JAPAN’S 2004 PENSION REFORMS IN RESPONSE TO DEMOGRAPHIC CHANGE: A LEGAL CRITIQUE

Trevor Ryan

I. INTRODUCTION

Japan’s public retirement system is in crisis. It faces two enormous problems. The first is apparently temporary. The economy that funds the pension program has under-performed in the last decade. The other problem is more difficult to address. Namely, Japanese society is experiencing a massive shift in its age structure with profound social and economic ramifications. Financing the social security system of which the public pension accounts for approximately half has thus become a matter of urgent concern. Meanwhile, this issue and other structural problems have instigated a crisis of confidence in the public pension system, which has further harmful ramifications. Furthermore, the pension system is out of step with the industrial changes that are inseparably linked to demographic transition.

This paper critiques legal reforms enacted in 2004 to remedy the perceived defects of the public pension system. I evaluate the changes on the grounds of legality in domestic law and effectiveness in the face of demographic and socio-economic change. Part II outlines the history and structure of the pension schemes in Japan, focusing on the public pension system. Part III examines its problems such as funding problems, non-compliance and defaulting by individuals and corporations, and the failure of the pension system to adapt to changing work patterns and industrial structure. Part IV scrutinizes the contents of the 2004 reforms and then evaluates these reforms in terms of their legality and effectiveness with respect to the problems outlined in Part II. Part V concludes by tying together the common themes and deficiencies of the reforms, while

1 Ph.D candidate, The Australian National University College of Law. The author thanks Kent Anderson for his assistance in the preparation of this paper. All translations are the author’s own, unless otherwise noted.

2 This has been caused by long-term reductions in death rates for all ages, greater relative increases in survival rates at older ages, and the arrival of baby-boom cohorts at retirement ages. JACOB S. SIEGEL, APPLIED DEMOGRAPHY: APPLICATIONS TO BUSINESS, GOVERNMENT, LAW, AND PUBLIC POLICY 11 (2002).
acknowledging the willingness and potential of policy makers to manage the crisis.

II. THE PENSION SYSTEM IN JAPAN

The Japanese public pension system has two tiers. The first, the Basic Pension (kiso nenkin), is mandatory for all residents and provides a flat rate pension. It is not income related and operates, in principle, as a guarantee of a basic income for retirees.\(^3\) The second-tier, the Employees Pension Insurance (kōsei nenkin), covers most employees, and contributions are shared equally by employers and employees. It is mandatory for companies with over five employees.\(^4\) Both of these schemes are “public” in the sense that they are operated and insured by the government.\(^5\) The minimum contribution period required to secure benefits under these schemes is, in principle, twenty-five years.\(^6\) Civil servants have a separate scheme called the Mutual Aid Pension, which also contains a fixed (i.e. Basic Pension) component and an income-related component.\(^7\) Moreover, private enterprise and individual-based pensions\(^8\) provide important


\(^4\) Kōsei nenkin hoken hō [Employees Pension Insurance Act], Law No. 115 of 1954, art. 6(1).

\(^5\) NIPSSR, supra note 3, at 6.

\(^6\) Kōsei nenkin hoken hō, art. 42(1); Kokumin nenkin hō [National Pension Act], Law No. 141 of 1959, art. 26. In determining an individual’s contribution period, the government calculates the total length of time that the individual has been enrolled under these various public pension schemes. ‘Nenkin Wakaru’ [“Understanding Pensions”], SHUKAN BUNSHUN, Oct. 5, 2004, at 16. See infra note 39 for a discussion on ‘karakin’ exceptions to the minimum contribution period.

\(^7\) NIPSSR, supra note 3, at 6.

additional coverage for both employees and self-employed and may thus be considered a third tier.\textsuperscript{9}

Complicating matters is the fact that the public pension scheme is further divided into three categories based on the nature of the insured. Thus, Category 1 consists of the self-employed, farmers, and other non-employed; Category 2 includes general employees;\textsuperscript{10} and Category 3 consists of employee’s dependent spouses (hifuyō haigūsha).\textsuperscript{11} The self-employed (Category 1) do not participate in the Employees Pension Insurance, and, adding to the confusion, when applied to this group the Basic Pension is called the National Pension (kokumin nenkin).\textsuperscript{12} This category may also participate in the National Pension Fund, an optional “third tier” scheme. The National Pension also covers Category 3 dependants. However, this category is exempt from making contributions if annual earnings for the previous year are less than ¥1,300,000.\textsuperscript{13}

\textsuperscript{9} Unfortunately, the details of private pensions are beyond the purview of this paper, except where incidentally relevant to the public system. For further information, see generally Robert L. Clark and Olivia S. Mitchell, \textit{Strengthening employment-based pensions}, in \textit{THE ECONOMICS OF SOCIAL SECURITY IN JAPAN} 170-201 (Toshiaki Tachibanaki ed., 2004).

\textsuperscript{10} In principle, part-time workers will only qualify for this category if working at least ¾ of full-time hours and earning more than ¥1.3 million. For the precise remuneration and working hour thresholds, see \textit{MINISTRY OF HEALTH, LABOUR AND WELFARE, PAATO TAIMU RODÔHÔ NO ARAMASHI (JIGYOSHA MUKÊ PANFURETTO) [OUTLINE OF PART-TIME WORK LAW: PAMPHLET FOR EMPLOYERS]} 24 (2006), available at http://www.mhlw.go.jp/bunya/koyoukintou/pdf/parttime1-06.pdf.

\textsuperscript{11} See NIPSSR, \textit{supra} note 3, at 6.

\textsuperscript{12} \textit{Id.}

\textsuperscript{13} \textit{Id.}, at 7.
The complexity of the public pension system is partly a result of its historical development. Although pension systems for public servants existed as early as 1875 (for armed services) and 1884 (for higher public officials), the Workers’ Pension Insurance Law of 1941 established the first scheme for ordinary workers in the private sector. This was the precursor to the Employees Pension Insurance

---

14. NIPSSR, supra note 3, at 8.
15. Rōdōsha nenkin hō [Workers’ Pension Insurance Law], Law No. 60 of 1941.
Act of 1954. The National Pension Revision Act, enacted in 1959, provided benefits for the self-employed (i.e. Category 1).

As incomes increased during the high-growth period (1955-1974), concern grew that older generations were being left behind. This led to a substantial expansion of public pension benefits (along with other social security reforms) in 1973. However, both pension schemes soon ran into financial trouble. This was partly a result of slower economic growth catalyzed by the oil shocks of the 1970s. Another factor straining finances was that, while both schemes began fully-funded (that is, contributors saved for their own retirement and withdrew their funds when that time came), they evolved into de facto pay-as-you-go defined benefit systems. The pay-as-you-go system does not mean that individuals fund their own pension as they go along. Rather, current workers’ contributions fund current pensioners’ benefits. Thus, benefit payments are essentially transfers from contributions rather than from a set fund.

Several factors account for the erosion of the fully funded principle in the Japanese public pension system. Firstly, despite political pressure for the expansion of benefits in 1973, this was not matched by equivalent increases in premiums. Secondly, unexpected increases in life expectancy mandated higher premiums, but these were not implemented. Hence, revenues consistently fell short of expenditures, and the value of reserves decreased in the face

---

17 Kōsei nenkin hoken hō.
18 Kokumin nenkin hō.
21 See MACKELLAR ET AL., supra note 19, at 65.
22 See Naohiro Yashiro, Aging of the Population in Japan and Its Implications to the other Asian Countries, 8(2) J. ASIAN ECON. 245, 253-254 (1997).
23 Id.
of inflation. Nevertheless, in Japan both public schemes are still supported by substantial trust funds for temporary deficits.

Revenue and expenditure in the social security system (including the public pension system) involves a complicated arrangement of cross scheme transfers and government subsidies. One important aspect of these is the substantial subsidy of the National Pension by government coffers. These favorable subsidies, and indeed the different treatment for employees and self-employed, seem to reflect the disproportionate political power held by (often older, self-employed) voters in rural electorates.

A pay-as-you-go defined benefit system depends on a sustainable ratio between contributors and beneficiaries. It is therefore susceptible to the vagaries of demographic change. By the 1980s fears had arisen regarding the threat that aging seemed to pose to the scheme’s finances. 1986 saw a package of reforms designed

---

24 See MACELLAR ET AL., supra note 19, at 69.


26 See NIPSSR, supra note 3, at 5. See also SAKAMOTO, supra note 25, at 13-19.


28 This has resulted from an electoral system that failed to keep up with urbanization. In Tottori Prefecture, for example, an individual vote is five times more powerful than that of urban electorates, a situation affirmed by the Supreme Court. PRADYUMNA P. KARAN, JAPAN IN THE 21ST CENTURY: ENVIRONMENT, ECONOMY, AND SOCIETY 292 (2005).

29 Toshiaki Tachibanaki, Introduction to THE ECONOMICS OF SOCIAL SECURITY IN JAPAN 1, 3 (Toshiaki Tachibanaki, ed. 2004).
to cut back on spending on the elderly. This was the culmination of a process beginning in the late 1970s whereby the government sought to reject the welfare state model and encourage a ‘Japanese-style welfare society’ (Nihongata fukushi shakai)\(^{31}\), namely, provision of care by families, companies and communities rather than by the state.\(^{32}\) This is clearly an appeal to a culturalist model: the notion that the Japanese possess a fixed and unique “culturally and socially homogeneous racial identity,”\(^{33}\) characterized by groupism, harmony, and hierarchy, for example.\(^{34}\) Skeptics, however, regard the concept of Japanese-style welfare primarily as a strategy for implementing financial austerity.\(^{35}\) In other words, the state seems to have manipulated culturalist notions of care for contemporary perceived needs. Obvious parallels can be found in the Reagan and Thatcher eras, and this ‘neo’ conservatism model has had wider appeal beyond Japan, the U.K. and the U.S. in recent years.\(^{36}\)

The upshot of this was a continuing erosion of benefits, but also other reforms. These included: (1) increased contributions; (2) an increase from twenty-five to forty years to be entitled to full benefits under the National Pension; and (3) the abolition of a system whereby retirees could accept reduced benefits if they began receiving the pension at the age of sixty.\(^{37}\) Moreover, a partial unification of the

---


32 *Id.*


34 See MCCARGO, *supra* note 20, at 5.


37 In effect, raising the age at which pension benefits may be received under the National pension to 65. However, this did not apply to
two public pension schemes was implemented. As already mentioned, contribution to the National Pension is a flat rate. For employees (Category 2), this amount came to be included as the fixed component (i.e. Basic Pension) of salary deductions under the Employees Pension Insurance. Furthermore, dependent spouses of employees (Category 3) were now also covered by the National Pension, yet exempt from paying premiums if they earned less than ¥1.3 million per year. In keeping with the concept of ‘Japanese-style welfare’, this arrangement privileged stay-at-home wives. In other words, it provided an incentive for women to remain dependants and provide domestic services, such as the care of elderly relatives.

Further changes followed the poor economic performance of the 1990s. In 1994, a package of reforms was passed that included gradually raising the general pensionable age to sixty-five. It is worth noting that those covered by the Employees Pension Insurance were still entitled to begin receiving the “Special Allowance Employees Old Age Pension” (tokubetsu shikyū no rōrei kōsei nenkin) from the age of sixty. This was composed of the fixed component (i.e. the Basic Pension) and the component proportional to their salary.

However, the age at which the fixed component was included was set to rise gradually. Also, from this time, pension benefits were indexed to general wage rates after tax. It was envisaged that this would have a restraining effect considering that taxes were projected to rise. Even with the changes, however, the reforms

employees contributing to the basic pension through the Employees Pension Insurance, who were still eligible for payments at the age of 60.

38 This was ¥13,300 in 2003. Note: the 2004 reforms increased this sum as discussed below.

39 A system called karakin was introduced to account for the fact that these new entrants into the public pension system were unlikely to meet the duration of payment qualifications required to receive a pension.


41 The first cohorts to receive the Basic Pension from the higher age of 65 will be those born after April 2, 1949 for men (in 2014) and April 2, 1954 for women (in 2019). See ‘Nenkin Wakaru,’ supra note 6, at 16.

42 See MACKELLAR ET AL., supra note 19, at 69.
called for an increase in contributions to the Employees Pension Insurance from 14.5% to 29% by 2025 to ensure financial sustainability.\textsuperscript{44}

By 2000, in light of new demographic projections, it was apparent that without further reform the public pension system would suffer huge deficits by the year 2050.\textsuperscript{45} Therefore, Parliament passed reforms in 2000 that effectively cut lifetime pension benefits by 20%.\textsuperscript{46} First, the amount of benefits was cut by 5%.\textsuperscript{47} Second, the age of payment of the earnings-related component of the Employees Pension Insurance benefit (now called the “part pension”, or \textit{bubun nenkin}) was set to rise gradually from sixty to sixty-five.\textsuperscript{48} Furthermore, the accrual rate, used to calculate the build-up of pension benefits relative to earnings under the Employees Pension Insurance for an annual benefit amount, was reduced from 0.75% to 0.7125%, which trimmed benefits.\textsuperscript{49} The reforms also called for a switch from indexing pension benefits to wages to a system of indexing to prices. Some calculate that the effect of this would have been to reduce the replacement ratio (the percentage of a worker’s earnings that are replaced by Social Security benefits) from 50% of after-tax income to 20%.\textsuperscript{50} This is because benefits indexed to rises in wages have the advantage of increases in real incomes that, it is assumed, will outstrip increases in prices.

\textsuperscript{43} Id.

\textsuperscript{44} Id.

\textsuperscript{45} Id.

\textsuperscript{46} The 2004 reforms were also a significant turning point in the management and investment of the public pension reserve funds. See \textsc{Sakamoto, supra} note 25, at 51.

\textsuperscript{47} Clark & Mitchell, \textit{supra} note 9, at 174.

\textsuperscript{48} The first cohorts to receive the proportionate component of the Employees Pension Insurance at the higher age of sixty-five will be those born after Apr. 2, 1961 for men (in 2026) and April 2, 1966 for women (in 2031). See \textit{’Nenkin Wakaru,’ supra} note 6, at 16.

\textsuperscript{49} See \textsc{MacKellar et al., supra} note 19, at 70.

\textsuperscript{50} \textsc{MacKellar et al., supra} note 19, at 70 (citing Yashiro, \textit{supra} note 22).
Even after the 2000 reforms, the sustainability of the public pension system was questionable, particularly in light of new, worse-than-expected demographic projections.\(^51\) This and other perceived problems are discussed below.

III. PROBLEMS BEFORE THE REVISIONS

A. Funding Crisis

On the one hand, rapid population aging has threatened the financial viability of the public pension schemes.\(^52\) The percentage of Japan’s population over sixty-five years old doubled from 7\% to 14\% in only twenty-four years (1970 to 1994) compared to 115 years in France.\(^53\) It was 17.4\% in 2000, but by the year 2050 is projected to double again, reaching 35.7\%.\(^54\) The causes of this are excellent longevity, a very low total fertility rate, and the mass retirement of the baby boom generation.\(^55\) Meanwhile, the productive population (ages 15-65) has been decreasing since 1995.\(^56\) Comparing Japan’s population pyramid in the 1950 post-war period and the projection in 2050 starkly represents the nature of the problem.

\(^{51}\) See MacKellar et al., supra note 19, at 70.

\(^{52}\) See NIPSSR, supra note 3, at 14.


\(^{55}\) See Siegel, supra note 2, at 11.

\(^{56}\) NIPSSR, supra note 54, at 2.
Graphs showing the age distribution of the population in Japan for 1950 and 2050.
On the other hand, there is great pressure to reduce public spending and because the public debt (at 150% of GDP) is the largest (proportionally) in the industrialized world. Thus, it has been politically difficult to secure government funds for pension subsidies. Various quarters have called for a higher consumption tax rate dedicated solely to Social Security purposes. Others are skeptical, citing the recession apparently caused by the 1997 increase in the consumption tax rate from 3% to 5%. Moreover, they have argued that a narrow focus on the consumption tax as a panacea for financing pension shortfalls obscures the need to address fundamental, structural problems. The fundamental change in age structure and other pressures on Social Security finances have shaken the public’s faith in the pension system.

---


60 See Hewitt, supra note 59, at 6.

B. Crisis of Confidence

The pension system faces a crisis of confidence. Two sources cause anxiety, particularly among younger generations in the public pension system: first, these individuals fear that they might not be able to receive pension benefits in the future; and second, they fear that an unsustainable level of contribution will be imposed in the future. There are perhaps several reasons for this anxiety, including unproductive fear mongering about Japan’s demographic situation. However, a significant reason is the impression created by politicians that each new revision will restore financial balance to the pension schemes. Some argue that actuarial valuation is inherently variable, hence the five-yearly revisions were never meant to be definitive, and that it was a significant reason why Japan has been able to keep Social Security spending under control. Nevertheless, the public viewed this as the continuation of the decreasing benefits, increasing contributions, and a changing pensionable age that some have compared to a receding mirage. Related to these anxieties is a sense that each revision further increases inequity between generations. For instance, on average cohorts born in 1935 will receive benefits 8.3 times what they contributed during their working period, but those

62 SAKAMOTO, supra note 25, at 4.

63 This is not unique to Japan. MacKellar states, “policy dialogue in the area has been characterised by too much blind extrapolation and tub-thumping.” MACKELLAR ET AL., supra note 19, at 1.

64 SAKAMOTO, supra note 25, at 24.

65 Id.

66 Atsuhiro Yamada, Shōshikōreika no Keizai e no Eikyō [The Effect of the Low Birthrate and Ageing Society on the Economy]. 1282 JURISTO 34, 39 (2005). Despite the increasing burden per person resulting from age structure changes, when viewed as a percentage of GDP, both current and projected levels of Social Security spending in Japan (of which public pensions account for approximately half) were relatively modest even before the reforms. In 2000 the percentage was 9.9% lower than in France (16.4%) and Germany (14.8%), but higher than the U.S. (6.9%). ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REVENUE STATISTICS 1965-2001, TABLES, available at http://www.oecd.org/dataoecd/6/63/1962227.pdf.

67 ‘Nenkin Wakaru,’ supra note 6, at 15.
born in 2005 would receive only 2.3 times their contribution amount.\textsuperscript{68}

C. Non-Compliance and Defaulting

Related to both crises is an increasing number of people, particularly younger generations, either refusing or failing to participate in the National Pension scheme. For example, they are registering but failing to pay the required premiums. This appears to be caused by economic reasons and distrust toward the system. The default rate in fiscal year 2002 was almost 40\%.\textsuperscript{69} Such behavior is leading to the so-called “hollowing out” of the National Pension, creating deficits and a heavy reliance on dwindling reserves.\textsuperscript{70} On the other hand, failure to pay is often a result of confusion rather than civil disobedience,\textsuperscript{71} which may suggest the system has accessibility problems. Such problems were highlighted by revelations of the shortcomings in the premium payment records of many prominent politicians that came to light just as the reforms were being debated.\textsuperscript{72}

In addition to private pension schemes difficulties, some corporations are failing to participate in Employees Pension Insurance despite their legal obligation to do so.\textsuperscript{73} As the popularity of the word ‘nenkin-tōsan’ (bankruptcy by pension) suggests, many companies


\textsuperscript{69} ‘Nenkin Wakaru,’ supra note 6, at 18.


\textsuperscript{73} NIPSSR, \textit{supra} note 3, at 15.
regard social security obligations as threatening their very survival in hard economic times.74

D. Failure of Pension System to Adapt to Changing Industrial Structure

Japan’s pension crisis cannot be properly understood without recognizing the broader socio-economic changes that have occurred in Japan and other industrialized countries in the past two decades. Working patterns characteristic of the Japanese labor system such as lifetime regular employment with seniority rewards are waning.75 Diverse work arrangements such as part-time and temporary employment have become more common.76 This is particularly true for women and older people, and increasingly younger generations, which are encapsulated by the disparaging word ‘furītā’ (jobseekers and part-time workers between the ages of fifteen and thirty-four, excluding students and housewives). The qualifications for securing an old-age pension established under the old labor system make it difficult for workers to build up the requisite years of full-time employment (in principle, twenty-five years). Foreigners and overseas Japanese face the same problem because of their intermittent participation in the pension system.77

Many others have failed to realize that the changes in working patterns are largely a result of changing industrial structure, rather than a counter-cultural movement. The movement away from primary industry and manufacturing toward the service and

74 ‘Nenkin Wakaru,’ supra note 6, at 18.

75 See PENELope FRANCKS, JAPANESE ECONOMIC DEVELOPMENT: THEORY AND PRACTICE 218 (1999). Some have sought to debunk this myth, noting that lifetime employment was only characteristic of male executives in large companies who never accounted for more than a quarter of the total workforce. Nevertheless, it is true that there is more instability in employment than there once was.

76 NAOKO SUZUKI, SHÔSHI KÔREIKA SHAKAI CHÔSA NO KADAI TO HAIKEI [LOW BIRTHRATE, AGEING SOCIETY: ISSUES AND BACKGROUND TO THE SURVEY] 18 (2005).

77 Japan reportedly collects over ¥100 billion a year in the form of pension premium payments made by foreigners, many who are unlikely to remain in Japan long enough to utilize the system. Barry Brophy, Your Golden Handshake, JAPAN TIMES, Aug. 24, 2004.
information industries, where women’s participation has been prominent, causes the changing work patterns.\(^{78}\)

\[\text{Trend of number of persons engaged in work by major industry}\]

\[\begin{array}{|c|c|c|}
\hline
\text{Industries} & \text{1997} & \text{2002} & \text{Changes} \\
\hline
\text{Agriculture} & 3,277 & 2,701 & 576 \\
\text{Construction} & 6,867 & 6,085 & 781 \\
\text{Manufacturing} & 14,452 & 12,425 & 2,027 \\
\text{Wholesale and retail trade, and eating and drinking places} & 14,961 & 14,669 & 292 \\
\text{Finance and insurance} & 1,975 & 1,793 & 177 \\
\text{Services} & 17,043 & 18,410 & 1,367 \\
\hline
\end{array}\]

Source: Ministry of Internal Affairs and Communications Statistics Bureau\(^{79}\)


Working patterns in service and information industries are inherently more chaotic because both skills and positions are characterized by change and uncertainty. The lifestyles of their workers also mold the current working patterns. Hence, as the sexual division of labor created by a bygone industrial era is eroded, both men and women increasingly need flexible working patterns to coordinate work, family, and leisure. Accordingly, the public pension system is straining under these changes as it is premised upon regular employment and the sexual division of labor. Thus, a need exists to rebuild the system in a form that allows for the diverse life and work choices of individuals. In an aging society that is inseparably linked to industrial development, the pension system needs to accommodate the participation of the so-called ‘invisible’ workforce, consisting of women, older persons, underemployed youth, and foreigners. If policymakers hope to improve the birthrate and soften the impact of aging, they should pay special attention to allow women to balance family and work. Benefits need to take into account the new social structure of changing families, as there has been a large increase in households constituted only of older persons, particularly single women.

80 Usui, supra note 78, at 182.


82 Such individuals are potential workers who are unable or reluctant to enter the workforce due to various obstacles. For a graphic representation of such labor potential relative to the population pyramid, see Takahashi Shigesato, Chô Shôshi Körei Shakai Shita no Jinkô Genshô [Depopulation in a Hyper-Ageing Low Fertility Society] 11 (Jan. 17, 2006), www.ipss.go.jp/seminar/j/seminar10/takahashi.pdf.

83 Suzuki, supra note 76, at 9.
IV. THE 2004 REFORMS

A. The Pension Revision Act

I now address the 2004 legislation that was to be the vehicle of change in reforming the public pension system. Warnings from many quarters including the United Nations, the International Monetary Fund, and the World Bank added to the sense of crisis regarding Japan’s pension system. Meanwhile, some applied a similar ‘elderly ratio’ to the likelihood of political intervention. That is, as an aging population is politically weighted towards the interests of the elderly, the ‘last train’ for pension reform in Japan (so the IMF’s equation goes) had long gone. Nevertheless, despite much surrounding controversy, the ruling coalition managed to secure passage of the Act to Partially Revise the National Pension Revision Act and Other Acts (hereafter, the 2004 Pension Revision Act) in June 2004.

The revisions to the National Pension Revision Act and the Employees Pension Insurance Act are to take effect in stages beginning October 1, 2004. First, in order to address the funding crisis, the Pension Revision Act introduced a new system of fixed
contributions and automatic adjustments for benefits based on future demographic and economic changes. Thus, the previous system of adjusting benefits and contributions every five years has been abandoned. Also, in an attempt to shore up the National Pension scheme the revisions increased the government’s contribution to funding. A second Act was passed simultaneously, introducing significant reforms as to how public pension funds were managed. Second, changes were made to address the problems in collecting premiums. Third, the Pension Revision Act included other important reforms aimed at updating the public pension system to match contemporary demographic and industrial structure. These reforms included: pension splitting upon the dissolution of marriage; measures to increase the working elderly; consideration toward child rearing; modifications to pensions for the bereaved; and other provisions relating to part-time workers.

B. Revisions to Address the Funding Crisis

1. Government’s contribution to Basic Pension benefits raised

The reforms raised the percentage of the government’s contribution toward financing the Basic Pension. The Pension Revision Act stipulates that in 2005-06 the government’s contribution will be raised to “a suitable level by taking necessary tax measures considering movements in the national economy.” The full increase must be implemented by 2009 through “sweeping tax measures to secure stable finances considering movements in the reform of the

---

90 As will be discussed below, the Social Security Agency makes a new determination of an individual’s benefits upon a claim by an eligible recipient. Determinations that have already been made will also be affected by the revisions.

91 The government now, however, must conduct an evaluation every five years regarding the condition and prospects of pension finances with a long-term view of about 100 years. Kokumin nenkin hō, art. 4-3; Kōsei nenkin hoken hō, art. 2-4.


93 Kokumin nenkin hō tō no ichibu o kaisei suru hōritsu, art. 15 (Supp. 2004).
social security system generally." However, precisely what reforms will take place is still a matter of serious contention. The government has announced the increase will be from one-third to one-half, although this figure is not codified in the Pension Revision Act.

2. **Premium amounts increased**

Monthly contributions to the National Pension (and Basic Pension) are to rise from ¥13,300 to a fixed ¥16,900 from 2005 to 2017. This will amount to an increase of ¥86,400 per year for a two-member household. With regard to the Employees Pension Insurance, current contributions of 13.58%, shared equally by employees and employers, will rise to 18.3% from 2004 to 2017. They will then be capped at this level.

3. **Benefit levels adjusted (Macroeconomic Slide)**

The 2004 reforms sought to introduce a permanent system of financing public pensions that could still respond flexibly to economic and demographic variables. The main tool to do this was called the ‘Macroeconomic Slide’ (makuro keizai suraido). Through the Macroeconomic Slide, the government is supposed to be able to keep benefits in check in the face of the supply limits entailed by a guaranteed fixed contribution rate. The default rule will now be that benefits will be indexed to the cost of living. However, the 2004

---

94 *Id.* art.16.

95 *SAKAMOTO, supra* note 25, at 31.

96 *NENKIN SEIDO KAISEI NO POINTO, supra* note 25.


98 *Id.*

99 *Id.*

100 Note every *fresh* determination by the Social Insurance Agency with regard to an individual’s pension benefits will be indexed to increases in average net wages. Benefits after determination will be indexed to the cost of living,
reforms introduced an ‘adjustment period’ to be set by Cabinet order whenever it appears that funding will be a problem.\textsuperscript{101} During this period, indices linking benefits to both wage levels and price levels will be adjusted to reflect demographic changes, namely, the reduction in the supporting (i.e. working) population relative to the elderly dependent population. This ratio is affected by future birth rates and improvements in longevity, thus the risk of these factors (along with macroeconomic factors) lies with the population receiving benefits. Put simply, the initial determination of pension benefits will be adjusted according to the following equation:

$$\text{increase in average wages} - (\text{decrease in productive population} + \text{increase in average life expectancy})$$\textsuperscript{102}

From then on, the adjustment rate will continue to be subtracted from benefits indexed to increases in the cost of living.\textsuperscript{103} The Cabinet

\begin{footnotesize}
\begin{enumerate}
\item[101] Kokumin nenkin hō, art. 16-2; Kōsei nenkin hoken hō, art 34.
Such a period began in 2005 and is expected to continue until the year 2023. Kokumin nenkin hō shikōrei tō no ichibu o kaisei suru seirei [Cabinet Order to Partially Revise the National Pension Act Enforcement Ordinance and Others], Cabinet Order No. 297 of 2004.
\item[102] Taeko Nakano, Rōrei Kiso Nenkin, Rōrei Kōsei Nenkin no Kyūfu Suijun: Hōgaku no Kenchi kara [Benefit Levels of the Old Age Basic Pension and Old Age Employee's Insurance Pension: a Legal Perspective], 1282 JURISTO 67, 68 (2005). Specifically, annual benefits under the National Pension will be calculated under the formula ¥780,900 x Revised Ratio. Benefits under the Employees Pension Insurance will be calculated under the formula Average Monthly Standard Remuneration (AMSR) x 0.05481 x months of coverage. The AMSR is the total of earnings and bonus amounts for (effectively) each month covered divided by the amount of months covered, and then multiplied by the Indexation Ratio. The Revised Ratio and Indexation Ratio are based on movements in the net wages index. During the adjustment period, an adjustment rate will be deducted from the Revised Ratio and Indexation Ratio both initially and thereafter and be indexed initially to wages and then the cost of living. The adjustment rate is defined in Kokumin nenkin hō, art. 27-5; Kōsei nenkin hoken hō, art. 43-5.
\end{enumerate}
\end{footnotesize}
stipulates in its Cabinet Order what period it regards necessary for an economically viable balance between benefits and contributions to be restored. The adjustment period (and thus, the Macroeconomic Slide) will continue until such balance is achieved.104


---

103 Kokumin nenkin hō, art.27-5; Kōsei nenkin hoken hō, art. 43-5. Note the adjustment rate will not apply if it results in a reduction in nominal benefit amounts, nor in the case of negative growth in average wages or cost of living. This means that although the purchasing power of benefits may decline the actual amount stays the same. However, nominal benefit amounts may be decreased independent of the macroeconomic slide, i.e. by wages or cost of living slides.

104 Kokumin nenkin hō, art. 16-2; Kōsei nenkin hoken hō, art. 34.

Importantly, the revisions set a lower limit to changes in benefit levels. Hence, if it appears as though the benefit level for a model household (an employee husband and full-time housewife, and thus the benefits that arise from their combined Basic Pension and Employees Pension Insurance) will fall below 50% of an average male insured’s net wages, the government must “undertake a consideration upon winding up the adjustment period” (and thus the Macroeconomic Slide), and “based upon this, bring the period to an end and implement other measures,” 106 presumably increasing the pensionable age again. The Macroeconomic Slide is expected to cut real values of both pensions by 15% (to 50.2% of the model household wage down from a current 59.3%) by 2023. However, the demographic projections on which this figure is based were overly optimistic. 107 Indeed the timing of the release of updated projections (allegedly delayed until the passing of the reforms) was one controversial element of the bill’s passage. 108 Hence, it appears as though the other measures, unspecified in the reforms, may be necessary.

4. Evaluation

The apparent long-term perspective 109 taken in the 2004 reforms was perhaps made possible by a bureaucracy less receptive than the legislature to voter discontent which should have (according to the IMF’s elderly voter profile) sunk the legislation. This may be one factor explaining the vast difference in deliberation time 110 between the preparation stage and legislative debate stages of the

---

106 Kokumin nenkin hō tō no ichibu o kaisei suru hōritsu, art. 2(2) (Supp. 2004).


108 Id.

109 That is, the automatic slide and the 100-year period the government must consider when preparing a current condition and future prospects report for pension finances.

110 See generally Tetsushi Kajimoto, Opposition to Wage Fresh War on Pension Reforms, JAPAN TIMES, July 23, 2004. Despite significant time spent preparing the new legislation, it contained an unprecedented amount of grammatical and other errors.
unpopular reforms. It may also account for the significant cuts to pension benefits despite strong opposition, particularly from older voters. Nevertheless, political momentum for the reforms was necessary, and the ruling coalition effectively used the sense of crisis (kōreika shakai kikiron) surrounding the aging issue in securing the passage of the 2004 reforms. The following sections address to what extent the reforms achieved restoration of financial viability, confidence, and intergenerational equity to the system. I then evaluate the legality of the reforms under domestic law.

a. Restoration of financial viability and confidence

There is debate regarding the inherent sustainability of the pay-as-you-go method of financing pension in an aging society. Nonetheless, as Komamura points out, like Finland, Italy, and Sweden, Japan seems to have successfully managed to factor in demographic change while maintaining a pay-as-you-go system. This novel solution has attracted interest abroad, and Komamura considers the Macroeconomic Slide a powerful means of locating the public pension system within society as a whole. On the other hand, some argue that there is no economic advantage to indexing pensions to demographic projections. Rather, it is a political decision

111 However, there were other reasons for this such as the many other controversial matters mixed up with the legislative debate, such as unification of the social security system, the default payment problem, personal information leaks, bribery and corruption within the social insurance agency, and the timing of the announcement of population projections.

112 Kohei Komamura, Rōrei Kiso Nenkin, Rōrei Kōsei Nenkin no Kyūfu Suijun: Keizaigaku no Kenchi kara [Benefit Levels of the Old Age Basic Pension and Old Age Employee's Insurance Pension: An Economic Perspective], 1282 JURISTO 60, 60 (2005).

113 Id. at 64.


115 Komamura, supra note 112, at 63.
automating adjustments to pension benefits while the concept is still palatable to voters.\footnote{117} Importantly, it does not reduce any of the uncertainty inherent in demographic projections.\footnote{118} An issue of significant contention during the legislative debate, the latest demographic projections were, perhaps deliberately, not made public until just after the law had passed.\footnote{119} As the surprisingly low fertility rate implies, there is a real risk that the Macroeconomic Slide will lower pension benefits to the minimum of 50% of employee wages ahead of time. This will require new measures to fund pensions. In a sense, therefore, the Macroeconomic Slide is a confidence trick, enabled by the spreading sense of panic regarding population aging. The political difficulty of finding ‘new measures’ is thus postponed until the political mileage of the Macroeconomic Slide runs out. And yet, a confidence trick may be just the thing that pension system needs to sustain it. It may just trick young defaulters back into the system and older voters to support measures that, in essence, place the risk of demographic factors with pension beneficiaries.

Furthermore, the government’s promise to increase its contribution to the Basic Pension to 50% will be somewhat effective in restoring confidence and financial viability to an area in dire need of help. On the other hand, some point out the lack of macroeconomic analysis behind this measure.\footnote{120} Such careful analysis, rather than political tricks and scare mongering, is essential to finding solutions to the basic dilemma of a pay-as-you-go pension system in an aging society. It is probably also the most effective way of restoring confidence.

b. Intergenerational equity

Komamura notes that although little has changed for current elderly generations, the windfall for cohorts born between 1950-1960

\footnote{116} See Henry J. Aaron & Benjamin H. Harris, \textit{Uncertainty and pension policy}, in TACHIBANAKI, \textit{supra} note 9, at 63.

\footnote{117} \textit{Id.}

\footnote{118} \textit{Id.} at 43.

\footnote{119} Yoshida, \textit{supra} note 107.

\footnote{120} SAKAMOTO, \textit{supra} note 25, at 33.
has lessened, and cohorts born after 1985-90 will suffer less unfavorable redistribution. While this is true, some point out that intergenerational distribution should be kept logically separate from intergenerational equity.\textsuperscript{121} Some argue, therefore, that the context of the whole economy must be considered in judging equity. For example, better returns for older generations may be offset by sacrifices they have made equipping the younger generations with human capital: education and training, for example.\textsuperscript{122} Moreover, younger generations now have less responsibility for the welfare of their parents, and indeed many receive resources from their parents.\textsuperscript{123} Therefore, comparing returns on pension contributions between current and previous generations is of limited utility without considering the wider context.

It is more constructive to focus on redistribution between current generations. Hence, it may be inequitable for the social security system to impose too heavy a burden on younger workers, who have lost their economic base through the casualization of the workforce. Conversely, it may be counterproductive to impose excessive social security obligations on working generations if this adversely affects the economy, which underpins the whole system. This is a real possibility considering that mandatory premiums effectively amount to a tax, which must be used carefully to balance efficiency and equity.

c.  Legality of the new benefit levels

I now examine the issue of whether the Pension Reform Act is consistent with certain constitutional guarantees such as the social right to a certain standard of living and the civil right of owning property. I also consider the Act’s consistency with other fundamental laws such as the Civil Code.


\textsuperscript{122} \textit{Id.}

i. Article 25 of the Constitution

Article 25, paragraph 1 of the Japanese Constitution states: “All people shall have the right to maintain a minimum standards of wholesome and cultured living.”124 This standard is given form by the ‘livelihood protection level’ (seikatsu hogo suijun). Assistance levels (fujo kijun) are set yearly according to household type, age, region, etc. by the Minister for Health, Labour, and Welfare.125 Before the revisions, the pension benefits of an average elderly couple were above this level, although a single member elderly household may not have been. After the lower benefit levels of the revisions are rolled out, both types of household will often fall below the livelihood protection level if they do not have supplemental income.

The Ministry of Health, Labour and Welfare has consistently stated that living assistance for the poor cannot be compared with the old-age pension because the Basic Pension is only one part of livelihood security, and is not subject to the same strict means testing.126 Nevertheless, comparing the current Basic Pension benefits of a single elderly household (2005 maximum ¥66,200,127 but a 2000 average of ¥51,000128) to the living assistance thresholds of this type of household (the level for a single 68-year-old in the Tokyo area is ¥80,820 per month),129 it is evident that a 15% cut will leave a single elderly household on the Basic Pension significantly below the threshold. Nevertheless, current scholarly thought, suggests that the

---

124 KENPÔ [JAPAN CONSTITUTION].
126 Komamura, supra note 112, at 65.
128 NIPSSR, supra note 3, at 16.
“minimum standards of wholesome and cultured living” of Article 25 need not be protected by one aspect of the legal system if it is protected by the system as a whole.130 This theory is given some weight by a decision of the Tokyo District Court considering whether the Basic Pension for Disability infringed upon Article 25 if it fell below the livelihood protection level. Holding that it did not, the Court stated that: “The minimum livelihood for each citizen is [. . .] … realised by the coordination of several policies based on several legal schemes.”131 Thus, if the same test were applied to the old age Basic Pension, the revised law would not infringe paragraph 1.

Article 25, paragraph 2 of the Constitution states: “In all spheres of life, the State shall use its endeavours for the promotion and extension of social welfare and security, and of public health.”132 There are two schools of thought on the legal implications of this paragraph. First, certain scholars133 and at least one Supreme Court judge134 hold that the article taken as a whole expresses an expectation toward the State that it will actively implement policies for the well-being of its citizens. However, there is also support for the contention that this paragraph, separate from the first, imposes an actual duty upon the State to ensure living standards beyond the absolute minimum.135 On one reading, the legislature would thus have more discretion in the field of social security and would have not only the prerogative to raise benefits but also to implement systematic reforms that involved cutting benefits.136 On another reading, such


131 1607 HANREI JIHÔ 30 (Tokyo Dist. Ct., Feb. 27, 1997).

132 Kenpô, art. 25, ¶ 2.

133 KÔ SATÔ, SHAKAI HOSHÔ HANREI HYAKUSEN [ONE HUNDRED SELECTED SOCIAL SECURITY LAW JUDGMENTS] 18 (1977) (cited in Nakano, supra note 102, at 70 n.16).

134 36-7 Minshû 1235 (Sup. Ct., July 7, 1982).

cuts would be limited by the need for sound rational grounds.\textsuperscript{137} Consistent with this reading, some argue that the law should be applied in the context of real world resource limitations, and the decision to maintain the balance of the pension system in the long-term by lowering benefits in the short-term should not be second-guessed by the courts.\textsuperscript{138} Accordingly, as long as a rational purpose exists for lowering benefits and the extent is proportionate to this purpose such an act will not infringe paragraph 2. Arguably, such purpose and proportionality exists in the 2004 revisions.\textsuperscript{139} Specifically, by utilizing the Macroeconomic Slide Mechanism, the system considers the impact on the livelihood of the elderly by maintaining the nominal amount of pension benefits and providing for adjustments to be made gradually.\textsuperscript{140}

Nakano acknowledges the situation created by the reforms by which the ‘income replacement’\textsuperscript{141} realized by the post revision benefit levels (50%) does not compare favorably to other social insurance payments such as health, and employment replacement rates (closer to 60%). However, she argues that it is more appropriate for a longer term scheme such as the old age pension to have lower replacement rates as adjustments can be made more gradually than in emergency situations such as health and employment crises.\textsuperscript{142} Furthermore, she notes that elderly households generally have fewer child-raising and housing costs.\textsuperscript{143}

However, an argument that the cuts are disproportionate could be made. Indeed, Komamura concludes that the cuts are so large that

\begin{itemize}
  \item \textsuperscript{136} Id., at 36 (cited in Nakano, \textit{supra} note 102, at 70 n.20).
  \item \textsuperscript{137} MASAYUKI UCHINO, \textit{KENPÔ KAIHAKU NO RONRI TO TAIKEI [THE SYSTEM AND LOGIC OF CONSTITUTIONAL INTERPRETATION]} 377 (1991) (cited in Nakano, \textit{supra} note 102, at 70 n.20).
  \item \textsuperscript{138} Nakano, \textit{supra} note 102, at 70.
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} Id.
  \item \textsuperscript{141} Nakano, \textit{supra} note 102, at 73.
  \item \textsuperscript{142} Id.
  \item \textsuperscript{143} Komamura, \textit{supra} note 112, at 66.
\end{itemize}
the role of the Basic Pension as a guarantee of a basic income for retirees requires re-evaluation.\textsuperscript{144} This is precisely because, while it is regarded as such, reforms such as those made in 2004 will continue to address but one pillar of the pension system without considering broader issues in the social security system.\textsuperscript{145} Particularly considering possible moves toward increasing the burden upon users in the nursing insurance system\textsuperscript{146} and drawing health insurance premiums from pensions,\textsuperscript{147} the failure of the 2004 reforms to provide a blueprint for the pension system that will compensate for the drop in income is a significant failure that arguably impairs any defense of the new system with regard to Article 25. Such a blueprint would include plans for enterprise and individual pension systems including, for example, policies to protect members of enterprise pensions funds.

The right to a certain standard of living is a social right. In the following section, I consider another major guarantee in the Constitution: the civil right to own property.

ii. Article 29 of the Constitution

Article 29 of the Japanese Constitution states:

\begin{quote}
The right to own or hold property is inviolable. Property rights shall be defined by law, in conformity with the public welfare. Private property may be taken for public use upon just compensation therefor.\textsuperscript{148}
\end{quote}

It is necessary to distinguish between pension benefits that have been determined and the mere expectation of pension benefits

\begin{footnotes}
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} See Komamura, supra note 112, at 66.
\textsuperscript{148} KENPÔ, art. 29.
\end{footnotes}
because of the different legal consequences that flow from each interest. 149 The basic right to benefits accrues upon fulfilling the conditions necessary to secure pension benefits. However, to obtain these benefits an application must first be made to the Chief Secretary of the Social Insurance Agency, who is required to make a determination. 150 It is through this determination that the specific right of claim accrues. 151 This distinction is important because it is difficult to regard a mere expectation as a property right subject to legal protections. 152

According to current scholarly thought, the right to own or hold property contained in the first paragraph of Article 29 extends to all property rights. These include those that arise under public law, including the right to receive a public pension. 153 On the other hand, as stated in the second paragraph, the contents of that asset right may be determined by law in accordance with the welfare of the public. 154 The Supreme Court has held with regard to this matter that the constitutionality of such a law depends on the following criteria considered collectively: the nature of the asset right, the extent the contents of that right have been changed, and the nature of the public benefit secured by the change. 155

On the first point, the nature of the asset right, some argue that because social insurance (shakai hoken) benefits are qualitatively different from social security (shakai hoshō) in the public purpose and funding of the latter, the former is an enforceable property right


150 Kokumin nenkin hō, supra note 6; Kōsei nenkin hoken hō, supra note 4, art.33.

151 49-9 Minshū 2829 (Sup. Ct., Nov. 7, 1995).


154 KENPÔ, art. 29.

155 32-5 Minshū 946 (Sup. Ct., July 12, 1978).
whereas the latter is not.\textsuperscript{156} Notwithstanding this argument, others argue that, unlike a private insurance scheme, the relationship between contributions and benefits in social insurance is inherently susceptible to adjustment considering the social policy purpose of the system as a guarantee of livelihood.\textsuperscript{157}

Regarding the second point, the extent to which the contents of that asset right have been changed, Nakano reiterates her conclusion that the cuts are not excessive (i.e. no more than necessary).\textsuperscript{158} Furthermore, she adds that the cuts should be considered in the context of other measures that have been taken to balance the equation between benefits and their burden, such as revising the taxation of the old-age pension and revising the system of payments for those receiving benefits with employment.\textsuperscript{159}

With regard to the third point—the nature of the public benefit secured by the change—the revisions have attempted to restore financial viability and public confidence in the public pension system by establishing a durable system that responds flexibly to socio-economic changes. Hence, it is arguable that the public benefit outweighs the individual loss of lower pension benefits.

Considering the above three criteria collectively, courts likely will find that revisions affecting cuts to benefit levels do not violate Article 29.

In addition to the Constitution, Article 1(2) of the Civil Code states: “The exercise of rights and performance of duties shall be done in faith and in accordance with the principles of trust.”\textsuperscript{160} This principle is generally recognized in Japan as also applying to the State.\textsuperscript{161} Some argue that because the public pension system (especially the National Pension) is founded upon trust, this Civil Code principle should especially be taken into account in gauging the

\textsuperscript{156} See Nakano, \textit{supra} note 102, at 71.

\textsuperscript{157} See Kikuchi, \textit{supra} note 152, at 79 (cited in Nakano, \textit{supra} note 102, at 71).

\textsuperscript{158} Nakano, \textit{supra} note 102, at 72.

\textsuperscript{159} \textit{Id}.

\textsuperscript{160} MINPÔ [CIVIL CODE], art. 1(2).

limits of acceptable modification to benefit levels.\textsuperscript{162} Indeed, in 1983 the Tokyo High Court quashed an administrative decision stripping pension benefits after the beneficiary had taken up foreign nationality.\textsuperscript{163} On the other hand, it seems unlikely that a court would reach the same conclusion regarding the 2004 reforms considering the diffused impact upon pension benefits relative to this case.

Policymakers are bound by constitutional limitations, and the judiciary has given substance to these limitations by examining the nature and scope of constitutional rights to welfare and property rights. This in itself should be a source of confidence underpinning the public pension system. However, it is also clear that the judiciary will give great discretion to policymakers in the field of pension reform considering the purpose and wider context of such reform.

C. Revisions to Address Non-Compliance and Defaulting

The reforms have raised the government’s contribution to Basic Pension benefits from one-third to one-half.\textsuperscript{164} This was to ensure that premiums would not have to be raised significantly, which would have likely increased the “hollowing out” problem – e.g. non-compliance and defaulting leading to insufficient revenue. Two other measures are discussed below: a new system of exemptions and reforms in the collection of premiums.

1. Exemptions

The fixed contribution rate has been seen as one of the causes of default\textsuperscript{165} because individuals on a low income simply could not bear the burden. According to a survey conducted by the Social Insurance Agency in 1999, this was the most common reason (63.8%)

\begin{itemize}
  \item \textsuperscript{162} Nakano, \emph{supra} note 102, at 72.
  \item \textsuperscript{163} 34-10 Gyōshū 1777 (Tokyo H. Ct., Oct. 20, 1983).
  \item \textsuperscript{164} Kokumin nenkin hō, \emph{supra} note 6, art. 85(1)(i); Kösei nenkin hoken hō, \emph{supra} note 4, art. 80(1).
  \item \textsuperscript{165} Iwamura, \emph{supra} note 71, at 45.
\end{itemize}
given for failing to make contributions.\footnote{166}{Toshiaki Tachibanaki, Social Security reform in Japan in the twenty-first century, in \textsc{Tachibanaki, supra note 9, at 19. Note, however, that this survey allowed multiple answers and such responses should be regarded critically.}} In 2000, a newly introduced system granted exceptions for students,\footnote{167}{Kokumin nenkin hō, \textit{supra} note 6, art. 90-3 (implemented Apr. 2000).} and permitted half payment for individuals who did not qualify for a full exemption.\footnote{168}{\textit{Id.}, art. 90-2 (implemented Apr. 2002).} In 2004, a system was introduced to allow more flexible exemptions\footnote{169}{\textit{Id.}, arts. 90-2(1), 90-2(3), 94 (post 2004 reform).} and special consideration for those less than 30 years of age.\footnote{170}{Kokumin nenkin hō tō no ichibu suru hōritsu, art. 19 (Supp. 2004).} However, some express reservations about the effectiveness of these measures considering the goal of reducing the financing problems of the National Pension.\footnote{171}{Iwamura, \textit{supra} note 71, at 46.} More partial contributors will only partially solve the problem. Furthermore, although the system of special exemptions for those under thirty envisages that these foregone payments will be recouped after the age of thirty, there are doubts that this will actually occur.\footnote{172}{\textit{Id.}}

2. \textbf{Collection of premiums}

The new revisions with regard to collection of premiums have two main elements. First, the revisions envisage measures to ensure that information about the system is presented in an accessible manner.\footnote{173}{\textit{See} Ministry of Health, Labour and Welfare, Heisei 16 nen nenkin seido kaiseian ni tsuite: Sankō shiryō [Regarding the 2004 Revisions to the Pension System: Reference Materials] 24 (2004).} Confusion rather than willful non-participation appears to be the cause of non-compliance and default.\footnote{174}{\textit{See} Yoshida, \textit{supra} note 72.} Second, the reforms seek to achieve higher compliance levels by strengthening the
investigation powers of the Social Insurance Agency Chief Secretary (the Social Insurance Agency Office). On the other hand, as regulatory theory suggests, enforcement is often an imperfect method of achieving compliance, not least, because it entails significant operational costs. Furthermore, despite increased investigation powers, limitations will remain on collecting information about assets and income. Therefore, enforcement is appropriately the last resort in a mix of regulatory techniques including encouragement and incentives. Restoring confidence in the system is a crucial part of this mix, as are the potential flexibility of exemptions, and information campaigns. For example, some quarters seek to demonstrate the self-serving nature of remaining in the public pension system, by emphasizing that the pension covers those with disabilities and the bereaved, by highlighting the risk of inflation and long life, and by offering advantageous tax deductions. Individuals, however, are not the only relevant actors

3. Non-compliance by corporations

Employee pension funds are widely thought to be grossly under-funded. However, MacKellar argues that obscure accounting practices make it difficult to grasp the reality of the situation in Japan. Some suspect that the situation may not be as bad as popularly perceived. Also, since reforms in 2001, more enterprises

175 Kokumin nenkin hō, art. 106.
177 See Iwamura, supra note 71, at 46.
178 See Grabosky, supra note 176, at 544.
179 ‘Nenkin Wakaru,’ supra note 6, at 19.
180 Id.
181 NIPSSR, supra note 3, at 15.
182 MacKellar, supra note 121, at 14.
183 Id.
are utilizing defined contribution schemes (as opposed to defined benefit), which are much less susceptible to the vagaries of aging and a particular company’s financial situation. ¹⁸⁴ Employers’ use of buzzwords, such as nenkin tōsan (bankruptcy by pension obligations) ¹⁸⁵ and nenkin risutora (layoffs because of pension obligations) ¹⁸⁶ therefore, takes on the shade of scare tactics used to cut labor costs. The shift towards casual and part-time employment is another strategy employers used to avoid social security obligations, which is why they strongly opposed extending such rights to these non-regular forms of employment. Moreover, employers have developed techniques of converting social security burdens into lower wages. ¹⁸⁷ More open accounting practices are required if companies are going to use cost-cutting measures as justifications for infringing upon workers’ rights to employers’ premium contributions. Although, as stated above, the details of private pension schemes are beyond the scope of this paper, problems in this area are a crucial part of the wider social security context and thus deserve attention. This is one area that was not addressed by the revisions. Yet, it needs to be considering the crucial position private pensions have in the wider context.

D. Revisions to Address Failure of Pension System to Adapt to Changing Industrial Structure

There were many respects in which the previous pension system was out of step with a changed demographic and socio-economic structure. Here, I address measures included in the 2004 reforms that seek to rectify the gap between the 1960s-moded legislative model and the actual structure of Japan’s current population and economy. First, I introduce and evaluate measures to increase worker participation. In an aging society it is crucial to utilize the invisible workforce made up of older persons and women.

¹⁸⁴ See Chikako Usui, Japan’s Aging Dilemma?, 107 WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS ASIA PROGRAM SPECIAL REPORT 16, 9 (2003).

¹⁸⁵ ‘Nenkin Wakaru,’ supra note 6, at 18.

¹⁸⁶ Id.

¹⁸⁷ See Yamada, supra note 66, at 39.
The pension system is thus fertile ground for reform considering the relationship pensions have to retirement. Equally relevant is the failure of the Employees Pension Insurance to recognize non-regular workers, which has a negative impact on women’s employment. Second, I examine reforms particularly relevant to female recipients of pensions. As the divorce rate increases, and women continue to live longer than men, adequate pension benefits are necessary to alleviate elderly female poverty, already a serious problem in Japan. Third, I critique reforms aimed at increasing the pool of labor by making the pension system friendlier to child-rearing and the incorporation of foreign workers into the system.

1. Measures to increase worker participation and labour mobility

   a. Pension benefits and the working elderly

Pension benefits are closely related to workforce participation of the elderly, because there is a high correlation between retirement and the age at which pension may be received. Any measures for reducing the number of dependents and increasing the ‘productive’ population are positive steps for an aging society. As described above, the 2000 reforms resolved that the ‘part pension,’ that is the earnings-related component of the Employees Pension Insurance, paid between sixty and sixty-five years of age would gradually be abolished. This means that the pensionable age will be sixty-five, without exception. To make up for this, policies to encourage workforce participation for sixty to sixty-five year olds are necessary. The 2004 revisions to the Stabilization of Employment of Older Persons Act are one arm of this. The other arm is removing work participation disincentives contained in the social security system. These policies are addressed below.

---

188 See MacKellar et al., supra note 19, at 71; see also Yamada, supra note 66, at 40.

189 See ‘Nenkin Wakaru,’ supra note 6, at 16.

Workers receiving benefits

One area particularly susceptible to reform is pension benefits paid to recipients still working. Significant reform occurred in this area in 1994, but some argue further reforms can increase participation.\(^{191}\) For example, a rule existed that cut 20% from all pension benefits for those in (full-time, regular) employment.\(^{192}\) Recent developments have changed the potential size of the pool of those still working and receiving benefits (zaishoku rōrei nenkin). First, although the pensionable age was officially raised to sixty-five, those receiving (relatively lower) benefits under the exceptions (“part pension,” for example) will remain for some time. Second, as it seems likely that part-time workers will be included in the Employees Pension Insurance, part-time workers between sixty and sixty-five years old would also be subject to the 20% cut. Considering the likely large number of people affected by this cut, policymakers regarded that the disincentives to employment outweighed the advantages for social security outlays. Thus, upon the recommendation of the Social Security System Deliberation Council’s Research Committee on Pension and Employment,\(^{193}\) the 2004 reforms abolished the 20% cut.\(^{194}\) On the other hand, other proposals submitted by the Committee were not taken up.\(^{195}\) This suggests that there is still some room for improvement.


\(^{192}\) Kösei nenkin hoken hō, arts. 11, 11-2, 11-3 (Supp.) (pre-2004 reform); Kokumin nenkin hō tō no ichibu o kaisei suru hōritsu, art. 21(1) (Supp.) (pre-2004 reform); Iwamura, *supra* note 71, at 47.

\(^{193}\) Social Security System Deliberation Council, *supra* note 191, sec. 4(5)i.

\(^{194}\) Kösei nenkin hoken hō, arts. 11, 11-2, 11-3 (Supp.) (pre-2004 reform); Kokumin nenkin hō tō no ichibu o kaisei suru hōritsu, art. 21(1) (Supp.) (pre-2004 reform); Iwamura, *supra* note 71, at 47.

\(^{195}\) These include easing restrictions on the permitted ratio (2 to 1) between benefits and wages when together they exceed ¥220,000. Social Security System Deliberation Council, *supra* note 191, sec. 4(5)ii.
Delayed pensions

As discussed above, the wage index or the price index is used to calculate pension benefits depending on when a worker chooses to retire and start receiving benefits. Hence, there is an incentive to continue working until sixty-eight, although some question the effectiveness of this incentive with regard to more wealthy retirees. Furthermore, reforms have been implemented to enable older workers covered by the Employees Pension Insurance to delay their pension benefits to receive a higher amount.

Analysis

Although reforms in this area go hand-in-hand with the Stabilization of Employment of Older Persons Act, arrangements in the social security system have a great impact on working arrangements. It is clear that the previous retirement system was eminently suitable for a modern industrial economy, one in which employees who have been paid and promoted according to seniority must be passed off onto the pension system to make way for young employees and control wage costs. However, this is no longer appropriate for the “new economy” in which labor pools must be maintained flexibly, including that of older persons. Therefore, much more significant reforms in the social security system will be necessary to enable autonomy in retirement decisions. This includes measures to promote diversity in working styles such as casual, part-time employment and gradual retirement to match the great diversity among individual older persons in health and motivation.

---


197 Kōsei nenkin hoken hō, art. 44-3 (effective Apr. 1, 2007); Iwamura, *supra* note 71, at 48. Moreover, the 2000 reforms extended coverage of the Employees Pension Insurance from below sixty-five to below seventy years of age. This means that those above sixty-five are also capable of both working and receiving benefits and are thus subject to the relevant zaishoku rōrei nenkin benefit restrictions. For those over seventy, however, the full pension benefit was received. The 2004 reforms did not change the upper age limit for entry coverage under the Employees Pension Insurance, but such workers will now come under the same benefit restrictions. This will help cut benefits, but may have a negative impact on older worker employment.


199 See Usui, *supra* note 78, at 182-83.
Policymakers have realized that this can be affected by removing inefficient disincentives to work, such as the 20% cut rule, and allowing workers to delay their pensions. However, measures to cut benefits need to be carefully planned so they do not affect the desire to continue employment. Policymakers need to explore further regulatory techniques and incentives. Another important reform would be to give increased recognition and protection to non-regular forms of work, which many older persons undertake. This is addressed in the next section on part-time employment.

b. Part-time workers

A significant feature of Japan’s new economy is part-time and temporary employment. Notably, this type of employment is particularly common among female workers. There was a marked increase in married women’s employment in the late 1970s, usually after childrearing. This was because of demand from an increasingly service-based economy, and women’s need to work to balance the family budget as the economy slowed. The vast majority of this employment was part-time as these married women were also undertaking housework without significant assistance from their husbands. Despite various reforms, it is still the case that married women are usually limited to part-time employment. Because of this strong link between women’s employment and part-time employment, any reforms in this area have a gendered aspect.

200 MACKELLAR ET AL., supra note 19, at 6.

201 Japan’s economy features a higher proportion of workers employed in the service and information industries. See generally Usui, supra note 184, at 16-22.

202 Suzuki, supra note 76, at 13.

203 Id.


205 Suzuki, supra note 76, at 20.
The sexual division of labor characteristic of Japan’s post-war “Fordist”\textsuperscript{206} industrial structure is reflected in, and sustained by, the pension system.\textsuperscript{207} Hence, the Employees Pension Insurance envisages a male breadwinner in full-time employment and a professional housewife, who is exempt from paying any contributions to either scheme.\textsuperscript{208} A number of problems arise from this arrangement in the face of the advancement of women in the workplace, and in recent years the exemption has come under fire. First, it discriminates against working women who must pay the Basic Pension (and Employees Pension Insurance if full-time). Second, it operates as a disincentive for dependent spouses to take on employment earning more than the threshold limit; an arrangement becoming less viable as the labor force shrinks. Also, for women generally, the threshold remuneration and working hours for entry into the employee pension system\textsuperscript{209} discriminate against women who, more so than men, do not meet the threshold.

Indeed, one of the major committees in the legislation formation process considering this issue has been the Investigative Commission on a Pension System that Responds to Changes Women’s Life Cycles\textsuperscript{210} under the supervision of the Ministry for Health, Labour, and Welfare. Its recommendations, in tune with the recommendations of the Research Committee on Employment and Pensions,\textsuperscript{211} included that the level of work required for qualifying for

\textsuperscript{206} Chikako Usui defines the Fordist economy as one characterised by mass consumption of durable goods and mass production by workers with durable skills. She gives the automotive, steel and rubber industries as examples. Usui, \textit{supra} note 184, at 17.


\textsuperscript{208} \textit{See} Roberts, \textit{supra} note 207, at 89.

\textsuperscript{209} \textit{Id}.

participation in the Employees Pension Insurance should be changed from three quarters of full-time working hours to half.\textsuperscript{212} Furthermore, even if this criteria is not met, coverage should be extended to workers who earn more than ¥650,000 in one year.\textsuperscript{213} Under the present system, dependent spouses who earn less than ¥1,300,000 in one year are exempt from making social insurance contributions.\textsuperscript{214} This results in workers (overwhelmingly women) limiting their participation in the workforce to below this threshold.\textsuperscript{215}

The 2004 round of revisions postponed until 2009 substantive consideration about whether, and if so, how, the incorporation of part-time workers into the pension system should be affected.\textsuperscript{216} The limiting effect on women’s labor in the face of aging and mass retirement suggests that this reform cannot be put off much longer. Indeed, some detect a fundamental shift in the Social Security Deliberation Council’s (shakai hoshō seido shingikai) position on this issue, noting that it appears to approve the two research committee’s recommendations.\textsuperscript{217} In July 2006, the Cabinet also backed reforms to include part-timers in the EPI.\textsuperscript{218}

\begin{thebibliography}{99}
\bibitem{211} Koyō to nenkin ni kan suru kenkyūkai [Research Committee on Employment and Pensions], was instigated by the Pension Bureau Chief of the Ministry of Health, Labour and Welfare.
\bibitem{212} Women’s Lifestyles, supra note 210, at 34.
\bibitem{213} Id.
\bibitem{214} NIPSSR, supra note 3, at 7.
\bibitem{215} Horioka places the number of wives who reduces their workforce participation for this reason at about 12%. C.Y. Horioka, Japan’s Public Pension System in the 21st Century, in Japan’s New Economy 99-119 (M. Blomstrom, B. Gagnes and S. La Croix eds., 2001), in MacKellar et al., supra note 19, at 72.
\bibitem{216} Kokumin nenkin hō tō no ichibu o kaisei suru hōritsu, art. 3 (Supp. 2004).
\bibitem{217} Sayuri Tsuda, Kōteki nenkin to pātotaimā [Public Pension and Part-timers], 1282 Juristo 55 (2005).
\bibitem{218} These measures were part of the “Basic Policies for Economic and Fiscal Management and Structural Reform.” Wives toiling part-time get pension boost, Yomiuri Shimbun, Aug. 21, 2006.
\end{thebibliography}
It is true that the competing goals of simplicity and yet responsiveness to diverse needs requires that this issue be given the deliberation it requires. However, the issue is by no means new and has been repeatedly postponed since first discussed by deliberative committees at least as early as 1994. A significant reason for the postponement was strong opposition from employers. Along with the flexibility of part-time and casual workers, such workers are cheaper to employ precisely because they do not incur Social Security costs. Nevertheless, the postponement of the issue reflects a failure to update the pension system to accommodate the diversity of working styles characteristic of the new economy. Moreover, this issue is logically prior to secondary issues, such as pension splitting, and the order in which these issues were addressed will affect their effectiveness, as shown below.

2. Measures to support female pensioners

   a. Pension splitting

In this section, I discuss pension rights upon the dissolution of marriage relationships. There are two reasons why this issue is relevant to demographic change. Firstly, benefit arrangements must keep pace with the changing shape of the family. As many households in the future will be single elderly women with little or no support from younger generations, pension benefits will be a key factor in alleviating poverty. A major reason for the increase in single elderly women is their superior longevity. Compounding

---

219 Id. at 59.
220 Id. at 53.
221 SAKAMOTO, supra note 25, at 48.
223 Tsuda, supra note 217, at 58.
this is the rising divorce rate in older cohorts. Some blame ‘excessive individualism’ for unsettling the family unit. However, more sophisticated analyses target the modern corporate culture that requires absolute commitment of husbands toward companies. Hence, long hours, for example, and *tanshin funin* (unaccompanied job transfers), have placed enormous stress on marriages. The result, an increasing divorce rate, has necessitated a system of splitting pension benefits.

Secondly, the increasing role of women as individuals in the public sphere (i.e. the workforce) has encouraged better recognition as individuals within the private sphere. That is, there is some movement toward individual (rather than family) ‘accounts’ under the pension system. This reflects the erosion of the family unit based on a modern sexual division of labor. The pension benefit splitting system reflects this recognition. Hence, upon marriage dissolution, it is now regarded as appropriate to calculate and apportion individual


226 The divorce rates for women in the cohorts 40-44, 45-49, 50-54, and 55-59 rose from 2.8 to 6.18, 1.91 to 4.23, 1.04 to 2.62, and 0.53 to 1.51 respectively. Nevertheless, the rate of increase is much larger at younger cohorts. NIPSSR, *Jinkō Tōkei Shiryōshū* (2005 Nenban) [Compilation of Population Statistics Data (2005 Edition)], http://www.ipss.go.jp (follow “Jinkō Mondai Kankei” hyperlink; then follow “2005 Nen Ban” hyperlink; then follow “VI. Kekkon, Rikon, Haigū Kankei Betsu Jinkō” hyperlink; then follow “Hyō 6-8” hyperlink).

227 See, e.g., the comments of members of the LDP’s Legal Affairs Panel regarding the use of different surnames for married couples: “The bill will promote too much individualism in society and lead to the collapse of Japan’s family system . . . [It’s] part of a campaign for breaking up the country,” *Dual-surname bill unlikely to be submitted to current Diet Session*, KYODO NEWS, Mar. 11, 2004.

228 *Kingston, supra* note 222, at 263.

229 *Id.*

pension benefits according to the economic and non-economic (domestic) contributions of both spouses to family finances.

Dependent spouses (overwhelmingly female) are covered individually by the Basic Pension. However, support in old age is premised upon a continuing relationship of dependency. In other words, the proportionate component of the Employees Pension Insurance is paid in the (employee) spouse’s name.\textsuperscript{231} In the case of divorce, particularly in middle age, many wives lost access to their husband’s substantial benefits and had to make do with just the Basic Pension allowance.\textsuperscript{232} Even in the case where both spouses pay into the Employees Pension Insurance, the eventual return on this is much lower on average for female than male employees. This is due to lower wages and less work experience.\textsuperscript{233} Upon divorce, either party can apply to the Family Court for a division of assets.\textsuperscript{234} However, the case law as to whether such assets include pension rights that have not yet accrued (i.e. determined by the Social Insurance Agency) is inconsistent.\textsuperscript{235} As a result of this, there is a significant gap in post-retirement income between the sexes.

As part of the reform package in 2004, a system was introduced (beginning in April 2007)\textsuperscript{236} to enable the division of pension benefits to ensure adequate income for divorcees, and to reflect equally the financial and other contributions both parties have made to the accumulation of pension benefits.

\begin{itemize}
\item \textsuperscript{231} \textit{Id.}, at 74.
\item \textsuperscript{232} This is due to a common lack of payments into the EPI. There are also few prospects of entering the EPI because of the difficulty re-entering the workforce as a full-timer. \textit{See id.}, at 74.
\item \textsuperscript{233} \textit{SIEGEL, supra} note 2, at 599.
\item \textsuperscript{234} \textit{MINPÔ}, art. 768.
\item \textsuperscript{235} \textit{Takahata, supra} note 230, at 74.
\item \textsuperscript{236} The system will be introduced for the period spent as a Category 2 on April 1, 2007 and for the period spent as a Category 3 on April 1, 2008. \textit{Kokumin nenkin hô tô ichibu o kaisei suru hôritsu}, art. 1(6) (Supp.).
\end{itemize}
How the system works

The Pension Revision Act inserts new sections\textsuperscript{237} into the Employees Pension Insurance Act that form the framework of the pension division scheme. One chapter deals with pension divisions in respect to the period of marriage in which the relationship consisted of two employees (i.e. two Category 2s).\textsuperscript{238} The Act creates a legal fiction dividing the record of payments of insurance premiums because another section prohibits the “assignment, seizure, or tendering as security of pension rights.”\textsuperscript{239} Parties to a divorce may agree to split the total record for both parties up to 50%\textsuperscript{240} If the parties cannot agree, either party may apply to the Family Court for a determination within two years of divorce.\textsuperscript{241} In this decision, the Family Court also has an upper limit of 50% and a lower limit of the amount that the party who has contributed a smaller amount has actually contributed.\textsuperscript{242} The decision is based on “the extent of the parties’ contributions to premium payments and all other considerations.”\textsuperscript{243}

A separate chapter of the Act deals with pension divisions with respect to the period in which the relationship consisted of an employee (Category 2) and a dependent spouse (Category 3).\textsuperscript{244} The legislation makes it clear that during this period insurance premiums

\begin{itemize}
\item \textsuperscript{237} Id., art. 12.
\item \textsuperscript{238} Kösei nenkin hoken hō, ch. 3-2 (effective April 1, 2007).
\item \textsuperscript{239} Id., art. 78-2(1).
\item \textsuperscript{240} Id.
\item \textsuperscript{241} Id., art. 78-3(2).
\item \textsuperscript{242} Id.
\item \textsuperscript{243} Id., art 78-2(2). In Japanese, hokenryō nōju ni tai suru tōjisha no kiyo no teido sono hoka no issai no jijō. To assist making the decision whether to settle or apply for pension division, either party may apply to the Chief Secretary of Social Insurance Agency for an assessment of accumulated pension benefits. This information is also given to the Family Court to assist in its determination. Although applications for pension division may be made in cases of marriage dissolution other than divorce, common-law marriages (jijitsukon) are beyond the scope of the new system.
\item \textsuperscript{244} Kösei nenkin hoken hō, ch. 3-3 (effective Apr. 1, 2007).
\end{itemize}
were borne as a couple (kyōdō shite futan shita mono). Hence, the division of the record is an automatic 50%, even if the other party does not agree.

**Discussion**

As noted above, the criteria for a Family Court determination regarding pension division between two working spouses has two elements and much room for judicial discretion. An evaluation of these criteria needs to keep in mind the apparent aims of the new revisions. Namely, to recognize mutual (but sometimes qualitatively different, i.e. non-financial) contributions to pension premiums by couples, to remedy the gap in pension amounts after marriage dissolution, and to ensure a decent livelihood in old age.

The first element of the criteria is the “extent of the parties’ contributions to premium payments.” Hence, in light of the first purpose, the revisions do not seek to divide pension amounts accumulated before marriage. Although this purpose seems to mandate a consideration of the particular circumstances, it is instructive to consider the case law with regard to the division of assets after divorce. There is some authority (particularly between two working spouses) for upholding the ‘50-50 rule’. That is, that the contribution should be regarded as relatively equal unless there is clearly a difference between the parties. Indeed, the Civil Code Reform Outline of February 1996 espouses this rule, which suggests it may be codified in the future.

245  *Id.* art. 78-13.

246  *Id.* art. 78-14(2).


248  Kokumin nenkin hō, art.78-2(2) (effective Apr. 1, 2007).

The second criterion is “all other considerations” (sono hoka issai no jijō). It is necessary to consider the case law regarding division of assets after divorce to determine how courts have interpreted this. Matters that have been held relevant include “living circumstances,” “other assets held,” and “responsibility for marriage breakdown.” The first two matters, “living circumstances” and “other assets held,” are consistent with the third aim of the revisions. That is, providing both parties to a divorce requires significant funds to support their well being in retirement. However, overemphasizing these matters does not sit easily with the second aim. That is, the more explicitly gendered element of remedying the gap (i.e. between husbands and wives collectively) in pension amounts.

It appears that conflicting goals exist in the revisions, reflecting deeper unresolved issues. The Basic Pension fails to provide a basic income. Therefore, a reform such as pension splitting that would otherwise be primarily a gender equality measure takes on the character of a poverty alleviation measure. Some argue that this wide provision equips the Family Court with the necessary flexibility to respond to the situation of the parties after the dissolution of marriage. This is done by considering pension distribution as merely one element of asset distribution. However, the confusion of the legislation’s purpose may affect judgements. For example, the third

---


251 Kōsei nenkin hoken hō, art. 78-2(2) (effective Apr. 1, 2007).

252 For judgements in which pension benefits have been at issue in asset division, see Shūhei Ninomiya, Zaisan Bunyo to Nenkin Bunkatsu -- Hanrei no Seiri to Kongo no Dōkō [Asset Division and Pension Division: Summary of Cases and Direction in the Future], 292 RITSUMEIKAN HÔGAKU 242 (2003) (cited in Takahata, supra note 230, at 80 n.20); Takatomi Ninomiya, Rikongo no Fuyō -- Nenkin ni Taisuru Kenri no Seisan [Dependants after Divorce: Liquidation of Pension Rights], 9 KAZOKU (SHAKAI TO HÔ) 107 (1993) (cited in Takahata, supra note 230, at 81 n.26); Shusei Ono, Fūfu Zaisansei to Taishokukin, Nenkin no Bunkatsu [Spousal Assets, Retirement Package and Pension Division], 131 HĪTOTSUBASHI RONGŌ 1 (2004) (cited in Takahata, supra note 230, at 80 n.26).

253 Shūhei Ninomiya, Zaisan Bunyo to Nenkin Bunkatsu -- Hanrei no Seiri to Kongo no Dōkō [Asset Division and Pension Division: Summary of Cases and Direction in the Future], 292 RITSUMEIKAN HÔGAKU 279 (2003) (cited in Takahata, supra note 230, at 81 n.27).
matter that courts have found relevant to “all other considerations” is “responsibility for marriage breakdown.” No relevant connection is apparent between this goal and the purpose of the revisions. Yet, the likelihood that courts will use similar benchmarks regarding division of pension rights highlights the broad discretion that the provision allows judges. While the judiciary in Japan remains overwhelmingly male,\textsuperscript{254} there is a danger that judges will identify more strongly with male applicants in applying this discretion. This danger suggests that specific limitations in the provision consistent with an explicit gender equality purpose are necessary.

As noted above, upon divorce there will be an automatic equal (50%) division of pension for periods in which an employee breadwinner (Category 2) financially supports a dependent spouse (Category 3). This is not true of other periods and thus, the new reforms have established a regime that discriminates against secondary breadwinner employees (also Category 2) by exposing them to the rigors of litigation. These are almost invariably working women, which creates an irony considering that one of the fundamental goals of the reforms was to remedy discrimination against women as befits the new economy.

Some may argue that the difference in treatment is negligible considering that courts may apply the 50% rule anyway. However, the difference is discriminatory practically as working dependents must undertake negotiation and then litigation if this fails. Even then, there is no guarantee that they will be granted the high level to which professional, i.e. not employed outside the home, housewives are automatically entitled. Moreover, it is illogical because the regime provides different outcomes based on the same justification. Namely, financial and non-financial contributions to household finances are qualitatively different and cannot be compared. Accordingly, so the argument goes, for the purposes of division, contributions should be assumed to be equal. However, this assumption seems too weak in the case of two working spouses and too inflexibly codified in the case of a working spouse and a dependent spouse. Furthermore, there appears to be an element of class bias in the arrangement as households with only one working spouse often belong to higher

\textsuperscript{254} In 2005, 13.7% of judges in Japan were women. Gender Equality Bureau, josei no seisaku, hōshin kettei sankaku jōkyō shirabe [Investigation into the State of Plans for Determinations on Policy and Directions with Regard to Women] (Jan. 24, 2006), http://www.gender.go.jp/2005statistics/1-3-1.pdf.
income brackets. Hence, it is only working women who must litigate for their pension rights even though they are often less equipped to do so.

Most importantly, the different treatment is also discriminatory symbolically, showing little awareness of the need to be neutral toward women’s participation in the workforce in light of an aging society. Admittedly, political compromise was a major factor in this outcome. Policymakers recognized that premium exemptions for dependent spouses are controversial for their differential treatment between working and dependent spouses. It was thus necessary to justify this different treatment by asserting that a dependent spouse actually did contribute to premiums, but in a non-financial way. One possibility would be to reflect this contribution in premium payments, creating a benefit right in the dependent spouse’s own name. However, the ruling coalition blocked the idea of individual ‘accounts’ for dependent spouses, due to fears that it would weaken the family bond. Hence, upon divorce only, the legal fiction that the burden of premiums had been borne by both was created.

The pension splitting system will be a significant factor in alleviating elderly female poverty. It is also in tune with contemporary attitudes toward the value of domestic work. Moreover, compromise is an inevitable element of the legislative

---

255 See Ueno, supra note 123, at 110.


258 Takahata, supra note 230, at 80.
process. Nevertheless, two fundamental and logically prior issues have not yet been resolved.

First, there remains the issue of whether, and how, to incorporate non-standard workers into the pension system. Although the trend of reform seem to be toward eroding, or even abolishing, the distinction between ‘Category 2’ working women and ‘Category 3’ dependent spouses, the new pension splitting scheme is premised upon, and strengthens, this distinction. As discussed above, this arrangement contributes to the polarization of working arrangements. It is thus no longer suitable for a new economy characterized by diversity in work arrangements. The distinction also has a dampening effect on women’s employment, which is undesirable in the face of the labor shortages associated with aging. Second, while the Basic Pension does not live up to its name, this reform takes on the character of a welfare measure rather than a primarily gender equality measure. Because the Basic Pension offers such a small benefit those who rely solely on this pension for income are susceptible to poverty. Women have a higher life expectancy than men. Thus, there are more female pensioners. Equally as significant, women are much more likely to depend solely on the Basic Pension. Hence, the pension splitting scheme was necessary to alleviate this somewhat.

b. Pension for the bereaved

The 2004 reforms affected several changes regarding widow’s pensions. Because of the superior longevity of women, this issue is strongly linked to women’s welfare. At present, a wife who has accumulated her own pension under the employment pension insurance loses these entitlements upon receiving a widow’s pension. From April 2007, adjustment will be made to reflect the wife’s premium contribution. Hence, the gap between the widow’s pension and her own pension will be paid.

Certain changes have been made to encourage workforce participation by widows. First, widow’s pension allowance will cease

259 ‘Nenkin Wakaru,’ supra note 6, at 15.


261 Kōsei nenkin hoken hō, arts. 38, 38-2 (effective until March 2007).

262 Id., arts. 60, 60-3 (effective Apr. 1, 2007).
after five years if a woman begins receiving allowances before the age of thirty and has no children.\textsuperscript{263} Second, widows above thirty-five are given extra consideration under the widows’ pension scheme considering the difficulty of entering the labor market at that age.\textsuperscript{264} The reforms have raised the minimum age to qualify for this consideration from thirty-five to forty years old.\textsuperscript{265}

Reforms in this area are positive readjustments to the new economy. They reflect the increasing role of women as income earners and remove disincentives to workforce participation when it is appropriate. However, while labor policies lag behind industrial change and women face discrimination and hardship securing employment providing adequate income, measures that reduce benefits need to be carefully scrutinized, lest they exacerbate the problem of poverty amongst elderly women.

3. Measures to combat low fertility and labor shortages

a. Consideration towards child rearing

Japan’s fertility rate will have a major impact on the future structure of the population.\textsuperscript{266} There is much room for reform of the social security system to facilitate the balance between work and family that many argue is the key to improving the low fertility rate. There are several provisions in the 2004 reforms, influenced by both the Investigative Commission on a Pension System that Responds to Changes Women’s Life Cycles and the Social Security System Deliberation Council’s Research Committee on Pension and Employment\textsuperscript{267} that display an increased awareness of the need to support parents engaged in child rearing. For example, at present a parent taking leave for childcare under the Japan’s national nursing  

\textsuperscript{263} Id., art. 63(1)(v).
\textsuperscript{264} Id., art. 62.
\textsuperscript{265} Id.
\textsuperscript{266} Ato, supra note 53, at 128.
\textsuperscript{267} See Women’s Lifestyles, supra note 210; see also Social Security System Deliberation Council’s Research Committee on Pension and Employment, supra note 219.
and childcare act 268 is exempt from paying pension insurance premiums. 269 The reforms now also extend this exemption to employers. 270 Furthermore, a system has been put in place for circumventing the disadvantage to calculating pension benefits faced by parents who suffer income losses by utilizing the childcare leave scheme.271

The reforms did nothing to remedy the structural impediments in the Social Security system such as the existence of polarizing categories based on dependency and work. Removing these would contribute to promoting a diversity of working styles that would allow the flexibility of all workers, but particularly women, to balance family and income. This seems a much more constructive way of combating low fertility.

b. Foreigners

The 2004 reforms contained no provisions concerning the pension system relating to foreigners. Indeed, since the Ministry of Health, Labour, and Welfare’s calls for the “internationalization” of the pension schemes in 1999 White Paper on Welfare,272 the issue has been conspicuously absent from the reform process. Social security is one of the most pressing issues regarding foreign residents in Japan, along with other infrastructure issues such as education and employment.273 There have been calls from various quarters for

---

268 Ikuji kyūgō, kaigo kyūgyō nado ikuji mata wa kazoku kaigo o okonau rōdōsha no fūkushi ni kan suru hōritsu [An Act for Childcare Leave, Nursing Leave and the Welfare of Workers Who Conduct Child and Family Care], Law No. 76 of 1991.

269 Kōsei nenkin hōken hō, art. 11 (Supp.).

270 Id., art. 81-2.

271 Id., art. 23-2.


273 See generally ATSUHIKO IDA, SHŌSHI KOREIKA TO GAIKOKUJIN RODÔSHA [LOW BIRTH RATE, AGING AND FOREIGN WORKERS], in SHŌSHIKA, KOREIKA TO SONO TAISAKU [AGING SOCIETY WITH FEWER CHILDREN] 224 (National Diet Library ed., 2005); Japan Federation of Bar Associations, Taminzoku Tabunka no Kyōsei Suru Shakai no Köchiku to Gaikokujin Minzokuteki Shōsūsha
allowing unskilled immigration to make up for the ever-increasing labor shortages inevitable in an aging society with a low birth rate. And yet, the government’s silence on this issue is in keeping with its policy toward unskilled foreign workers up to the present. Precisely by the failure to recognize the rights of such workers, and at times even their existence, the government allows these workers to enter through ‘side doors’ such as in the guise of students and trainees. This leaves them in a ‘legal limbo’ without the security of employment, welfare, and health that residents of any place require. Some have argued that the government’s relative silence on this issue demonstrates a deliberate policy of maintaining such foreign nationals as ‘guest workers’ workers who will leave before they put down roots and, as policymakers discern in the experiences of other countries such as those of Western Europe, make demands as residents on the social security system. Some suggest ideological reasons for this attitude, such as the desire to maintain cultural or racial integrity. Policymakers are doubtlessly wary of committing


275 An estimated 250,000 illegal residents are present in Japan. Diet Cracks Down on Overstayers, Widens Door for Refugees, JAPAN TIMES, May 28, 2004.


277 See KINGSTON, supra note 222, at 300.

278 See Id. at 301.


280 See generally TESSA MORRIS-SUZUKI, RE-INVENTING JAPAN: TIME, SPACE, NATION 185 (1998); MULTICULTURAL JAPAN: PALAEOLITHIC TO POST-MODERN (Donald Denoon et al. eds., 1996).
to a path of official multiculturalism, just as some detect its weakening popularity in other liberal states.\textsuperscript{281}

From a demographic perspective, the intake of immigrants as settlers would have to be immense to make any difference to the age structure, as immigration occurs across all age levels and is relatively small compared to the number of births and deaths.\textsuperscript{282} The government’s apparent policy of immigration is one of limiting period and age group. Most new immigrants are young because of the focus on students, trainees, and South American descendants of Japanese all of whom also tend to be young.\textsuperscript{283} Such a policy is sound, demographically speaking. From a humanistic perspective, however, it is problematic. It is also practically impossible, as a certain number of temporary workers inevitably settle in their host country.\textsuperscript{284} Moreover, the capacity of nation-states to resist the demands of the global market is questionable.\textsuperscript{285} In light of these points, therefore, the Government’s failure to address infrastructure issues for foreigners, including pension coverage, is destined to lead to counterproductive results in the long-term for both individuals and society.\textsuperscript{286}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{282} \textit{SIEGEL}, \textit{supra} note 2, at 11. \textit{See also} Jerrold W. Huguet, \textit{Can Migration Avert Population Decline and Ageing in East and Southeast Asia?} 20 J. Pop. Res. 122 (2003) \textit{Note that the number of immigrants required to maintain the Potential Support Ratio} (productive to dependent population) \textit{begins to be more realistic in terms of the host country’s capacity to absorb them when the retirement age is increased, although even at a retirement age of 75, 17 million immigrants are required between 2005 and 2050.}
\item \textsuperscript{283} \textit{See generally} \textit{Sellek}, \textit{supra} note 276 at 55-92.
\item \textsuperscript{285} \textit{Id.} at 28.
\item \textsuperscript{286} \textit{Sellek}, \textit{supra} note 276, at 229. \textit{See also} \textit{JAPAN FEDERATION OF BAR ASSOCIATIONS, Taminzoku, tabunka no kyōsei suru shakai no kōchiku to gaikokujin, minzokuteki shōsūsha no jinken kihon no seitai o motomeru sengen [Declaration Calling for the Establishment of a Basic Law on the Human Rights of...}}
\end{itemize}
\end{footnotesize}
It is important to note that this issue is not new. Residents with foreign nationality, such as ethnic Korean and Chinese have long been faced with this problem. The National Pension Revision Act excluded foreign nationals until 1982. To account for the impossibility of reaching the qualifying period of twenty-five years when they were belatedly brought into the system, a measure was taken in 1986 to allow pension benefits after only five years of contributions. However, this was of no help to foreigners over the age sixty, leaving many elderly foreigners without pensions. Although many municipalities have made efforts to remedy this, there are still many elderly foreign nationals – many who are second or third generation, Japanese born – who receive no old-age pension benefits. Test cases have recently been brought before the Kyoto District Court seeking pronouncement that this arrangement was unconstitutional and in violation of international treaties.

The ‘internationalization of pensions’ issue of which the Welfare White Paper speaks differs in focus from the above discussion. That is, due to economic globalization, more Japanese travel abroad for employment and more foreign skilled workers are required in Japan, while at the same time the pool of young Japanese shrinks. Therefore, new rules are required to cover the practical difficulty of qualifying for pensions when, for Japanese, these periods abroad are not taken into account, and for foreigners, their period of stay in Japan is insufficient. In other cases, individuals must pay


288 Id.

289 Id.


291 See Brophy, supra note 77.
‘double premiums,’ that is, one for each country.292 Rules to overcome these problems depend on bilateral treaties and the cooperation of other countries.293 Therefore, it is understandable that the 2004 revisions focused on areas under Japan’s jurisdiction only. Nevertheless, as with the part-time issue, some mention of the urgency of this issue could have been made.

In summary, the 2004 reforms merely entrenched a Social Security system that is premised upon a combination of citizenship and residency. This is counterproductive in the globalized economy of an aging society. Preparations need to be made in Social Security and other social infrastructure, as early as possible to avert future problems in Japan’s reception of migrant labor.

V. CONCLUSION

With regard to the financial viability of the reforms, some commentators are positive about incorporating the demographic issue into the pension system by way of the Macroeconomic Slide. However, it is important to realize that automating the revision process is a political decision, rather than an economic one. In this sense, the reforms are positive in making such a political decision at an early stage. The illusion of permanence in the system may be important in restoring confidence in it. Nevertheless, it remains illusory. Although legislation, once enacted, has a certain level of traction, future legislators are always free to dismantle the system.294 Furthermore, the system may be unsustainable in light of the unexpected demographic projections released just after the Pension Revision Act was passed. This issue in itself demonstrates problems in the government’s public relations campaign with regard to the pension system. This lies at the heart of the confidence issue. That is, under the five-year revision system, politicians continued to make

292 Id.

293 The state of such agreements is described in the White Paper on Welfare (Kōsei Hakusho). White Paper on Welfare, supra note 271. As of 1999, arrangements had been made with Germany and the U.K., and negotiations conducted with Belgium, the Netherlands, South Korea, Canada, Italy, France, and Luxembourg.

294 Indeed, opposition parties are campaigning to have the new system scrapped. Reiji Yoshida, Pension Bills Littered with Errors: Government Blasts Bureaucrats over Litany of Errors, JAPAN TIMES, Jan. 17, 2004.
unrealistic promises about the durability of reforms. Meanwhile, policymakers failed to explain to the public the inherent uncertainty of demographic projections. They also failed to explain in a historical sense why redistribution to older generations may not be a simple transfer of wealth. These failures explain the public’s alarm at each new round of reforms.

While the political headache associated with reforms may have been passed off to the automatic slide, there may be negative ramifications. For example, in buying (at least a sense of) more time to implement other measures to combat dropping fertility rates, more time may amount to more procrastination. This may delay reforms to facilitate the compatibility of childrearing and employment.

With regard to the legality of the automated benefit cuts, some potential remains for judicial intervention. This may occur if saddling the risks of demographic change with pension beneficiaries becomes disproportionate or irrational. The guarantee of social protection in Article 25 of the Constitution appears to require a holistic interpretation. That is, one arm of the system cannot be held wanting without considering all of the others. The corollary of this is that one aspect of social security, such as the old-age pension, may be found wanting if inadequately supported by the system as a whole. The 2004 revisions fail to address some important areas, such as the protection of members of enterprise pension funds. Although, it is unlikely that the 2004 revisions would be found to be unconstitutional in light of its means and grounds, the legislature is not completely unrestrained in this area, including the restrictions contained in Article 29 with regard to property rights. This may become significant in likely future reforms, such as increasing the burden upon users of the nursing insurance system and drawing health insurance premiums from pension benefits.\textsuperscript{295} Such reforms may need to take supplementary measures taking a broader contextual approach. Indeed, holistic reform of the entire social security system is a fundamental issue that remains unresolved.\textsuperscript{296}

The revisions to address non-compliance and defaulting in pension schemes can only be judged by their results. However, some have reservations as to their likely effectiveness. On the one hand, new special exemptions and dispensations may indeed increase cooperation. Yet, this may come at the expense of lost revenue. On

\textsuperscript{295} See Komamura, \textit{supra} note 112, at 66.

\textsuperscript{296} See Eguchi, \textit{supra} note 61, at 12.
the other hand, strengthening the arm of the Social Insurance Agency may be beneficial. However, due consideration must be given to regulatory theory. For example, in the face of resource and other limitations, enforcement is often best placed at the top of a ‘regulatory pyramid,’ in which most regulation is not coercive. Any number of incentives may be employed. Ultimately, the most effective measure to increase cooperation with the public pension may be to convince the public that it is in their best interest to do so. This also applies to enterprises, although there are sufficient grounds to apply stronger measures when enterprises seek to cut costs by infringing upon workers rights.

With regard to the revisions to address the failure of the pension system to adapt to changing demographic and industrial structure, the reforms are fraught with problems. The reforms targeted three crucial areas: first, increasing worker participation. The provisions with regard to removing disincentives for the working elderly are positive. However, the fact that policymakers did not adopt some proposals suggests that work remains to be done. Moreover, the effectiveness of these measures with regard to wealthy retirees is questionable. This demonstrates the importance of careful analysis based on regulatory theory to achieve optimum results, cutting costs to benefits without reducing the desire to work. The issue of bringing part-time workers into the social security system was addressed by not addressing it. The different treatment of individuals by the system, particularly between working women and dependent spouses, has counterproductive results for worker participation, for people of all ages.

The second area of reform was specifically aimed at female pension beneficiaries. The first issue was splitting pensions upon divorce. However, the failure to resolve the part-time issue impairs the effectiveness of this ostensibly gender equality measure. The new scheme entrenches the systematic bias towards a certain type of working-living unit: the ‘traditional’ family of employee husband and dependent spouse. This exacerbates the problem of how to adapt the pension system to reflect the individual, diverse working patterns of the new economy characterized by service and information industries and requiring maximum participation and productivity. Moreover, the purpose of this measure was obscured considering that it is also necessary as a welfare measure; the Basic Pension does not function

---

as according to its purpose, a provider of a basic living allowance. Thus, policymakers implemented a system for pension splitting to alleviate elderly female poverty.

The changes to pensions for the bereaved are inherently linked to the welfare of women. The reforms target widows, particularly those without children, to cut benefits and improve workforce participation. However, these changes must be accompanied by measures to improve the marginalized position of women in the workforce.

The measures aimed specifically at women, therefore, are not wholly committed to gender equality. This appears to be because of unresolved issues such as the role of the Basic Pension, the position of part-time workers in the social security system, and discrimination in employment.

The third area of reforms was attempts to increase the pool of workers. The reforms show promising consideration toward individuals in the pension system who are raising children. Policymakers made an important step in recognizing that employers must also be brought on side in attempting to maximize utilization of the childcare leave regime. It was also positive that the reforms recognized the income disadvantages associated with using the system. This is particularly relevant to men, who with higher incomes stand to lose more. On the other hand, if the government’s goal is to increase the birth rate, it is the structural issue of different treatment for different categories of insured that needs addressing. Obstacles and disincentives such as the earnings threshold for social security force women to choose between work and child rearing. This affects the birth rate because an increasing number of women are choosing work.

Finally, measures with regard to foreign workers and residents are absent from the reforms. This is in spite of the crucial need to address these issues for all immigrants, old and new. The aging economy needs these workers, and there is surplus supply. If these issues are left unresolved, Japanese society will face serious disruptions in the future.

In spite of these defects, the momentum of reform itself remains promising. This is particularly so, considering the compromises that had to be made to conservative legislators and aging voters with significant interests at stake. It seems that policymakers and legislators are sufficiently concerned with the demographic issue. Therefore, venues to discuss unresolved
fundamental issues will increasingly appear. Moreover, such strategic compromises will not be fatal to what will be Japan’s massive effort to both fight and adapt to population aging. While the public pension system remains in crisis, the reforms demonstrate that it is a manageable one and policymakers are ready to respond.