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What Japanese Policymakers Should Know about How Government Contributes to Irregular Immigration

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Deborah Milly cautions that in establishing strict immigration regulations, governments run the risk of paradoxically contributing to irregular immigration. She identifies three general types of problems in government policies by comparing trends in Japan with South Korean, Spanish, and Italian responses to irregular immigration. To mitigate these problems, nongovernmental advocacy groups have an important role to play.

Japan is pursuing policy directions that combine a hard line on prosecuting illegal immigration with cautious encouragement of immigration by select groups. A recent document developed by the Ministry of Justice under former Deputy Minister of Justice Kono Taro advocates broadening opportunities for legal migration by moderately-skilled workers who do not qualify under current standards for highly-skilled professionals.[1] These workers would be allowed to enter for work only in designated industries where the Japanese labor force is inadequate, providing they met certain conditions such as Japanese language proficiency. The proposed changes would specify a range of rights for legally-resident foreigners and provide social security coverage, while prosecuting irregular immigration. These changes, while limited, would be a step in the direction of rectifying failings in Japan's current immigration regime, which relies on trainees and ethnic Japanese from overseas as unofficially recognized foreign labor sources. The extent to which foreign residents' rights are addressed in the document is also important. However, since both this proposal and existing immigration policy take a stern approach on monitoring foreigners and prosecuting irregular immigration, Japanese policymakers would do well to consider the dynamics of systems used elsewhere. The experiences of others suggest that without careful construction, government policies contribute to the emergence of irregular immigrants. Further, effective policies require incorporating the voices of civil society groups that serve immigrants.

The problem is this: restrictive policies designed to bolster enforcement often have a paradoxical effect of also promoting irregular immigration. Current policy directions aim for absolute enforcement but fail to ask how government policies may contribute to irregular residence. The experiences of other countries suggest that an emphasis on immigration enforcement without corresponding attention to human rights easily leads to unintended consequences. It is necessary to understand these dynamics and develop a system of rules that are feasible for foreign migrants, employers, citizens, and public officials to follow. More specifically, Japan and other countries will need to overcome definitional ambiguities concerning irregular immigrants, perverse incentive structures inherent in labor migration regulations, and administrative shortcomings. NGO advocacy groups play a crucial role in each area.

The discussion here draws on the experiences of South Korea, Spain, and Italy to consider issues that Japan also faces. (For Spain and Italy, the issue is immigrants from non-European Union countries.) These countries have experienced parallel effects of global political, economic, and technological developments. The four countries all confront very low fertility rates, ageing populations, and labor market imbalances, and in Spain, Italy, and South Korea most legal immigrants enter in order to work. While Japan allows much less migration for low-skilled work, it shares with these countries a demand for migrant labor by the informal sector and small businesses.

Grasping the dynamics that produce irregular immigrants is central to making policy improvements. In popular discourse, irregular immigrants are often portrayed as persons who have unlawfully entered a country. Irregular immigration is also seen as the failure of government to enforce border controls. But because of specific administrative requirements, irregular status can result for a number of reasons that vary by country, such as overstaying a visa, a change in activities allowed under a visa status, working more hours than are allowed, the loss of a regular employment contract, failure to renew a residence permit, or even divorce or reaching the age of adulthood by children of legally-resident immigrants.

Considering these administrative dynamics cross-nationally first entails clarifying differences in terms and usage, as governments may employ similar terms for permissions for entry or residence that are not equivalent across countries. Spain and Italy, and now South Korea, allow people to stay temporarily for the purpose of doing manual labor, among other forms of employment. All three countries require work permits, but in Italy and Korea, employers request them, while in Spain the individual does so. A work permit is only one part of the documentation requirement, as it is distinct from a "stay permit" (a visa) and separate again from a "residence permit." After entering Spain or Italy legally, one needs to apply for a residence permit, which may require additional documentation. In Spain, this includes proving one has housing that meets official standards of adequacy, not an easy thing to do. In Korea, the worker uses the signed work contract to obtain a certificate necessary for applying for a visa. Once in Korea, a worker must register as a foreign resident as is done in Japan.

These layers of permits affect how one may come to be "irregular." Because of the multiple permissions required, it is quite possible in Spain and Italy for a person to have a work permit but not a residence permit or to have a valid residence permit but to have lost one's job. In addition, regulations govern how much time workers have to look for a new job after losing one before their stay permit or residence permit is not longer valid. Sometimes government's own inability to handle backlogs in processing requests contributes to immigrants' losing regular status. Cross-national comparisons of estimates of irregular immigrants need to take these administrative conditions into account and one should be careful about equating large numbers of irregular immigrants with failures of border controls.

How to respond to irregular immigrants has been a challenge for all four countries, and this fact has made Japanese officials cautious. The large numbers of irregular immigrants in Spain, Italy, and Korea have fluctuated in response to periodic regularizations, generally in conjunction with immigration law revisions. Typically these regularizations have given legal residence status for a set period of time to immigrants who meet specified conditions; such processes do not cover everyone, however, and they often produce only temporary results, after which the number of irregular immigrants once again increased. In Japan, the number of irregular immigrants has been relatively stable or slowly declining. The government has resisted mass regularization as a solution. Rather, it has used case-by-case consideration of requests for residence permission in the context of deportation proceedings. Over time, exceptions for certain types of cases have become relatively straightforward. [2] Yet as Japanese immigration officials contemplate expanding work opportunities for immigrants, they also are focused on enforcement mechanisms that will prevent a growing irregular population.

Nongovernmental advocacy organizations, which provide services to immigrants but also often urge changes in relevant policies, are important for identifying inadequacies in immigration systems and providing necessary feedback. Their firsthand knowledge of immigrants is critical for policymakers, but unless officials listen to such NGOs they are unlikely to understand the realities that give rise to irregular immigrants or why the failure to insist on the rights of legal immigrants is part of the problem. In the four countries,

these NGOs comprise a mix of sectarian, labor, human rights, educational, and other types of organizations, but they vary in whether and how they are included formally through government institutions and in their impact on policy. Whether in Spain, Italy, or Korea, administrations sympathetic to advocacy groups' views have developed policies attentive to the human rights of irregular immigrants, but advocacy groups at times have been able to influence more restrictive administrations. In Italy and Spain, after sympathetic administrations lost power (after the Popular Party achieved an absolute majority in 2000 in Spain and after the Casa delle Liberta alliance under Berlusconi took control of both houses in 2001 in Italy), the voices of advocacy groups became muted, but they were not totally ineffective. In that context, however, the voices of international advocates became even more critical. In Japan, where advocates have not had a sympathetic administration with whom to ally, the results have been more piecemeal and dependent on lobbying of administrative officials, on decisions by the courts, and on surrogate representation through academic specialists. Similarly, for issues that reflect emerging international norms, foreign governments and international nongovernmental organizations have had an impact that domestic Japanese groups acting alone could not.

The opportunities for advocates to have a voice also vary according to how political and governmental systems work in these countries. Formally, in Spain and Italy, national, regional, and municipal forums include the voices of pro-immigrant groups, but it is questionable how much influence the local forums can have at the national level without a responsive political administration. In Spain, where the entire system of government is highly decentralized and the state's administrative apparatus is woefully inadequate, NGOs have been most active at the regional and municipal levels; they have even participated in negotiations over the administrative processes for regularizations and residence permits so as to better protect immigrants' rights. In Italy, advocacy groups have been able to mobilize and organize nationally to influence the content of legislation and urge changes in specific policies; they have been more effective under sympathetic administrations. Korean groups have followed a very similar path. They have pursued sustained efforts under a succession of sympathetic administrations to build a coalition outside of and within government in support of eliminating the Industrial Trainee Program.[3] Their influence has continued in the form of feedback on the recent Employment Permit System, which continues to undergo refinements. In addition, the Korean Human Rights Commission has addressed cases related to treatment of foreign workers.

Whether in Spain, Italy, or South Korea, and whether the governing administration at a given time takes a restrictive or lenient approach to irregular immigrants, many of the concerns raised by advocacy groups have to do with the ways that policies exacerbate the likelihood that immigrants will become irregular. Japanese advocacy groups share similar concerns. They should be able to contribute constructively to policy revisions that address unintended consequences of policies. Often such policies create irregular immigrants, sometimes because of the lack of basic rights protection.
They possess necessary information about how these policies are in fact working. They are thus well-positioned to contribute to proposals for improvement, even if the current administration is committed to a restrictive immigration regime with strict border enforcement.

Paradoxical Structures that Promote Irregular Immigrants

The regulations and rules that define an immigrant's existence can end up working in unintended ways. To balance the rhetoric of prosecuting illegal immigrants, policymakers and citizens need to ask how the government's own rules are directly or indirectly responsible for the appearance of many forms of irregular immigration. Here I identify three ways that governments make would-be immigrants into illegal migrants and the corresponding role played by advocacy groups.

The distinction between illegality and legitimate vulnerability

At a macro level of categorizing immigrants, many governments struggle to specify an often ambiguous boundary between "illegality" and the legitimate vulnerability of asylum-seekers and victims of human trafficking. International norms and international advocacy groups have had mixed impact in Japan and its peer countries. Domestic citizen groups have also attempted to play a role, but with less effect.

Because international conventions and European law have established standards for asylum cases, the international community has been especially vocal toward restrictive immigration regimes. Critics focus on the tendency by Spain and Italy to equate asylum-seekers with illegal immigrants, and to stage mass deportations worked out with Morocco and Libya, respectively. Italy's restrictive procedures and regulations for asylum-seekers, reminiscent of the system in Japan until 2005, have come under fire from the European Union, the United Nations High Commissioner for Refugees, Amnesty International, and other groups. Three major rulings from different Italian courts have faulted different elements in the system. Planned revisions of the immigration law of 2002 should improve the treatment of asylum-seekers.[4]

Japan, too, has made some major changes in its asylum regulations in the last two to three years. Despite years of domestic criticism, these came only after much international criticism, public mobilization on behalf of Afghani asylum-seekers, and a major diplomatic incident concerning North Koreans attempting to seek asylum at the Japanese embassy in China. In response, as of May 2005, the time period allowed for applying for asylum was extended from 60 days to 6 months after entering the country. In addition, an independent review board of private citizens and specialists was created to hear appeals. Prior to such changes, asylum seekers easily ended up as irregular residents. The procedural changes should be viewed positively, but just as the Italian government has come under fire for some of its practices, the Japanese government's handling of specific cases still periodically meets with rebuke.

Besides asylum-seekers, until recently victims of trafficking have tended to be treated as illegal immigrants rather than as victims of crimes. International cooperation to prevent trafficking is growing, and the European Union has issued documents that urge protections and stay permits for victims of trafficking to encourage their cooperation with criminal authorities; Spain and Italy both have set up systems for this. In 2005, the Japanese government established a new crime of human trafficking and set up protections for the victims and strong penalties for the traffickers. The public trigger for these revisions was not internal activism, however, but the harsh and embarrassing critique leveled at Japan by a US State Department report in 2004.

Thus, evolving international norms have contributed to leniency in accepting certain vulnerable groups as legal residents. Distinguishing between legitimate asylum-seekers and those with fabricated claims, to be sure, is a challenge for numerous European governments. Yet that does not justify dismissing the plight of those who merit treatment as asylum-seekers or arbitrarily making them into irregular immigrants. As indicated, intergovernmental organizations, international nongovernmental organizations, and individual states have been more persuasive than domestic groups acting alone when urging countries with restrictive regimes like Italy and Japan to conform to a higher standard.

The incentives to become irregular in employment permit systems

A second level of policy that contributes to irregular immigration is the structure of rules governing employment. Would-be immigrants are often caught in a set of administrative rules to regulate immigration that make it difficult to keep a regular status, create incentives to become irregular, and motivate employers to work outside of the system, even when a government specifies the rights of legal workers. Workers find themselves with grim choices of either accepting employers' abuses, becoming irregular, or returning to their countries. Employers likewise may be reluctant to play by the rules because of the extra costs imposed on them. The role of advocacy groups in such circumstances is not necessarily to protest government controls but to make sure that the rights of immigrants spelled

out in law are enforceable and that the system is not inherently biased against them.

Work-permit systems that claim to protect the rights of workers are a step above the trainee system in Japan, but the trainee and intern systems (*kenshusei seido* and *gino jisshusei seido*) in Japan share failings also inherent in many work-permit systems used elsewhere. How effective these systems are for protecting rights depends on the rules for workers who seek redress for abuse. In Japan's trainee system, one year of trainee status may be followed by up to two years of work-internship status. Trainees are not workers and are not eligible for standard workers' protections provided for by law, but interns are. The violations against trainees are rife: failure to pay full compensation promised, withholding from trainees' allowances all sorts of charges, holding of passports and bankbooks, large amounts of forced overtime work without compensation, and failure to provide training. Work interns have more legal standing to pursue some of these violations, but official intervention usually results in loss of one's position and returning to one's home country, as changing one's position is not an option. It is therefore difficult for trainees and interns to pursue their rights without either being sent home or fleeing and becoming irregular.

In work-permit systems, which guarantee basic labor rights, the rules may still impose this difficult choice. If a worker's pursuit of due treatment is likely to lead to retaliation and job loss, the rules fuel the process of irregular and abusive employment. In Spain, if a person with a work permit loses her/his job, s/he is required to leave the country to change jobs or to obtain a new work permit for a different job. In Italy, the 2002 law required immigrants to have a signed work contract to enter the country for residence and to leave the country as soon as the contract expired, with no opportunity to look further for work. An anticipated new law there will provide more legal means for workers to remain in the country if their contract ends; several features of the bill show the impact of nongovernmental advocacy groups.

In South Korea, where a sustained movement for foreign workers' rights eventuated in the shift from a trainee system to the Employment Permit System (EPS), more care has been taken to mitigate these contradictory incentives, but problems remain. Under the EPS, workers are allowed to change their jobs once a year, for up to a three year limit. In theory, this provides more choice, mobility, and an option to move should one's employer turn out to be abusive. However, to make such a move at the end of a contract year, one needs to meet a set of requirements, and the strict time limit placed on finding a new job means workers often become irregular. Finding the right mix of rules will require sustained efforts by the government, advocacy groups, and experts. The South Korean government continues to initiate more support services to protect workers but even so, problems remain. Recent newspaper reports indicate it is also seeking unpaid wages for overstayers before initiating their deportation. In short, the South Korean system continues to pursue a commitment to human rights while enforcing immigration controls.

Incentives likewise work against employer compliance. When expected to meet labor standards, pay into social security, and often to pay additional costs such as airfare, employers find it in their interest to hire irregular workers rather than conform to the work-permit systems. For this reason, Spanish employers have often resisted their workers' requests for a contract to obtain legal status. In South Korea, the transition from the trainee system to the EPS was only completed in January 2007, so major questions remain as to how much employers are living up to its requirements.

The incentive structure that discourages workers from protecting their rights and employers from observing the rules about equal treatment may drive both groups to rely on an underground labor market. But in countries where advocacy groups have a voice, as in South Korea, these groups are in a good position to pursue incremental changes that improve the chances that workers and employers will follow the law.

Administrative incapacities and inconsistencies

A third way government can contribute to the phenomenon of irregular immigrants is through its administrative incapacities and inconsistencies. Systems for administering work permits, residence permits, and contracts, all of which involve minute specifications, documentation, and processing, may work in theory but not necessarily in practice, especially when mechanisms for enforcement are weak. Japan does not face as many administrative challenges as do Spain and Italy, but administrators sometimes behave inappropriately or inconsistently, and the Immigration Bureau is often unwilling to make explicit the rules that govern certain kinds of cases. As well, stiff administrative requirements intended to control immigrants, when combined with an inadequate administrative system to implement them, easily compound the problem. Sometimes the only way to address the problem, as in Spain, is to incorporate advocacy groups into the administrative process, to compensate for failings of the state.

The Italian government's inability to process asylum applications and residence permits in a timely manner has often ended up producing irregular immigrants who lose legal status while waiting for applications to be processed. In Spain, the extreme lack of administrative capacity led to reliance on nongovernmental organizations in implementing regularizations. In South Korea, delays in processing and the complexity of the paperwork involved for the EPS have evoked employer resistance to the new system, as it has made it difficult for them to meet their employment needs quickly enough.

Administrative incapacity is only one piece of the problem everywhere: another is inconsistencies in delegation of responsibilities and the degree of discretion allowed. In Japan, immigrant-support groups have complained about inconsistencies from one regional immigration bureau to the next for some time. Since trainees do not have worker status, the Immigration Bureau has monitoring responsibility, but is unprepared for this supervisory role. In South Korea, it is difficult for government officials to enforce labor standards for foreign workers; for this reason, currently the government is trying to make it easier for abused or exploited foreign workers to obtain assistance through support centers.

What does the above discussion suggest for Japan as it proceeds to modify conditions for immigration and foreigners employment? Rather than simply focus on strict enforcement of immigration controls, officials would do well to attend to the dynamics that lead to irregular status. At this juncture, among the three general problems mentioned, the most pressing for Japan is to develop a set of rules and processes that will treat enforcement of protections, especially worker protections, as integral to immigration controls. Japan has made important changes toward mitigating ambiguities over the status of asylum-seekers and trafficking victims in response to international pressure, but it will still need to attend to how standards are applied in individual decisions. Administratively, Japan does not suffer from as much incapacity as some of its peers, but still needs greater consistency and transparency; in addition, if adopted, an employment permit system would mean additional layers of processing with potential for worsening delays, inconsistency, employer circumvention, and other problems.

The primary challenge for Japan is a pervasive one for countries who receive immigrants: to develop a system of managing migration that will ensure workers' protections and minimize incentives for employers and workers to engage in irregular employment. In doing this, Japanese officials would benefit from actively engaging advocacy groups as constructive participants in the policy debate. The lesson of the South Korean case is that, even with a commitment to human rights, it is difficult to protect workers and prevent irregular employment unless there is a concerted and sustained effort by officials, advocacy groups, and employers to make repeated adjustments that will respond to unintended policy outcomes. Including a role for citizen advocates is especially important for Japan, because the obligation to report violators of immigration law (*tsuho gimu*) causes sympathetic public officials to avoid studying closely the problems of irregular immigrants. Moreover, officials need to recognize that employing foreigners with moderate skills will still require monitoring to ensure worker protections and to prevent the dynamics that produce an irregular workforce. The upshot is that we

need to understand the relationship among government policies and practices, human rights violations, and irregular immigration, and not just enforce immigration controls.

NOTES

[1] Kongo no gaikokujin no ukeire ni kansuru purojekuto chiimu, "Kongo no gaikokujin no ukeire ni kansuru kihonteki na kangaekata," September 2006.
[2] Note that such visas are not equivalent to permanent residency, and they must be renewed on a regular basis.
[3] Lee, Y. W. and H. Park (2005). "The Politics of Foreign Labor Policy in Korea and Japan." Journal of Contemporary Asia 35(2): 143-165.
[4] South Korea became a signatory to the 1951 Convention relating to the Status of Refugees in December 1992, so its experience with asylum-seekers has been limited. Since 2000 the number of asylum applications has grown steadily with the largest number from China. However, some of the Korean government's asylum procedures have met with criticisms from international human rights groups.

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