to social welfare has probably been overstated. The ruling applies only to public assistance. Other aspects of Japan's social welfare structure, such as unemployment support, health insurance and pensions, are provided on their own statutory bases and are therefore entirely outside the scope of the decision. Additionally, there is little evidence that local governments are intrinsically anti-foreigner. In fact local authorities have traditionally been fairly proactive in outreach efforts to foreign residents, and certainly not obstructive to the provision of social welfare.²⁸ Moreover, public bodies do not anticipate any change in practice. Authorities say they will continue to accept applications from foreign nationals and

23 *Supra* note 16.

24 T. OSAKI, A closer look at the Supreme Court's welfare benefits ruling, in: The Japan Times News, 25 July 2014, available at <http://www.japantimes.co.jp/news/2014/07/25/national/crime-legal/a-closer-look-at-the-supreme-courts-welfare-benefits-ruling/>.

25 J. RYALL, Anger erupts over court denial of welfare to foreign permanent residents of Japan, in: South China Morning Post, 21 July 2014, available at <http://www.scmp.com/news/asia/article/1557063/anger-erupts-over-court-denial-welfare-foreign-permanent-residents-japan>.

26 NISHIYAMA, *supra* note 11.

27 OSAKI, *supra* note 24.

28 T. RYAN, Supreme Court of Japan rules against welfare for foreigners, in: East Asia Forum, 23 August 2014, available at <http://www.eastasiaforum.org/2014/08/23/supreme-court-of-japan-rules-against-welfare-for-foreigners/>.

award benefits in the same way as to Japanese citizens. Ōita City, the local authority involved in the litigation, has stated that it will not be changing its policy of equal treatment for public assistance applications from foreign nationals in light of the ruling.²⁹ Likewise the central Health, Labour and Welfare Ministry denied that the ruling would prompt any review of the policy of awarding equal public assistance to foreigners.³⁰ Indeed, the judgment does not require local authorities to act any differently from the way they have acted since the 1954 Notice was promulgated. The Supreme Court did not rule (and would have had no basis for ruling) that the award of *de facto* public assistance as an administrative measure was inconsistent with the PAA 1950 or in any other way unlawful.

Nonetheless, the decision does present problems. Although it is, in Weberian terms, *formally rational* (flowing from black-letter statutory interpretation and a conservative approach to the division between law and mere administrative practice), the outcome does appear *substantively irrational* to the lay observer. Although, as will soon be shown, the inequity of the law cannot be attributed to the Supreme Court, it nonetheless reflects badly on the Japanese state that it has for so long maintained the PAA 1950 unrevised.

The image a country projects to its immigrant communities and potential immigrants is essential in maintaining the necessary influx of economic migrants. Like many countries in the developed world, Japan's population is ageing and its birth rate problematically low. Although increasing immigration is a politically controversial (and widely unpopular) move, it is acknowledged by serious commentators to be the only realistic solution to Japan's population and economic issues. A Supreme Court decision confirming that only those of Japanese citizenship can receive a benefit towards which all workers contribute by taxation can be received only negatively. The decision, although legally correct, is therefore hardly good PR for Japan in her bid to attract the skilled foreign labour her economy urgently needs. Yoshiyuki Nakamura, professor of law at Japan's Meiji University and head of the Japan Association for Refugees, has expressed concern: "The ruling could send a mistaken message to the international community that foreigners who have lived in Japan for a long time would be excluded from the nation's [social welfare] program."³¹ According to a 2011 Welfare Ministry survey, over 85% of welfare recipients in Japan are of Korean, Chinese or Philippine nationality, with Chinese and Koreans by far the largest groups. Anything that could be perceived as state action to the detriment of these communities in particular will do little to improve Japan's already troubled reputation in the region, or to change the perception among her East Asian neighbours that the Japanese Establishment remains nationalistic, exclusion-

29 NISHIYAMA, *supra* note 11.

30 OSAKI, *supra* note 24.

31 NISHIYAMA, *supra* note 11.

ary and unwelcoming.³² The decision has encouraged Japan's far-right political groups. The nationalist *Jisedai no Tō* (Party for Future Generations) has since demanded the creation of an entirely separate welfare system for non-Japanese residents, comprising mostly in-kind support such as food stamps and involving close monitoring of recipients' bank accounts. Non-citizen welfare recipients would be obliged after one year to choose between naturalisation and repatriation.³³ A motion in line with these proposals has been submitted to the Japanese Diet.³⁴

VII. OBLIQUE EVICTION FROM CONSTITUTIONAL RIGHTS

The decision illuminates a grave problem latent not just in Japan's social welfare law, but in the fundamental document at the base of all Japanese law – the Constitution itself. Although this is perhaps the case's most profound relevance for Japanese jurisprudence, it appears not yet to have received attention in the Japanese media or legal academic circles. The Supreme Court stated that the legislative phrase *kokumin* covers only those of Japanese citizenship, excluding all foreign nationals regardless of length of residence or legal status in Japan. Assuming that the breadth of the word *kokumin* is to be interpreted alike in all legal texts (which for purposes of legal consistency one would ordinarily hope), this case might have untold significance for the protection of human and social rights in Japan.

The word *kokumin* enjoys a particular prominence in Japanese law, forming an important term in many Articles of Japan's post-war Constitution, for instance in Article 14: "All of the people [*kokumin*] are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin."³⁵ If permanent foreign residents are not part of the *kokumin*, then it follows that all the social and political rights the Constitution bestows on the *kokumin* do not, as a matter of strict law,³⁶ extend to foreign residents of Japan.

32 C. RICHARDS, Japanese Nationalists Target Foreign Welfare Recipients, in: *The Diplomat*, 17 October 2014, available at <http://thediplomat.com/2014/10/japanese-nationalists-target-foreign-welfare-recipients/>.

33 RICHARDS, *supra* note 32.

34 T. OTAKE, Ruling denying welfare for foreign residents finds homegrown, biased support, in: *Japan Times News (Kyoudou)*, 17 October 2014, available at <http://www.japantimes.co.jp/news/2014/10/17/national/welfare-rollback-underway-ruling-empowers-xenophobes/>.

35 *Kenpō* of 3 November 1946, Art. 14 (1); Engl. transl.: Japanese government's Japanese Law Translation Database System (as of 2009), available at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=constitution&ia=03&x=0&y=0&ky=&page=1>.

36 It has in the past been judicially held that foreigners enjoy certain constitutional rights. However, these do not include those rights which "by their nature" can apply only to Japanese nationals (Supreme Court, 4 October 1978, *Minshū* 32, 1223; Engl. trans. L. BEER/H. ITŌ, *The Constitutional Case Law of Japan, 1970 through 1990*, 477). This wide and unexplained category of citizen-only rights includes several of the most fundamental, including the right to vote, although its exact parameters are undefined. Consequently, the judicial be-

Not only does this mean that foreign residents enjoy less protection than their Japanese peers in a wide range of areas (for example, foreign women will not be covered by the Article 14 guarantee of sexual equality), it also means that foreigners in Japan have no protection against discrimination based on the very fact they are of a different racial or national origin.

VIII. IN SUPPORT OF THE SUPREME COURT DECISION

Despite the problems associated with the decision, the Supreme Court can hardly be criticised for its ruling. To legal commentators and practitioners familiar with Japanese constitutional and human rights law, the Supreme Court's decision should be entirely unsurprising. Although the Japanese lower courts have in the past issued legally inventive, liberalising rulings expanding foreigners' rights to equality and freedom from discrimination,³⁷ the Supreme Court has frequently overturned such attempts. In this regard the recent decision is entirely on-trend. Indeed, in summarising some previous cases in which the Japanese Supreme Court has considered the legality of discriminatory practices, Webster pessimistically notes:

“[A] governmental body that discriminates against foreigners [needs only to] appeal to the highest court to vindicate the right to discriminate. The Japanese Supreme Court has earned a reputation for both deference to the other branches of government and conservatism with respect to human rights and social issues.”³⁸

As well as being unsurprising, the Supreme Court decision is also correct as a matter of statutory construction. It corresponds with both the ordinary, common-parlance meaning of the statutory language (i.e. *kokumin*) and the legal historical background of the term *kokumin* itself and the PAA 1950 in which it appears (see *infra*).

The Court's reasoning is almost entirely procedural, turning on the division between what is part of the law (i.e. the PAA 1950 itself) and what is not (i.e. administrative

stowal of constitutional rights on foreigners is inherently limited and vulnerable to judicial restriction, or even revocation. Indeed it appears that foreigners only enjoy their (limited) constitutional rights because of judicial goodwill, since there is no textual authority to which foreign residents can point to prove the existence of these rights. The Supreme Court decision concerning public assistance reveals the vulnerability of rights if they are based only on goodwill and convention rather than statutory text (indeed, *quaere* whether such weak entitlements can be properly termed “rights” at all). Therefore the judicial convention that foreigners enjoy (limited) constitutional rights does not compensate for their exclusion from the text of the Constitution.

37 Often drawing on norms of public international law. See for instance the Fukuoka High Court's own reasoning, as well as cases such as the much-discussed *Bortz* decision (Hanrei Taimuzu 1045, 216; Engl. trans. T. WEBSTER, *Bortz v Suzuki: A translation and introduction*, in: *Pacific Rim Law & Policy Journal* 16 (2007) 631.

38 T. WEBSTER, *Legal Excisions: “Omissions are not Accidents.”*, in: *Cornell International Law Journal* 39 (2006) 435, 454.

memoranda and policies such as the 1954 Notice). The Court located this division correctly and in accordance with the principle of the separation of powers. Had the Supreme Court ruled the other way and concluded that the 1954 Notice (and/or sustained subsequent practice) had brought non-citizens within the ambit of the PAA 1950, it would in effect have bestowed on the Japanese executive an extra-constitutional power to amend the content or meaning of primary legislation by administrative decree. That would be a profoundly counter-democratic prospect by which legal commentators in Japan would be legitimately concerned.

Consequently the deeply inequitable state of the law cannot be attributed to the Supreme Court, which simply applied a doctrinally unobjectionable reading to the Act in question. Rather the fault lies with the Japanese government for its sustained failure to revise conspicuously discriminatory legislation which, it will be shown, places Japan in breach of several international accords.

IX. *KOKUMIN* AND THE POST-WAR RESTRICTION OF THE LEGAL RIGHTS OF FOREIGNERS

To support its conclusion that the language of the PAA 1950 plainly applies only to Japanese nationals, the Supreme Court referred to the Act's immediate legislative history, noting the insertion of the crucial term *kokumin*. The Court did not need to engage in much further legal or historical analysis. However, delving deeper into the legal history strongly corroborates the Supreme Court's conclusion that the insertion of the term *kokumin* amounts to a conscious eviction of foreign nationals from the ambit of the PAA 1950. This reflects badly on the Japanese authorities of the mid-Twentieth Century, and shows that old, nationalistic notions remain, unpurged, in important areas of modern Japanese law.

The PAA 1950 and the Japanese Constitution share two important characteristics. First, they are of a closely similar vintage; the Constitution was drafted in 1946 and entered into force in 1947, whilst the original PAA was enacted in 1946 and revised in 1950. Second, the applicability of both documents is contingent on the term *kokumin*. Consequently, analysis of their legislative background is most instructive if taken together. There are strong grounds to conclude that the restriction to Japanese nationals of both legally-mandated public assistance and constitutional rights were not mere oversights. Rather it was a conscious policy reflecting a nationalistic mind-set among sections of the Japanese authorities in the wake of the Second World War and the defeat of Japanese militarism.

As the foremost legal text in Japanese law, the Constitution has received significantly more scholarly attention than the PAA 1950. Legal and political history shows that the exclusion of foreign nationals from the new Constitution's bestowal of rights was a deliberate choice on the part of the Japanese authorities. Much is revealed by attention to the process of constitutional renewal that followed the Japanese surrender in 1945 and

the subsequent period of occupied administration by United States forces, led by General Douglas MacArthur.

Constitutional renewal was a key Allied objective from the start of the occupation. The Japanese authorities had anticipated merely updating the existing Constitution of the Empire of Japan (hereinafter: Meiji Constitution),³⁹ promulgated in 1890, going so far as submitting a draft Constitution that took almost half its provisions from the Meiji document⁴⁰ to the Supreme Command of the Allied Powers in the Pacific (hereinafter: SCAP) on 8 February 1946. SCAP rejected this outright as “wholly unacceptable [...] as a document of freedom and democracy.”⁴¹

The American occupiers had rather more radical reform in mind:

“[SCAP] drew up a draft of the new Constitution in February 1946 and handed it down to the Japanese government. The slightly revised version of the draft was passed in the Diet in 1946, and the new Constitution came into effect in 1947.”⁴²

In fact it is probably too simplistic to call the Constitution as eventually adopted a “slightly revised” version of the original draft. Although to the casual observer it was substantially similar, several key changes had occurred, often by the amendment of apparently unassuming but legally crucial terms. The Constitution Japan adopted in 1947 was not the same Constitution that the Americans had envisioned.

LaFeber, an historian of the USA’s Twentieth Century foreign affairs, has explicitly drawn attention to the term *kokumin* which appears throughout Japan’s Constitution. The phrase appeared in place of the English term “people” (of “We the People” fame⁴³) which the American authors had inserted into the English-language draft Constitution:

The Japanese had no comparable history of popular sovereignty, so the translation turned “people” into *kokumin*, a term that connotes traditional harmonious relations between the people and the authorities, including the Emperor. Indeed, *kokumin* had been a popular term in wartime propaganda. Pivotal U.S. officials (one of whom admitted gleaning his knowledge about the country from his morning newspaper) let the word stand. Thus the intent of New Deal reform was blunted by the unwitting insertion of a Japanese nationalist term.⁴⁴

39 *Dainippon teikoku kenpō*, Engl. trans. M. ITO, National Diet Library, available at <http://www.ndl.go.jp/constitution/e/etc/c02.html>.

40 K. INOUE, *MacArthur’s Japanese Constitution: A Linguistic and Cultural Study of its Making* (Chicago 1991) 11.

41 INOUE, *supra* note 40, 17.

42 T. SHINKAWA/Y. TSUJI, Conceptual development of welfare and social policy in Japan, in: Béland/Petersen (eds.), *Analysing Social Policy Concepts and Language: Comparative and Transnational Perspectives* (Bristol 2014) 193, 200.

43 Preamble, Constitution of the United States.

44 W. LAFEBER, *The Unmasterable Past: The Limits of Japan’s Postwar Transformation*, in: *Foreign Affairs*, August 1999, available at <http://www.foreignaffairs.com/articles/55224/wal>

It is true that the notions of popular sovereignty with which the English legal-rhetorical term “the people” resonates may not have been obvious to the Japanese drafters. A feudal autocracy until the Meiji Restoration of 1868, for most of the preceding two centuries Japan had been almost totally insulated from Western learning due to the isolationist policy of the ruling military elite. Many aspects of Western learning had become influential during the Meiji era but openness to foreign ideas succumbed all too quickly to militaristic ultra-nationalism. Consequently the Japanese nation in the aftermath of the Second World War had very limited experience of democracy of any kind, let alone an instinctive familiarity with the philosophical notions of popular sovereignty that had emerged from the European Enlightenment and found such fertile soil in the fledgling United States of America.

Thus LaFeber’s straightforward *lost-in-legal-translation* explanation for the insertion of the term *kokumin* is not entirely implausible. Indeed, examples from Japan’s Meiji era legal modernisation show the difficulty of seamlessly importing notions from Western legal science into Japanese jurisprudence. One example is the difficulties encountered in translating the fundamental juristic notion of a right. In the sense the term was used by European and American lawyers, the idea was alien to pre-existing modes of legal thought in Japan, whose origins lay not in Rome like those of the common law and civilian nations but in customary law, neo-Confucianism and other schools of traditional Chinese and Japanese thought.⁴⁵

However, the restriction of constitutional rights to Japanese nationals was almost certainly more deliberate than LaFeber allows, and certainly was not the necessary result of a difference in legal-political traditions (what LaFeber calls the lack of “a comparable history of popular sovereignty” in Japan). The deliberateness is exposed by analysis of the drafting process itself and the substantive and linguistic changes it produced.

The drafting process was protracted, and “[t]hroughout these months of constitutional contestation, the rights of foreigners gradually eroded.”⁴⁶ On the linguistic front, it should be noted that *kokumin* saw off many alternative translations of “the people”. The Japanese government had initially suggested *shinmin*, perhaps most naturally rendered

ter-lafeber/the-unmasterable-past-the-limits-of-japan-s-postwar-transformatio. In fact, “the people” may not be as self-evidently all-encompassing as the American drafters assumed.

A century previously the United States Supreme Court had held the constitutional term “people” synonymous with “citizens”, in support of the abhorrent ruling that black people were “not regarded as a portion of the people or citizens” (*Dred Scott v Sandford* (1857) 60 U.S. (19 How.) 393, 410–411). Although this is a famous case, the American drafters generally had little or no legal training, and probably assumed “the people” to be an inherently and obviously inclusive term whose breadth would be replicated in the Japanese translation.

45 For a succinct discussion of the troubled emergence of the now accepted term *kenri*, (権利), see E. A. FELDMAN, *The Ritual of Rights in Japan: Law, Society and Health Policy* (Cambridge 2000) 16–19.

46 WEBSTER, *supra* note 38, 442.

into English as “subjects”.⁴⁷ The Americans rejected this for its connotations of subordination; a people whose nationhood was tied to a monarchical leader was quite distinct from the constitutional monarchy envisaged by the Americans, who intended the Constitution to make clear that sovereignty lay in the Japanese people, rather than their Emperor.⁴⁸ A later Japanese draft used the term *jinmin*.⁴⁹ This too did not survive long, possibly due to its Marxist connotations, having been a preferred term in documents drafted by the Japanese Communist Party.⁵⁰ It is impossible to argue that the Japanese side adopted the term *kokumin* automatically or without serious thought as to its implications.

The wider drafting process also reveals a conscious project of removing constitutional protection for foreigners. It is often assumed that the terms of the new Constitution were essentially dictated to the Japanese nation by the Allied occupiers: “[...] SCAP, while allowing the Japanese government to make minor changes, did not allow the fundamental principles of the draft to be altered in any way.”⁵¹ However, the true extent of the Japanese input is revealed by detailed analysis of the drafting process:

By focussing on the Japanese adaptation of the English-language document – and its concomitant deletions, interpretations, and accommodations – we find that the Japanese Constitution is no carbon copy of its Anglophone counterpart. Rather, the Japanese officials who helped draft the Japanese-language Constitution in essence *recomposed* it [...]. Specifically, the Japanese stripped away constitutional provisions protecting the rights of foreigners.⁵²

The early American drafts of the Constitution aimed to ensure that fundamental civil rights applied to “Japanese subjects and to all persons within Japanese jurisdiction.”⁵³ It included key provisions specifically providing for the status of foreigners:

Article 13: All natural persons are equal before the law. No discrimination shall be authorized or tolerated in political, economic or social relations on account of race, creed, sex or social status, caste, or national origin.

Article 16: Aliens shall be entitled to the equal protection of law.⁵⁴

47 臣民.

48 INOUE, *supra* note 40, 188–189. Cf. Art. 4 Meiji Constitution: “The Emperor is the head of the Empire, combining in Himself the rights of sovereignty [...]”.

49 人民.

50 INOUE, *supra* note 40, 189.

51 S. MATSUI, *The Constitution of Japan: A Contextual Analysis* (London 2010) 19–20.

52 WEBSTER, *supra* note 38, 436–437 (emphasis in original).

53 State-War-Navy Coordinating Committee, Decision Amending Decision 228 of the State-War-Navy Coordinating Committee (SWNCC 228): Reform of the Japanese Governmental System (7 January 1946) at 4 (a) (5), available at <http://www.ndl.go.jp/constitution/shiryo/03/059/059tx.html>.

54 S. KOSEKI, *The Birth of Japan’s Postwar Constitution* (ed. & trans. Ray A. Moore, 1977) 114.

After receiving the Japanese translation of the American draft (which had reproduced faithfully Articles 13 and 16 above), General MacArthur personally ordered American and Japanese delegates to compile a final version, with Japanese translation, over a two-day period in March 1946.⁵⁵ This intensive revision process saw most constitutional protections for foreigners emasculated or simply removed.

Notably, the draft Article 13 guarantee of legal equality to “all natural persons” became rephrased, extending to “all people”, translated in the Japanese version as *kokumin*. Additionally, the reference to national origin as grounds on which discrimination would not be tolerated was replaced by the term *monchi*.⁵⁶ Translated into English as “family origin”, this is an entirely unrelated notion referring to one’s ancestral place in the traditional Japanese caste structure. Scholars have not yet found conclusive evidence for how the Japanese side sold to the Americans the removal of all references to the rights of foreigners, or why the Americans agreed to such a major reduction in the scope of their rights.⁵⁷

The explicit draft Article 16 guarantee of legal equality for aliens was removed entirely. This at least can be accounted for, and has been attributed to the intervention of Tatsuo Satō, a senior Japanese official who often acted as go-between in the negotiations.⁵⁸ He appears to have persuaded the Americans that an express statement that aliens were equal before the law was unnecessary in light of the draft Article 13.⁵⁹ As described above, however, the inclusion of foreigners in draft Article 13 was itself destined for removal during the revision process. Satō was probably motivated less by concern for textual succinctness than by an ideological opposition to the inclusion of foreigners in Japan’s new Constitution. Before the Japanese Diet several years later, Satō would reminisce: “[T]reating foreigners equally was bad enough in itself, but having to include Article 16 in the Japanese draft was particularly objectionable.”⁶⁰

The same analysis that shows the Constitution’s exclusion of foreign nationals to have been a deliberate choice can be applied to the PAA 1950 to similar effect. There is reason to see the presence of *kokumin* in the text of the PAA 1950, which the Supreme Court correctly noted was absent from its 1946 predecessor, as a conscious decision to remove any legal duty to provide for the welfare of destitute foreign nationals in Japan.

The Allied occupation forces embarked on reform of Japan’s social welfare provision as well as the Japanese Constitution. In February 1946, around the same time as the constitutional renewal process was beginning, SCAP issued a memorandum declaring the Japanese government responsible for providing “adequate food, clothing shelter and

55 WEBSTER, *supra* note 38, 22–26.

56 門地.

57 KOSEKI, *supra* note 54, 129.

58 WEBSTER, *supra* note 38, 444 at note 54

59 KOSEKI, *supra* note 54, 120.

60 KOSEKI, *supra* note 54, 235–236.

medical care equally to all indigent persons without discrimination or preferential treatment.”⁶¹ The original Public Assistance Act of 1946 was enacted in response, although the Japanese authorities made several reservations and reductions in the range of persons to whom the state would henceforth be obliged to provide support: “In spite of [SCAP]’s explicit call for universalism, the government slipped several modifications into the Act, as it would only offer benefits when applicants were unable to receive necessary support from their families.”⁶²

Thus, even the 1946 Act contained several retrenchments from the principle of universal benefits. Demonstrably, restrictions on the availability of benefits did not stop with the Act’s enactment. Just as the Japanese government made exclusionary changes before the Act was enacted, a further narrowing occurred in 1950 when the Public Assistance Act was revised, this time to exclude non-Japanese residents from its ambit with the insertion of the term *kokumin*. The removal of foreigners looks even more deliberate when it is remembered that the general thrust of the PAA 1950 was an *intensification* of the public assistance programme the 1946 Act had incepted.⁶³

The statutory language of the PAA 1950, its legislative history, and that of the contemporaneously drafted Japanese Constitution show that the PAA 1950 excludes any right to public assistance by non-Japanese citizens due to the crucial presence of the term *kokumin*. By extension, it follows that the Constitution’s guarantee against discrimination does not apply to foreign nationals in Japan as a matter of strict textual construction. It has further been shown that both situations are the product of a conscious policy of the Japanese authorities in the mid-Twentieth Century. The preceding analysis has confirmed the doctrinal legal correctness of the Supreme Court decision, showing that the state of the law must be attributed to the Japanese government, which enacted and has since failed to amend a discriminatory statute and inadequately inclusive Constitution.

X. A DIRECTLY DISCRIMINATORY STATUTE AND PUBLIC INTERNATIONAL LAW

A Supreme Court confirmation that part of Japan’s social welfare law discriminates on the grounds of nationality, and the oblique indication that the Constitution’s anti-discrimination rights do not extend to non-citizens, suggest that Japan is in breach of certain international legal obligations.

Japan ratified the International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR)⁶⁴ in 1979. Under this important Convention, States Parties “un-

61 Supreme Command for Allied Powers Instruction Note 775 (“Public Assistance”) (SCAPIN-775).

62 SHINKAWA/TSUJI, *supra* note 42, 201.

63 E. TAKEMAE (engl. trans. R. Ricketts/S. Swann), *Allied Occupation of Japan* (New York 2003) 408.

64 International Covenant on Economic, Social and Cultural Rights 1966.

dertake to guarantee that the rights enunciated in this present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁶⁵ In addition, Article 23 of the Refugee Convention requires States Parties to “accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.”

The Japanese government has maintained that social welfare provision involves no discrimination on the basis of nationality:

Social security is also granted on the basis of the principle of equality regardless of nationality. For example, the nationality requirement for joining the National Pension and the National Health Insurance as well as for receiving Child Allowance and Child-Rearing Allowance has been abolished. In addition, permanent residents and settled residents residing in Japan in the same way as Japanese nationals can be provided, *as an administrative measure*, public assistance under conditions identical to those of Japanese nationals.⁶⁶

The Japanese government may genuinely believe the state of affairs does not discriminate against foreigners. Indeed, it appears to see the 1954 Notice as ensuring foreigners receive equal treatment such that discrimination is avoided.

In light of the incremental narrowing of the scope of public assistance in the mid-Twentieth Century, the 1954 Notice expanding it to cover non-citizens (albeit on a *de facto* administrative basis rather than a legal one) may seem surprising, but is accounted for by its historical context. Although Japan officially surrendered to the Allied Powers in September 1945, the state of war that had existed since December 1941 only formally ended when Japan signed the Treaty of San Francisco in September 1951. The Treaty entered into force in April 1952 and provided for the return of sovereignty to the Japanese people and the end of Allied military rule. Among the Treaty’s many goals was a definitive end to Japan’s status as an imperial power. The Treaty therefore took away what had until then been held by the many Taiwanese and Koreans who had entered Japan following colonisation of their homelands, namely citizenship of the Empire of Japan. It has been supposed that the 1954 Notice resulted from the Japanese government’s inability entirely to ignore the needs of Japan’s former colonial subjects simply because the peace process had removed their Japanese citizenship.⁶⁷

However, although the 1954 Notice was intended to ensure non-citizens received the necessary social welfare and does generally ensure their receipt of equal funds, it does

65 Art. 2 (2) ICESCR.

66 Reports Submitted by States Parties under Article 9 of the Convention: Second periodic reports of States parties due in 1999, CERD/C/350/Add.2 at 21, emphasis added.

67 K. KOMAMURA, On the Recent Japanese Supreme Court Decision and Its Implications on Japan’s Immigration Policy, in: *Citizens and Strangers – Meridian 180*, Cornell University Law School, 26 September 2014, available at <http://meridian-180.org/en/citizens-and-strangers-Japan-Supreme-Court>.

not follow that there is no discrimination between Japanese and foreign nationals with respect to public assistance. The Supreme Court decision removes any doubt that the PAA 1950 itself discriminates on grounds of nationality. Even the statement from the Japanese government quoted above acknowledges that in the case of foreign residents, public assistance is received only “as an administrative measure”, tantamount to a concession that *the law* itself does not provide public assistance to Japanese nationals and foreigners on an equal basis.

The basis on which Japanese citizens receive public assistance is far superior to the basis on which it is granted to foreign nationals. Unlike foreigners, Japanese applicants enjoy a legal entitlement to consideration and a process of appeal if they are rejected or dissatisfied with the level of assistance provided. Although the government emphasises the uniformity of the means test employed and the amounts awarded, lawyers will appreciate the great difference between receiving funds *as of right* under the law and receiving them, essentially, at the goodwill of the executive.

XI. JAPAN’S LACK OF ANTI-DISCRIMINATION LAWS AND PUBLIC INTERNATIONAL LAW

Japan is conspicuous among the developed nations of the world in her lack of any specific legislative instrument focussed on comprehensively prohibiting discrimination on grounds of nationality or ethnicity. Government efforts against discrimination, particularly racial and national, are conspicuously lacking in teeth:

[W]ith the rapid increase in the number of foreign residents, there are reported incidents of human rights violations against foreigners [...]. These include discriminatory treatment of foreigners in various daily life situation [sic] [...]. The Government takes these incidents as serious human rights violations against foreign residents in Japan, and *it requests that the relevant groups and authorities remove the prejudice and misunderstanding against foreigners at all possible times* [...].⁶⁸

Nonetheless, Japan is a member of the International Covenant on Civil and Political Rights (hereinafter: ICCPR), which states that: “[T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁶⁹ This obligation is generally taken to require States Parties affirmatively to prohibit discrimination in their territories.

Additionally, the International Convention on the Elimination of All Forms of Racial Discrimination 1969 (hereinafter: Racial Discrimination Convention), which Japan ratified in 1995, requires Japan to “prohibit and bring to an end, by all appropriate means,

68 *Supra* note 66 at 31, emphasis added.

69 Art. 26 ICCPR.

including legislation as required by circumstances, racial discrimination by any persons, group or organization”.⁷⁰

Japan has frequently been criticised by international bodies and human rights commentators for the inadequacy of the protection against discrimination, particularly racial discrimination, afforded by Japanese law. Prominent in the criticism of Japan’s lack of anti-discrimination laws has been the Committee for the Eradication of Racial Discrimination (hereinafter: the Committee), a body operating under the auspices of the United Nations and established as part of the Racial Discrimination Convention framework:

The Committee is concerned that the only provision in the legislation of [Japan] relevant to the Convention is article 14 of the Constitution. Taking into account the fact that the Constitution is not self-executing, the Committee believes it necessary to adopt specific legislation to outlaw racial discrimination.⁷¹

The Japanese Government has long maintained that legislative measures to combat racial discrimination are unnecessary:

“We do not recognize that the present situation of Japan is one in which discriminative acts cannot be effectively restrained by the existing legal system and in which explicit racial discriminative acts, which cannot be treated by means other than legislation, are conducted.”⁷²

Additionally, Japan maintains that it is under no international legal obligation to legislate, particularly in light of the existing constitutional guarantee of equal treatment contained in Article 14. The Committee has noted Japan’s arguments but remains unconvinced that legislation is unnecessary, given the non-self-executing nature of the Japanese Constitution and the fact that such discrimination remains widespread in Japan, particularly against ethnic Chinese and Korean communities.⁷³

In subsequent discussions with representatives of Japan, Committee experts raised the issue of Japan’s continued lack of anti-discrimination legislation. Osamu Yamanaka, an official of the Japanese Ministry of Foreign Affairs, reiterated how Article 14 of the Constitution prohibited discrimination on the basis of race. Anwar Kemal, the Committee member acting as Rapporteur, insisted that comprehensive legislation specifically combating racial discrimination was demanded by Japan’s obligations under the Racial

70 Art. 2 (1) (d) Racial Discrimination Convention.

71 Report of the Committee on the Elimination of Racial Discrimination, CERD A/56/18 at 168.

72 Comments of the Japanese Government on the Concluding Observations Adopted by the Committee on the Elimination of Racial Discrimination on March 20, 2000 Regarding Initial and Second Report of the Japanese Government (2001) at 5 (1), available at <http://www.mofa.go.jp/policy/human/comment0110.html>.

73 Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by States parties under Article 9 of the Convention, CERD/C/JPN/CO/3-6 at 9.

Discrimination Convention.⁷⁴ These same concerns were recorded formally in the Committee's concluding observations to Japan's most recent written reports.⁷⁵

Other international bodies are similarly unconvinced that Japan's continued lack of anti-discrimination legislation is consistent with the demands of public international law. In 2006, UN Special Rapporteur on Racism Doudou Diène published a report based on the results of his investigatory mission to Japan the previous year. He found evidence of extensive private and institutional racism in Japan and demanded that the government quickly pass a law directly prohibiting racial discrimination. He saw the absence of such a law as partly responsible for the situation he observed in Japan, namely that "racial discrimination is practised undisturbed."⁷⁶

The Japanese Government's argument that Article 14 provided adequate protection against discrimination in Japan has never been compelling, since Article 14 offers little real help to those suffering discrimination. Alone it is inadequate in both its legal force (as the Committee noted, Japan's Constitution is not self-executing) and scope of application. Because Article 14 expressly refers only to *kokumin*, it has always been vulnerable to the argument that it does not apply to non-Japanese residents of Japan, a prospect increasingly likely in light of the Supreme Court ruling that *kokumin* means only those of Japanese citizenship.

As the Committee noted long ago, the only piece of positive law bestowing a right to equal treatment and a prohibition on discrimination on the grounds of race to which the Japanese Government could point was Article 14, which Japan's own Supreme Court has now obliquely ruled does not literally cover those of non-Japanese citizenship.

In Japan, there remains a very close connection between nationality and race; Japanese citizenship is generally held by those of Japanese ethnicity. It follows that it is overwhelmingly residents of foreign nationality that are most likely to suffer racial discrimination in Japan. Frustratingly, therefore, the group by far the most likely to suffer racial discrimination is excluded from the law's only protection against it.

The Supreme Court's oblique demonstration that even the constitutional guarantee of non-discrimination in Article 14 does not extend to foreign residents only strengthens the existing criticisms and highlights Japan's failure to enact comprehensive anti-discrimination legislation as required by certain instruments of public international law.

74 "Committee on the Elimination of Racial Discrimination considers report of Japan", United Nations Office of the High Commissioner for Human Rights, 21 August 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14957&LangID=E>.

75 Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of Japan, CERD/C/JPN/CO/7-9.

76 United Nations Economic & Social Council (ECOSOC), Racism, Racial Discrimination, Xenophobia and All Forms of Racial Discrimination: Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Mission to Japan, at 64.

XII. CAN THE JAPANESE COURTS DO WHAT THE GOVERNMENT HAS NOT?

Japan is generally regarded as a monist system, her Constitution stating that, “[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed.”⁷⁷ Japan’s Constitution also contains the usual provision that it is to form the ultimate source of law in Japan, such that no legislation or executive action in contravention of its provisions can have legal force.⁷⁸ Consequently in the event of a direct collision between the demands of the Constitution and of a provision of ratified international law, Japanese courts will defer to the Constitution, although there is a judicial tendency harmoniously to interpret provisions of the Constitution and international legal instruments as far as possible.⁷⁹ Nonetheless international law in Japan is generally considered to have legal force second only to the Constitution itself, ranking above domestic legislation and executive acts.⁸⁰

The prevailing view is that Article 98 (2) of the Constitution means that ratified international treaties have “domestic legal force in Japan”,⁸¹ although as Webster notes, the picture is actually more complex and Japanese courts in practice have a large amount of discretion to decide whether and to what extent a specific provision of international law is directly applicable in domestic law. An interpretive process to decide the question of direct applicability will occur when the international legal provision in question is not a clear, concrete and unambiguous obligation or entails conflict between international and domestic Japanese law.⁸²

The possibility therefore exists for a Japanese court either to conclude (i) that racial discrimination is rendered domestically unlawful by international law, or (ii) that the government is breaching its international legal obligations by failing legislatively to ban such discrimination, or (iii) that the government is acting unlawfully in maintaining a statute (the PAA 1950) which directly discriminates on grounds of nationality.

Webster notes the development of discrete canons of judicial interpretations as to the direct effectiveness of specific international instruments concerning discrimination.⁸³ For instance, courts have so far generally denied that the ICESCR has any direct effect in domestic law, ruling that it places obligations on States Parties only and does not create domestically litigable rights for foreigners.⁸⁴ In contrast, on occasion the ICCPR

77 Art. 98 (2).

78 Art. 98 (1).

79 T. WEBSTER, Racial Discrimination in Japan: Unity, Diversity and International Law, in: Fauchald/Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Oxford 2012) 295, 303.

80 Y. IWASAWA, *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (Oxford 1998) 95.

81 IWASAWA, *supra* note 80, 29.

82 WEBSTER, *supra* note 79, 298.

83 WEBSTER, *supra* note 79.

84 See for instance Tōkyō District Court, 22 September 1982, Hanrei Jihō 1055, 18.

has been ascribed “direct effect as domestic law, and moreover the effect of prevailing over statutes.”⁸⁵ Nevertheless, although Japanese courts have held some ICCPR provisions directly effective in the sense that they can be invoked in private litigation, no court has ever declared the government liable for failing to pass anti-discrimination laws.⁸⁶

There have also been repeated attempts before the Japanese courts to use Article 2 (1) (d) of the Racial Discrimination Convention to obtain a judicial declaration that the Government is breaching its international legal obligations in failing to enact anti-discrimination legislation. However, Japanese courts have consistently interpreted Article 2 (1) (d) merely as a “political obligation”:⁸⁷ the Article “should not be interpreted to impose a clear and uniform obligation to prohibit and bring to an end specific acts of racial discrimination by enacting laws for individual citizens.”⁸⁸ The “general and abstract” Article obligation is not such as necessarily to dictate the kind of laws a State Party should enact,⁸⁹ and legislation need anyway only be enacted if required “by circumstance.” Consequently the Article 2 (1) (d) obligation cannot be an absolute duty to legislate against discriminatory practices.⁹⁰ This reasoning matches the position of the Japanese government as expressed to the CERD Committee: “[I]n Article 2 (1), legislative measures are required by circumstances and are requested to be taken when the States Parties consider legislation appropriate.”⁹¹

The courts have additionally denied that the Racial Discrimination Convention has any direct effect between private persons and the state:⁹²

“[S]ince the substantive provision of the [Racial Discrimination] Convention (Article 2 to 7) provides ‘the States Parties undertake [...],’ the Convention shall be considered not originally to establish individual rights and obligations but to place an obligation of elimination of racial discrimination on the States Parties.”⁹³

In light of the decisions to date, it seems unlikely that the Japanese courts will draw on international legal norms to the extent that the government will be held liable for the continued absence of anti-discrimination legislation, or to the extent necessary to provide comprehensive anti-discrimination rights to foreign nationals in Japan to patch the gap.

85 Tokushima District Court, 15 March 1996, Hanrei Jihō 1597, 115, 127.

86 WEBSTER, *supra* note 79, 298.

87 Sapporo District Court, 11 November 2002, Hanrei Taimuzu 1150, 185, 194. Engl. trans.: T. WEBSTER, *Arudou v. Earth Cure: Judgment of November 11, 2002*, Sapporo District Court (2008) *Asian-Pacific Law & Policy Journal* 9, 297, 310.

88 WEBSTER, *supra* note 87.

89 Ōsaka District Court, 18 December 2007, Hanrei Jihō 2000, 79, 83.

90 *Ibid.*

91 *Supra* note 72.

92 WEBSTER, *supra* note 79, 305.

93 *Supra* note 72.

XIII. PROSPECTS FOR THE FUTURE

There may be the possibility of challenging the PAA 1950's exclusion of foreign nationals as inconsistent with Article 25 of the Constitution, which grants "the right to maintain the minimum standards of wholesome and cultured living."⁹⁴ This would probably be ill fated, however. Since Article 25 likewise extends its rights only to *kokumin*, the PAA 1950 would probably be upheld as providing livelihood support to all those the Constitution actually requires of it.⁹⁵

Ideally, government-led legislative reform of the PAA 1950 would extend the legal entitlement to relief to foreign national residents, thereby bringing the law of Japan into conformity with her international obligations and the normative proposition that those who contribute equally to a social welfare initiative in the form of taxation should be entitled to its benefits equally. Such reform is, sadly, improbable. Given the economic and political climate in Japan, any reform of the welfare system seems likely further to *reduce* its availability to foreigners, rather than expand it. Short of funds like governments worldwide, Japan's ruling Liberal Democratic Party (LDP) has made it a public priority to cut wasteful expenditure. A government task-force has been established to investigate potential public spending savings. It has already turned its attention to the issue of welfare for foreigners, concluding in August 2014 that the existing bill for providing welfare to foreigners in Japan (approximately 122 billion ¥ per annum) makes it "difficult to maintain the status quo".⁹⁶ Head of the task-force, prominent LDP politician Tarō Kōno, has advocated a probationary period in which foreign national residents would be barred from claiming social welfare. According to Kōno, foreign nationals who apply for welfare too soon after arrival in Japan are likely to have lied about their financial situation and reasons for coming in the first place.⁹⁷

The gravity of the issue might be reduced by Japan's permitting long-term residents to gain Japanese citizenship without surrendering their nationality of birth. Most people likely to require public assistance are those settled in Japan for the long term, who might be inclined to apply for Japanese citizenship if it did not necessitate surrender of one's own and therefore have significant implications for one's community and cultural identity. This is particularly relevant for one of Japan's largest foreign national communities, the ethnic Koreans descended from those brought forcibly to Japan or who elected to immigrate after Japan's annexation of the Korean peninsula. This community, as discussed above, is one of the main recipients of public support, and although most are

94 Art. 25 (1).

95 KOMAMURA, *supra* note 67.

96 OTAKE, *supra* note 34.

97 B. BLOCH, Ruling Against Foreign Residents Brings Japan's Xenophobia to the Foreground, *Politics and Policy*, 11 November 2014, available at <http://politicsandpolicy.org/article/ruling-against-foreign-residents-brings-japan%E2%80%99s-xenophobia-foreground>.

naturalised in terms of language and culture, for reasons of community and identity many are unwilling to relinquish their Korean nationality for Japanese citizenship.

Unfortunately, a solution to the grander problem the Supreme Court decision reveals – i.e. that the Japanese Constitution bestows many of its crucial rights only on citizens – seems equally improbable. The prospect of constitutional revision is small. Since its promulgation, Japan's Constitution has undergone no legislative amendment. The mechanism for making constitutional revisions, contained in Article 96, is very demanding, requiring a Diet motion and “concurring vote of two-thirds or more of all the members of each House and [...] the affirmative vote [...] at a special referendum.”⁹⁸

Although such constitutional locks appear to have satisfied the American drafters in the belief they would help prevent a lurch to the right and the re-emergence of nationalism after Japanese independence, they have ironically made it much harder to eradicate the nationalistic sentiments which the Americans failed to exclude from the Constitution during drafting. There is, perhaps, a lesson here for those who assume it wise to “future-proof” a country's constitutional law in the sincere belief that legislators of the day know best.

XIV. CONCLUSION

It is hoped that this article has served a number of purposes. It has summarised and analysed an interesting sequence of litigation that has recently ended with determination in the Supreme Court of Japan, which ruled that foreign nationals have no legal entitlement to the receipt of public assistance payments under the PAA 1950. It has also been shown that the decision will probably have comparatively little direct effect on foreign residents in Japan in its own right, and that it was anyway legally correct as a matter of statutory construction and juristic reasoning. However, the decision has been shown to be worthy of examination because it exposes systematic flaws in the state of Japanese law. Textual examination of the PAA 1950 and the Constitution of Japan and the immediate legal history of each document reveal a conscious project to exclude foreign nationals from the scope of the State's protection in the mid-Twentieth Century. Despite an increased openness to foreign nationals in recent decades, the text of these Japanese laws has remained unamended. The Constitution's exclusion of foreign nationals is particularly worrying, especially in light of Japan's continued lack of comprehensive anti-discrimination legislation. This situation places Japan in probable breach of several international legal obligations. Solving these problems has been shown to require a tremendous concentration of political will, which seems an improbable prospect in the immediate future. Nonetheless, it is hoped that increased awareness of the problems will accelerate whatever improvements may eventually emerge.

98 Art. 96 (1).

SUMMARY

The Public Assistance Act 1950 empowers and requires Japanese local authorities to distribute public assistance payments to “kokumin” (citizens) in financial need. A 1954 Notice from the Japanese Ministry of Health instructs local authorities to provide de facto public assistance payments to foreigners on an equal footing as Japanese citizens. In a recent decision, the Supreme Court of Japan overturned an appellate ruling by the Fukuoka High Court which had concluded that the 1954 Notice, combined with Japan’s ratification of the Convention relating to the Status of Refugees, had given foreign nationals a litigable legal entitlement to public assistance payments equal to that of a Japanese national. In denying this, the Supreme Court insisted on adherence to the textual language of the Act itself and regarded the 1954 Notice as a mere administrative practice statement, incapable of true legal reform. In holding that the word “kokumin” necessarily excludes foreign residents of Japan, the Supreme Court has obliquely shown that another crucial Japanese legal document that bestows rights on the “kokumin” – namely the Constitution of Japan – likewise strictly excludes foreign nationals. Although the Supreme Court decision will probably have only limited effects on the foreigner population in terms of social welfare provision, the notion that the text of the Constitution makes no provision for the human rights of foreign nationals in Japan, such as rights against discrimination, is a major cause for concern.

An examination of the immediate legal history of both the Public Assistance Act 1950 and the Constitution of Japan itself (particularly the process of constitutional drafting in the immediate wake of the Second World War) shows the exclusion of foreigners from both documents to have been a conscious eviction of non-Japanese nationals from the State’s protection. The Supreme Court decision shows that even now some Japanese legal texts are haunted by old, nationalistic sentiments that have never been properly exorcised. The Constitution’s exclusion of foreign nationals is particularly worrying in light of Japan’s continued lack of comprehensive anti-discrimination legislation. The fact that the Public Assistance Act discriminates against foreign nationals and Japan’s lack of adequate protection against discrimination on the grounds of race or nationality place Japan in probable breach of several international legal obligations, such as those under the 1969 International Convention on the Elimination of All Forms of Racial Discrimination. It appears unlikely that the Japanese courts will innovate to the level required to patch the gaps left by the lack of constitutional or statutory anti-discrimination protection, meaning that both the expansion of legal entitlement to public assistance payments and legally enforceable equality rights can only be provided by legislative reform. This would require enormous political will and is an unlikely prospect in the immediate future. Japan will therefore probably continue to receive criticism from international bodies and human rights commentators.

ZUSAMMENFASSUNG

Das Sozialhilfegesetz von 1950 ermächtigt die japanischen Kommunalverwaltungen dazu und verlangt von ihnen, dass sie Sozialhilfezahlungen an finanziell bedürftige „kokumin“ (Staatsbürger) leisten. Eine Mitteilung des japanischen Ministeriums für Gesundheit aus dem Jahr 1954 („1954-Mitteilung“) weist die Kommunalverwaltung an, de facto Sozialhilfezahlungen in gleicher Weise an Ausländer wie an japanische Staatsbürger zu leisten. Der japanische OGH hat kürzlich ein Berufungsurteil des Obergerichts Fukuoka aufgehoben, in dem das OG festgestellt hatte, dass die 1954-Mitteilung, zusammen mit dem von Japan ratifizierten internationalen Abkommen über die Rechtsstellung von Flüchtlingen, ausländischen Staatsangehörigen ein einklagbares Recht auf Sozialhilfeleistungen einräume, welches denen eines japanischen Staatsangehörigen gleichgestellt sei. Der OGH beharrte bei seiner Zurückweisung eines solchen Rechts darauf, an dem wörtlichen Inhalt des Gesetzes festzuhalten, und erachtete die 1954-Mitteilung als eine schlichte Anweisung für die Verwaltungspraxis, die keine Änderung der Gesetzeslage bewirken könne. Durch die Feststellung, das Wort „kokumin“ schließe ausländische Staatsangehörige zwangsläufig aus, hat der OGH indiziert, dass eine weitere äußerst wichtige japanische Rechtsquelle, welche für die Zuordnung von Rechten ebenfalls auf den Begriff „kokumin“ abstellt – nämlich die japanische Verfassung – anscheinend in gleicher Weise ausländische Staatsangehörige ausschließen soll. Obgleich das Urteil des OGH wahrscheinlich nur begrenzte Auswirkungen auf die Sozialleistungen für in Japan ansässige Ausländer haben wird, gibt die Vorstellung, dass die Verfassung ihrem Wortlaut nach ausländischen Staatsbürgern keine Menschenrechte, etwa gegen Diskriminierung, gewährt, Anlass zur Sorge.

Eine Analyse der unmittelbaren Rechtsgeschichte sowohl des Sozialhilfegesetzes von 1950 als auch der japanischen Verfassung (insbesondere die Entstehungsgeschichte der Verfassung unmittelbar nach dem Ende des Zweiten Weltkrieges) zeigt, dass der Ausschluss von Ausländern in beiden Dokumenten einen bewussten Ausschluss von Nicht-Japanern darstellt, was den Schutz durch den Staat betrifft. Das Urteil des OGH lässt erkennen, dass manche japanischen Gesetze selbst heute noch unter den veralteten nationalistischen Auffassungen leiden, die nie in Gänze beseitigt wurden. Der Ausschluss von ausländischen Staatsangehörigen aus dem Schutzbereich der Verfassung ist gerade angesichts eines immer noch fehlenden umfassenden Antidiskriminierungsgesetzes besorgniserregend. Ihr Ausschluss aus dem Anwendungsbereich des Sozialhilfegesetzes wie auch der fehlende Schutz von Ausländern gegen Diskriminierung aufgrund von Rasse oder Staatsangehörigkeit dürften zu einem Verstoß gegen gleich mehrere Pflichten führen, zu deren Beachtung Japan international verpflichtet ist. Dies Pflichten ergeben sich aus internationalen Abkommen wie etwa dem Internationalen Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung von 1969. Reformen seitens der japanischen Gerichte, die diese Lücke aus verfassungsrechtlichem und gesetzlichem Antidiskriminierungsschutz schließen würden, sind unwahrscheinlich. Gesetzesreformen

sind daher erforderlich, um den Rechtsanspruch auf Sozialhilfeleistungen auszubauen und einen rechtlich durchsetzbaren Anspruch auf Gleichbehandlung zu schaffen. Derartige legislatorischen Regelungen würden einen starken politischen Willen voraussetzen; die Aussichten hierfür sind in naher Zukunft indes schlecht. Aus diesem Grund wird Japan wohl auch in Zukunft Kritik von internationalen Organisationen und von Menschenrechtlern ernten.

(Die Redaktion)

