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JAPAN'S RECENT DYNAMIC DEVELOPMENTS IN IMMIGRATION LAW AND POLICY

RÉSUMÉ

Si le Japon n'a longtemps admis que des travailleurs étrangers qualifiés et sans le statut d'immigrant, il a toutefois récemment modifié sa loi sur le contrôle de l'immigration. Cette modification pourrait entraîner des évolutions importantes de la politique relative à l'immigration et notamment une acceptation plus large des travailleurs non qualifiés. Le présent article examine cette évolution sous l'angle de l'harmonisation des politiques de l'immigration et du travail.

MOTS CLÉS: *Japon, travailleurs étrangers, travailleurs non qualifiés, droit de l'immigration, droit du travail et de l'emploi.*

ABSTRACT

Having long admitted only skilled foreign workers on a non-immigrant basis, Japan recently amended its Immigration Control Act. This amendment could bring major changes in immigration policy, specifically the wider acceptance of unskilled workers. This paper introduces and examines this amendment from the perspective of harmonising immigration and labour policies.

KEYWORDS: *Japan, Foreign Workers, Unskilled Workers, Immigration Law, Labour & Employment Law.*

This paper analyses law and policy relating to foreign workers in Japan. In the era of «Abenomics», the economic policies advocated by Prime Minister Shinzo Abe's second administration since 2012 comprise «three arrows»¹: fiscal stimulus, monetary easing, and structural reforms. Immigration, as one element of the third arrow, has been widely debated in Japan against a background of falling birth rates, an ageing society, and globalisation.

At the end of 2018, the number of foreign nationals living in Japan was 2.73 million, forming 2.16 % of the total population². This is the highest in the country's history. Through the combined impact of the global recession and the disastrous earthquake on 11 March 2011, the number of foreign residents decreased to 2.08 million at the end of that year, before its subsequent recovery. It is reported that 1.46 million foreign nationals are currently working in Japan as of 30 October 2018³, of which 74,167 are reportedly overstaying as of 1 January 2019⁴, in contravention of the Immigration Control and Refugee Recognition Act (hereinafter, the «Immigration Control Act»). The majority of these over-stayers are thought to be working illegally.

Japan has continuously adopted a policy of accepting foreign workers only as skilled non-immigrants. However, it appears that this policy is beginning to be reconsidered.

Facing declining birth rates and an ageing society, the challenge of ensuring Japan's labour force is sufficient to meet nursing care needs and maintain manufacturing productivity is a contemporary policy issue. At some levels, the utilisation of Japan's domestic workforce, such as women, youths, the elderly, and the disabled, who have conventionally lacked sufficient employment opportunities, is being proposed as a solution to this problem. However, it is also being considered whether foreign workers should be

1 This references an account of Motonari Mori (a prominent samurai in the 16th century), who explained to his three sons, «one arrow could be broken easily, but three arrows held together could not».

2 Ministry of Justice, Immigration & Residence Control Basic Plan of 2019 : http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri06_00140.html

3 Foreign Workers' Affairs Division, Ministry of Health, Labour and Welfare, Press release, on 25 January 2019: https://www.mhlw.go.jp/stf/newpage_03337.html

4 See note 2.

allowed to immigrate to work in areas hitherto closed to them⁵. Furthermore, given the developments in both the economy and society engendered by globalisation, there is a current policy issue regarding not only the training of Japanese human resources but also the proactive immigration of a diverse range of highly qualified foreign nationals to maintain and strengthen Japan's international competitiveness.

From a medium to long-term perspective, setting policies to ensure Japan's vitality through both Japanese citizens and foreign nationals is an increasingly important issue. However, it is necessary to also consider how to cope with the unemployment of both Japanese and foreign workers when economic downturns undermine the employment situation.

Besides not accepting unskilled workers, Japan's immigration policies from the 1980s to today are seemingly a series of ad hoc strategies too heavily influenced by changing industrial needs. When Japan's economy has grown, significant numbers of foreigners have been accepted, such as *Nikkei-jin* (up to third-generation Japanese descendants⁶) and trainees (now called «technical intern trainees» or «interns»). However, with each recession, Japan has required them to return to their home countries⁷. It is questionable whether Japan has truly learned from these experiences.

This paper examines these policy issues, initially outlining the perspectives from which labour law and policy issues relating to foreign workers, and then considering legal issues relating to the Immigration Control Act in Japan.

I - PERSPECTIVES FOR EXAMINING LABOUR LAW AND POLICY ISSUES RELATING TO FOREIGN WORKERS

Before considering this topic's main issues, it is necessary to clarify the perspectives from which this paper examines labour law and policy issues relating to foreign workers (see Figure 1).

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- 5 Before the amendment of the Immigration Control Act of 2018 as stated below, Nippon Keidanren (Japanese Business Federation) suggested that highly qualified human resources should be allowed to immigrate within certain parameters: Nippon Keidanren, An Economy and Society That Responds to the Challenges of a Declining Population, 14 October 2008: <http://www.keidanren.or.jp/english/policy/2008/073.html>. The Japan Chamber of Commerce and Industry (JCCI) and the Tokyo CCI proposed the establishment of a new status of residence for «Medium-Skilled Workers»: JCCI and Tokyo CCI, «A Proposal on Accepting Foreign Workers in Specialist/Technical Fields», 25 April 2018: <https://www.jcci.or.jp/recommend/2018/0426110527.html>
 - 6 *Nikkei-Jin* workers have the status of residence of a «Spouse or Child of Japanese National», or «Long-Term Resident». Recently, a special treatment programme was implemented for fourth-generation *Nikkei-Jin* workers to allow them to work in Japan for a certain period.
 - 7 In reality, many poor and unemployed *Nikkei-jin* workers remained in Japan during the global recession. See H. Watanabe, «Gaikokujin Rodosha No Shitsugyo No Genjo» [Surveys on Unemployed Foreign Workers], *Japan Institute for Labour Policy and Training*, 2012, p. 43.

Figure 1 - Framework of policies and laws relating to foreign workers

Source: Created by the author

A - SELECTION AND INTEGRATION

The first perspective concerns the principles of selection and integration, considered to be fundamental to any policy on foreign nationals. Under international conventions, each country has discretion over whether or not to allow each foreign national to enter its territory⁸. This is the principle of selection, the criteria for which are defined by each country in their immigration laws (in Japan's case, the Immigration Control Act).

For foreign nationals admitted to a country and residing therein according to applicable laws, the principle of integration requires that they should be given the same basic status as nationals of the host country, which should not engage in inappropriate discrimination toward them. The principle of integration is often reflected in international conventions regarding, inter alia, national treatment⁹, and is significant in establishing the rights of foreign nationals. Countries have adapted their constitutions and laws to regulate the principle of integration in practice. Specifically regarding the aspects of labour explored in this paper, labour and employment law is the means by which integration is functionally realised.

⁸ Judicial precedents also confirm that foreign nationals' right to remain in a country is not constitutionally protected (*McLean v Minister of Justice*, Supreme Court judgment, 4 October 1978, 32 Minshu 7, 1223).

⁹ For instance, the Universal Declaration of Human Rights (1948) and the International Covenant on Economic, Social and Cultural Rights (1966).

B - COMBINATION AND BALANCE OF IMMIGRATION POLICY AND LABOUR POLICY

To summarise the above in terms of foreign labour policy, immigration law is the means of realising the principle of selection, while labour and employment law is the means of realising the principle of integration. The second perspective, then, is that immigration and labour policies based on these laws interact in realising these principles. We can consider these perspectives by approaching immigration law from a labour policy standpoint and, conversely, by approaching labour and employment law from an immigration policy standpoint. In addition, the third perspective concerns achieving balance and harmonisation between the selection and integration principles under immigration and labour policies.

II - IMMIGRATION LAW SCHEMES RELATED TO LABOUR POLICY

A - OUTLINE OF IMMIGRATION LAW SCHEMES

With respect to labour policy, some functions of immigration law may influence a country's labour market law. More specifically, immigration law usually:

- determines whether foreigners can be admitted and, if so, the duration of their stay (permanent or temporary; immigrants or non-immigrants);
- considers impact on the domestic labour market (labour policy consideration);
- controls quality (skilled or unskilled) of foreign workers;
- controls quantity (cap, allocation of visas) of foreign workers.

To achieve these functions, immigration law institutes specific schemes. In most countries, immigration law relating to foreign workers adopts a combination of schemes (see Table 1 p. 97).

B - EVALUATION OF IMMIGRATION LAW IN JAPAN

Japan has a status of residence system (a), a points-based system (b), and admission based on transfer of technology, skill, or knowledge (c), the latter being termed the Technical Intern Training Program. Its points-based system differs from those of other countries, and would be more accurately termed a «points-based preferential treatment system» for highly skilled professionals under the status of residence system, including (e.g.) fast track permission for permanent resident status. By contrast, Japan does not employ any of the other three schemes outlined in Table 1 (d) to (f).

III - FOREIGN WORKERS AND THE IMMIGRATION LAW: REALISING THE PRINCIPLE OF SELECTION

A - JAPAN'S TRADITIONAL POLICY

1 - Acceptance of Immigrants

First, regarding limitations on length of stay, an important issue of immigration policy is whether a country (a) accepts immigrants, who are given permanent resident status at the time of entry, or (b) accepts foreigners only as non-immigrants, allowed to stay temporarily. To date, Japanese policy has only been to accept non-immigrants. However, it is currently

Table 1 - International Comparison of Immigration Law Schemes

Scheme	Features	Main Targets of Regulation	Adopting-Country Examples	Advantages	Disadvantages
(a) Status of Residence System	Requires foreigners to belong to the category based on work activities.	Workers (general)	U.S.A. Japan	Establishes a category and sets criteria based on labour market demands	Unsuitable for complex work activities
(b) Points-Based System	Admission to enter and stay is given based on points obtained by individuals.	From highly skilled professionals to skilled workers (usually for Immigrants)	Canada, Australia, U.K. [1]	Easy to attract desirable people due to transparency; Easy for foreigners to estimate their own eligibility.	Even if recognised as a highly skilled professional at time of entry, there are risks of low utilisation of the competency or later unemployment problems.
(c) Admission based on Transfer of Technology, Skill or Knowledge	Work permit is preconditional on such transfer.	Non-skilled or medium-skilled workers	Japan	Benefits for sending countries through skill transfer; Non-immigrant status can avoid problems arising from permanent residence.	Abuse of scheme, such as exploitation of cheap labour; To confront abuse, inspection schemes are required; High social cost to protect interns.
(d) Labour Certification	Estimates impact of a foreign worker on the labour market and eliminates negative impacts such as unpleasant working conditions, or unemployment.	Non-skilled or medium-skilled workers	U.S.A. Germany [1]	Reduce or prevent negative impact on domestic labour market, and adverse working conditions or unemployment.	By individually estimating impact on the labour market, the procedure may become complicated and time-consuming; Occupation changes after entry reduce significance of original estimations.
(e) Employment Permission	Employers must first seek workers in domestic labour market before being allowed to employ foreign workers.	Employers who want to employ workers from outside the country	South Korea	Same as above (d)	Limitation on workers' mobility conflicts with human rights such as freedom of choice of occupations; Not suitable for long term permission.
(f) Employment Tax (Levy)	Impose tax or levy on employers who employ foreign workers.	Mainly regulates employers who employ non-skilled foreign workers.	Singapore	Social costs of foreign workers are borne by their employers; Tax revenue can be utilised for vocational training of nationals.	Burden on the employer; if protections of foreign workers such as minimum wage and equal employment are insufficient, then tax burden is likely to reduce foreign workers' wages.

[1] The U.K. and Germany both accept foreigners from outside the EEA.

Source: Created by the author

becoming easier for a foreigner who first enters Japan as a non-immigrant to acquire permanent resident status after a certain period of stay.

2 - Acceptance of Unskilled Workers

Next, regarding the qualitative management of foreign workers, it is an important policy question whether a country (a) only accepts skilled or professional workers, or (b) also accepts unskilled workers. Japan's basic policy has long been to accept foreign workers in skilled or professional fields but reject unskilled workers.

Regarding the admission of non-immigrants, skilled workers are admitted without much difficulty, whereas (at present) unskilled workers are not accepted. The exceptions are *Nikkei-Jin* workers and technical intern trainees, which were respectively added in the 1980s and 1990s.

B - OUTLINE OF JAPAN'S IMMIGRATION LAW

1 - Status of Residence System

Let us briefly examine how Japan's Immigration Control Act treats foreign workers. Under this Act, the core concept regarding the immigration and residence of foreign nationals is their status of residence (see Table 2 p. 99). In principle, foreign nationals can enter and remain in Japan only if permitted to do so by their status of residence (art. 2-2); unless they are given permission to renew the period of stay (art. 21), they may not remain in Japan beyond the expiry of their status of residence. In addition, foreign nationals may not engage in any activity resulting in income or payment other than those expressly permitted by the terms of their status of residence (art. 19).

Categories of status of residence that allow employment include «Permanent Resident», «Spouse or Child of Japanese National», «Spouse or Child of Permanent Resident», and «Long-Term Resident». These statuses are not based on job qualification, but persons holding these statuses are permitted to work in any kind of employment, including unskilled jobs.

Foreign nationals not falling into any of these categories cannot be admitted without special technical skills. Thus, unskilled labourers cannot be admitted. Categories of status of residence that permit working are restricted to highly specialist roles, such as «Engineer/Specialist in Humanities/International Services», «Diplomat», «Professor», and other categories indicating a commitment to public life. Another status category is «Designated Activities», the scope of which is defined by the Minister of Justice. Meanwhile, other categories of status of residence, such as «Student», only permit working under certain conditions, other than in activities for which the status of residence is given. In these ways, the Immigration Control Act uses the status of residence system to restrict working by foreign nationals.

With regard to the scope of immigration they allow, some of these statuses of residence have been acknowledged to require adjustments, in consideration of their impact on Japan's industry and the lives of Japanese nationals. For such categories as «Engineer/Specialist in Humanities/International Services», «Business Manager», and «Intra-company Transferee», the criteria for receiving permission to enter Japan are defined in the «Ordinance of the Ministry to Provide for Criteria Pursuant to Article 7, Paragraph (1), Item (ii) of the Immigration

Table 2- How status of residence determines permission to work

Status of residence defined by activity ^{*1}				Status of residence defined by identity or position
Eligible to work within scope of status of residence		Ineligible to work without permission	Depends on contents of Minister of Justice's designation	No work restrictions
Diplomat	Highly Skilled Professional (i)(a), (i)(b), (i)(c), (ii)	Cultural Activities	Designated Activities	Permanent Resident
Official		Temporary Visitor		
Professor		Student		Spouse or Child of Japanese National
Artist		Trainee		
Religious Activities	Business Manager	Dependent		Spouse or Child of Permanent Resident
Journalist	Legal/Accounting Services			Long-Term Resident
	Medical Services			
	Researcher			
	Instructor			
	Engineer/ Specialist in Humanities/ International Services			
	Intra-company Transferee			
	Nursing-Care			
	Entertainer			
	Skilled Labour			
	Specified Skilled Worker (i) & (ii)			
	Technical Intern Training (i)(a), (i)(b), (ii)(a), (ii)(b), (iii)(a), (iii)(b)			

Special Act ^{*2}
Special Permanent Resident

*1 Permission can be granted for employment outside the scope of a status of residence by the Minister of Justice.

*2 Special Act on the Immigration Control of Inter Alia, Those Who Have Lost Japanese Nationality Pursuant to the Treaty of Peace with Japan (Act no. 71 of 1991).

Source: Created by the author, according to the Immigration Control Act of Japan.

Control Act» (hereinafter, the Criteria Ordinance). Among those statuses of residence to which the Criteria Ordinance applies, those categories defined according to types of work activities are almost all subject to the legislative requirement that foreign workers must «receive an equivalent or higher salary to any Japanese national doing the same work».

It is clear from this that the legislation seeks to minimise the impact of admitting these foreign nationals on the labour market; however, the Criteria Ordinance contains no guidance on how to judge whether a foreign worker is paid an equivalent or higher salary to a Japanese one.

2 - Prohibition of Illegal Work

Foreign nationals working without a status of residence that allows them to work under the Immigration Control Act (i.e., a work permit) are known as undocumented workers. Persons hiring undocumented workers, placing them under their control, or sending them to work for others on a regular basis are liable to be prosecuted for facilitating illegal work (art. 73-2 Paragraph [1]). Undocumented workers themselves are liable to punishment (art. 70) and deportation (art. 24), but the Minister of Justice can consider their circumstances during the deportation process; if special permission for residence is granted, the person in question may remain in Japan under the terms of the status of residence they are awarded (art. 50).

IV - TECHNICAL INTERN TRAINING PROGRAM

Before the 2009 Amendment, revision of the Industrial Training and Technical Internship Program had been widely discussed in Japan, focusing particularly on the protection of trainees receiving on-the-job training (OJT). Under the pre-2009 system, first-year trainees engaged in OJT were not protected by labour legislation, since they were not regarded as workers. The 2009 Amendment stipulates that any training, including OJT, constitutes a Technical Intern training, and that labour and employment laws apply to trainees from the first year of their program, classifying them as «interns» with worker status. The only exception is the period of orientation taking place immediately after arrival in Japan. With effect from 1 July 2010, a new status of residence called «Technical Intern Training» was established, combining the former «Trainee» and «Designated Activities» statuses of residence into one.

Problems remain under the Technical Intern Training Program (TITP), including the violation of labour and employment laws by accepting companies and the collection of so-called deposit money by sending organisations abroad. Although the program is intended to promote skills transfer to developing countries, it has been criticised as back-door acceptance of cheap labour.

In response to these problems, the Technical Intern Training Act was enacted in 2016, and the new TITP was implemented on 1 November 2017. The Act established a new regulatory organisation, called the Organization for Technical Intern Training. In addition, supervising associations that manage the acceptance of trainees are now required to obtain government permission for their activities. The Act is enforced through various means, including penalties, the cancellation of such entities' permission, and the accreditation of technical intern training plans. In response to Cabinet pressure, the program has been greatly extended to include elderly care work.

Under the 2016 Act, the status of residence «Technical Intern Training» is divided into three stages, according to the nature of the activities. Stage (i) covers technical intern training activities corresponding to the classroom lecture and involving on-the-job training; stage (ii) covers technical intern training activities corresponding to the former technical internship; and stage (iii) covers technical intern training activities to develop higher skills. All stages are undertaken under employment contracts, so technical intern trainees at every stage are covered by labour legislation. Each stage is further divided into two categories, (a) and (b), according to the form of acceptance: category (a) training is provided by enterprises on an individual basis («individual enterprise-based training»), and category (b) training corresponds to association-managed training (art. 2-2 and Appended Table I (2) of the Immigration Control Act). Skill-acquisition activities are undertaken in an employment relationship with an «intern training provider» (an accepting company), overseen by a supervising association in accordance with the technical intern training plan prepared by the intern training provider.

One of the most important features of the Technical Intern Training Act of 2016 is the combination of immigration policy and labour policy, since the Act contains both immigration-related regulations and labour protection regulations. It could, therefore, be considered as hybrid legislation. Despite its enactment, however, the reformed TITP is still criticised as a way of importing cheap labour. We should carefully monitor whether the Act is correctly implemented. For instance, in the construction industry, which is important with regard to TITP, there are higher risks of industrial accidents. Measures on utilising the TITP should be established, together with industrial safety mechanisms for foreign workers.

V - INTRODUCTION OF STATUS OF RESIDENCE OF «SPECIFIED SKILLED WORKER» IN 2018

The Japanese government amended the Immigration Control Act at the very end of 2018, and the revised Act has been in force since 1 April 2019¹⁰. It established a new status of residence: «Specified Skilled Worker (i)» and «Specified Skilled Worker (ii)».

The government announced that 345 140 skilled workers would be admitted in the first five years of the scheme in 14 specific industries facing severe labour shortages: nursing care, building cleaning, materials industry, industrial machinery industry, electronics and electrical equipment industry, construction, shipbuilding/marine industry, car maintenance, aviation (airport ground handling and aircraft maintenance), hospitality, agriculture, fishing industry, food & drink manufacturing, and restaurant services.

To be granted the status of residence «Specified Skilled Worker (i)», a foreigner is required to pass tests of their skills and basic Japanese language competence. Technical intern trainees who complete the stage (ii) of the TITP in the same job categories are eligible to apply for roles in the above-mentioned 14 industries without first passing skill and Japanese tests. Such foreigners should have sufficient skills to enable them to start work without a specific training period. Additionally, although they must be aged at least 18 and be in good health, no educational qualifications are required. Workers with the status of residence «Specified Skilled Worker (i)» are allowed to stay in Japan for a maximum

¹⁰ On 8 December 2018, the Bill of Revision of the Immigration Control and Refugee Recognition Act was passed by the Diet (Japan's Parliament).

of five years in total; if unable to obtain the skill level of «Specified Skilled Worker (ii)», they should return to their home countries.

They are not permitted to bring their family members into the country. To be granted the status of residence «Specified Skilled Worker (ii)», a foreigner must have accumulated skills as high as other status of residence's skill levels. Although the maximum period of stay based on each permission is three years, this period is renewable without limitation. Individuals with this status are also allowed to bring family members into the country. It is thus feasible for a «Specified Skilled Worker (ii)» to stay in Japan for a long period or even permanently.

This amendment could lead to major changes in immigration policy in Japan, specifically through wider acceptance of unskilled workers. While some stakeholders see unskilled foreign workers as a source of cheap labour, others fear the cost of educating and managing them, citing cultural and language barriers. Further concerns include «integration» factors, such as welfare costs, as well as public safety and social stability.

Although Japan has toughened some aspects of its immigration policy - such as the rules of the Technical Intern Training Program - this will be offset by the possibility of more relaxed requirements for highly skilled professionals and greater immigration by unskilled workers. At the same time, it is becoming easier for foreigners who have entered Japan as non-immigrants to acquire permanent resident status.

Recent pushback from the domestic labour market indicates that the government might need to conduct more extensive consultations. It might become necessary to introduce certain labour market tests, such as requiring employers who plan to hire foreign workers to show they have attempted to recruit domestic workers beforehand. In addition, the idea of «integration», which should be considered within the framework of labour and employment policy, is not being given enough thought currently.

To avoid negative impacts on the domestic labour market and problems regarding working conditions and foreign worker unemployment, it is necessary to integrate and adjust these policies with a long-term perspective.

Conclusion

Chronic labour shortages have caused the Japanese government to liberalise its immigration policy. Since labour shortages in Japan's ageing society are becoming increasingly serious, the Japanese government is moving towards wider acceptance of unskilled workers under the 2018 amendment of the Immigration Control Act. However, the government denies that its policy has changed, pointing to the fact that «skill» features in the name of the newly created status of residence.

Such matters are not only immigration issues but also relevant to the labour market. This paper has proposed the perspectives that should be adopted when considering legal policy relating to foreign workers. In this regard, it is necessary to achieve balance and harmonisation between the selection of foreigners under immigration policy and the integration of foreign workers under labour policy.

The above-mentioned developments in Japan's immigration policy are short-term responses to current labour shortage problems. It appears that possible negative impacts

on the domestic labour market are not being sufficiently considered, especially as there remains no labour market test.

Another flaw in current policy developments is the insufficient consideration of «integration», which should be realised mainly under labour and employment policy.

To avoid negative impacts on the domestic labour market, as well as problems regarding the working conditions and unemployment of foreign workers, it is necessary to integrate and adjust the policies on immigration and labour & employment with a long-term perspective.

Unskilled workers were formerly admitted to Japan through the back door. However, under current policy, Japan is apparently beginning to open its front door to unskilled workers, although the relevant legislation still purports to require «skill».

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