IRREGULAR FOREIGNERS’ RIGHT TO HEALTH IN JAPAN: AN ANALYSIS FROM THE PERSPECTIVES OF INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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This paper aimed to analyze whether Japan fulfils its obligation as a State party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) as regards irregular foreigners’ right to health. In Japan, there are a great number of foreigners who reside and engage in activities (e.g. work) without proper documents. Due to their irregular status under the national law, these foreigners are restricted access to health care, including emergency medical care. This may be an infringement of international human rights standards set out by the ICESCR. Certain rights prescribed by the ICESCR are applicable to foreigners who are in an irregular situation. The paper focused on aspects of legal framework of the issue and conducted legal analyses of the ICESCR and the relevant laws and regulations of Japan. Through the analyses, the paper identified international standards of the rights concerned that States parties have obligations to ensure economic accessibility to emergency medical care by irregular foreigners. For the condition in Japan, the paper revealed that irregular foreigners are not guaranteed economic accessibility to emergency medical care due to their irregular status under the national law. The paper concluded that the concerned State practice of Japan was inconsistent with the international standards set forth by the ICESCR. The paper proposed recommendations to improve the condition.

Keywords: Irregular Foreigners, The Right to Health, International Human Rights Standards, ICESCR

1. INTRODUCTION

In Japan, there are a large number of non-nationals who have entered, stayed and/or engaged in activities without proper documents.\(^{10}\) Because their status is ‘irregular’, human rights of irregular foreigners are restricted under national legislation and policies, including the right to health. Japan prohibits, by law or administrative practice, the entitlement of irregular foreigners to public medical insurance coverage and to public assistance – the two national schemes available to the population for their economic accessibility to health care services. This condition puts irregular foreigners in a situation that they have to pay all the expenses by themselves when they receive health care, including emergency medical care. Since the expenses of health care, in particular that of emergency medical care involving surgical operations, are very high in Japan, even Japanese nationals with the national average income cannot afford the full expenses by themselves. For most

\(^{10}\) Hereafter, this paper will use the term ‘irregular foreigners’ to refer to these people. The term applies to, both, short-term stayers (e.g. foreign tourists) and long-term stayers (e.g. immigrants) where they are undocumented or in an irregular situation. Among immigrants, those who have naturalized as Japanese nationals are not referred to by the term.
irregular foreigners whose income is much lower than the national average as they work as low-skilled labours, the difficulty of paying the full expenses is more apparent.

This situation that irregular foreigners are not guaranteed economic accessibility to emergency medical care may be an infringement of obligations that Japan owes under the ICESCR. Although their residency status is ‘irregular’ under the national law of Japan, irregular foreigners are entitled the internationally recognized fundamental right to health under the ICESCR. Japan as a State party to the ICESCR is legally obliged to ensure irregular foreigners the right to health, to the extent the ICESCR stipulates. Given this background, this paper purports to find out: (1) the obligations of Japan under the ICESCR with regard to the implementation of the right of irregular foreigners to health, and (2) whether the relevant State practice of Japan meets the obligations. To this end, the paper conducts comparative legal analyses of the relevant international instruments and Japanese legislation through reviewing and interpreting the texts of the said legal documents.

2. INTERNATIONAL STANDARDS OF THE RIGHT OF IRREGULAR FOREIGNERS TO HEALTH UNDER THE ‘ICESCR’

This section identifies obligations of Japan regarding the implementation of the right of irregular foreigners to health under the ICESCR. The relevant provisions of the ICESCR as well as general comments issued by the Committee on Economic, Social and Cultural Rights (CESCR), the treaty body of the ICESCR, will be examined.

2.1. International Standards of the Right to Health

Article 12(1) of the ICESCR stipulates that “[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. The phrases “everyone” and “highest attainable standard” in this paragraph are crucial for the application of Article 12(1) to irregular foreigners. It has to be made clear in interpreting the clause whether the phrase “everyone” applies to an irregular foreigner, and to what extent a right-holder is guaranteed the right concerned under the phrase “highest attainable standard”.

2.1.1. The ‘Subject’ of The Right To Health

Concerning the meaning of the phrase “everyone” as the subject of the right to health under Article 12(1), the interpretation of Article 2(2) is critical. Article 2(2) provides that “the rights enunciated in the present Covenant will be exercised without discrimination of any kind”. This provision is generally referred to as the principle of non-discrimination, which can be found in other key international human rights instruments. Where these instruments reserve the application of

11 Article 12(1) of the ICESCR reflect in the 1946 Constitution of the World Health Organization (WHO), preamble, recital1, and the 1948 Universal Declaration of Human Rights (UDHR), Art. 25(1). Ito (2006) explains that the concept of the right to health emerged upon the great sacrifice of humanity during the Second World War and upon the international community’s deep reflection from it. In this respect, this paper finds a substantial international moral obligation of Japan – in addition to its international legal obligations under the ICESCR – for the implementation and development of the right to health in its territory and internationally, especially in the Asia-Pacific region.

12 The said instruments are the UDHR, Art. 2; the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Art.1(1); the International Covenant on Civil and Political Rights (ICCPR), Art. 2(1); the Convention on the Rights of the Child (CRC), Art. 2(1); and, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), Art. 1.
specific rights, the instruments provide for saving clauses. For the case of the ICESCR, there is a reservation of the implementation of ‘economic rights’ of non-nationals in ‘developing countries’ under Article 2(3). As it is clearly defined by the text of the article, this clause does not apply to ‘developed countries’ such as Japan, nor to ‘social rights’ such as the right to health. There is no clause that reserves the application of the right to health to irregular foreigners under the ICESCR. Given the absence of the relevant saving clauses, the general principle of non-discrimination set forth by Article 2(2) applies to irregular foreigners. Accordingly, it shall be interpreted that the right to health stipulated in Article 12(1) is, in principle, guaranteed to irregular foreigners.

With regard to this, the CESCR (2000) affirms the entitlement of irregular foreigners as the subject of the right to basic health care: “States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants” (para. 34). This comment is vital as it exemplifies such irregular foreigners as “illegal immigrants” as among the subjects of the right to the minimum essential level of health care under the ICESCR.

2.1.2. The ‘extent’ of the right to health

The subjectivity of irregular foreigners regarding the enjoyment of the right to health under Article 12(1) is confirmed, above. Now the term “highest attainable standard of health care” needs to be clarified. To what extent, are irregular foreigners guaranteed the right to health under the ICESCR? Concerning this, the Committee (2000) clarifies that irregular foreigners such as “illegal immigrants” are guaranteed “equal access” to health care (para. 34), as mentioned above. The Committee (2007) also points out that “[a]ll persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care” (para. 37). Accordingly, it shall be established that irregular foreigners are entitled the right to access to, at least, primary and emergency medical care.

2.2. States Parties’ Obligations regarding the Realization of the Right to Health

2.2.1. The issue of progressive realization

Considering the domestic implementation of the right to health by States parties, the issue of ‘progressive realization’ of the ICESCR rights shall also be discussed. With regard to this, the CESCR (1991) spells out that “while the Covenant provides for progressive realization …, it also imposes various obligations which are of immediate effect” (para. 1), and that “the full realization of the relevant rights may be achieved progressively” but the States parties must take “steps towards that goal … within a reasonably short time after the Covenant’s entry into force for the States concerned” (para. 2). The CESCR (1991) clarifies that the ICESCR “establish[es] clear obligations

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13 For instance, Article 25 of the ICCPR provides that only citizens are guaranteed the right to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Also, Article 1(2) of the ICERD prescribes the possibility of different treatment between citizens and non-citizens in respect to the application of the rights enshrined in the ICERD. Yet, in this respect, the Committee on the Elimination of Racial Discrimination (CERD), the treaty body of the ICERD, confirms in general the non-discriminatory application of the rights stipulated by the ICERD, noting that some rights – e.g. the right to participate in elections, to vote and to stand for election – may be applicable only to citizens (2004, paras. 2, 3 and 4).

14 Under the ICESCR, progressive realization is prescribed by Article 2(1): “Each State Party to the present Covenant undertakes to take steps … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means …”
for States parties in respect of the full realization of the rights in question” and thus the States parties are obliged “to move as expeditiously and effectively as possible towards that goal” (para. 9). In this regard, “any deliberately retrogressive measures” undertaken by the States parties would entail highest careful consideration, as well as full justification in terms of “the full use of the maximum available resources” (para. 9).

### 2.2.2. States parties’ core obligations

The CESCR (1991) comments on States parties’ core obligations that every State party has “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights (para. 10). In order to fulfil the core obligations, a State party must demonstrate that it has taken “every effort … to use all resources … in an effort to satisfy, as a matter of priority, those minimum obligations”; otherwise the State party cannot “attribute its failure to meet at least its minimum core obligations to a lack of available resources” (para. 10).

Regarding the realization of the right to health, the CESCR (2000) takes the stand that States parties have core obligations to ensure, inter alia, everyone’s “access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups” (para. 43). According to the CESCR, the said ‘accessibility’ is an essential element of the right to health; and the ‘accessibility’ has four dimensions, i.e. non-discrimination, physical accessibility, economic accessibility (affordability), and information accessibility. Among these four dimensions, this paper pays attention to ‘economic accessibility’ because in Japan irregular foreigners are not guaranteed access to emergency medical care due to the lack of appropriate public schemes that enable irregular foreigners to afford such health care services. Concerning the economic accessibility, the CESCR (2000) is of view that “States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities” (para. 19).

### 2.3. Summary

The international standards of the right of irregular foreigners to health under the ICESCR are as follows: (1) The right to health applies to irregular foreigners in States parties to the ICESCR; (2) States parties, including Japan, have core obligations to immediately take steps to ensure irregular foreigners access – including economic accessibility (affordability) – to the minimum essential levels of health care services, such as emergency medical care; and, (3) States parties, including Japan, have a special obligation to provide necessary health insurance and health-care facilities to irregular foreigners who do not have sufficient means.

### 3. IRREGULAR FOREIGNERS’ RIGHT TO HEALTH IN JAPAN

This section examines the conditions of irregular foreigners’ right to health, in particular their access to emergency medical care, in Japan. The national regulatory framework regarding the immigration control and the residency management of foreigners, as well as national schemes that ensure the economic accessibility of emergency medical care, will be examined.

#### 3.1. Irregular Foreigners in Japan

Japanese government carries out the immigration control and residential management of foreigners under the Immigration Control and Refugee Recognition Act (hereafter as the ICRR

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15 ‘Economic accessibility (affordability)’ is whether medical and health care facilities, goods and services are affordable to all, including those who are socially disadvantaged (CESCR, 2000, para. 12).
Act), 1951. The Act creates a framework of immigration control, so-called the ‘status of residence’ system. The Act prescribes 33 categories of the status of residence under which foreigners are permitted to land, engage in authorized activities, and reside for an authorized period (Article 2.2(2)). All foreigners, except those who are given a status of special permanent resident, must obtain 1 of 33 statuses of residence upon landing Japan (Art. 2.2(1)). Foreigners who do not have a status of residence appropriate to their landing, stay and/or activities are regarded as irregular foreigners.

Residency management of foreigners is implemented under so-called the residency management system, centered on the ‘residence card’ scheme. In general, foreigners who are permitted to stay in Japan for more than 3 months are registered in the system and issued a residence card. Irregular foreigners are not registered in the system, and not given a residence card.

3.2. Elimination of Irregular Foreigners from National Schemes that Ensure Economic Accessibility to Emergency Medical Care

There are two schemes available in Japan that ensure people economic accessibility to emergency medical care: (1) the public medical insurance system and (2) the public assistance. Yet, irregular foreigners are prohibited entitlement to both schemes as follows.

Public medical insurance system consists of two programs: the employee’s health insurance (EHI) program and the national health insurance (NHI) program. The EHI program is for employees and their dependents, whereas the NHI program is available to those who are not covered by the EHI, e.g. the self-employed, pensioners and their dependents. Every Japanese national must join either program. Foreigners who have an appropriate status of residence under the ICRR Act are entitled the membership in either program almost equally to Japanese nationals, provided that they meet the qualification requirements of the program (Ministry of Internal Affairs and Communications 2015). Meanwhile, irregular foreigners are, in practice, prohibited

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16 Japanese government maintains an extensive discretionary power to control the entry and residence of foreigners as foreigners do not hold the rights to land and reside in Japanese territory. The ICRR Act has its own procedural provisions that are not within the scope of the Administrative Procedure Act, 1993, and the Administrative Appeal Act, 1962. There is an argument (Japan Federation of Bar Associations 2014, 21-22; Kodama and Ohashi 2009, 93-100) that the procedures prescribed by the ICRR Act do not fulfill the constitutional requirement of due process, which is stipulated by Article 31 of the Constitution. Regarding the foreigners’ rights to entry and residence, however, most constitutional scholars, including those who extensively recognize the constitutional rights of foreigners, such as Prof. Okudaira and Prof. Urabe, take the stance that it is a matter of national policy or a matter of government discretion (Ito 1990, 198 and 357; Miyazawa 1971, 390; Okudaira 1993, 65; Sato 1999, 34-35; Urabe and Yamamoto 2002).

17 According to the latest survey done by Japanese government (Ministry of Justice 2015), the total number of irregular foreigners staying in Japan as of 1 January 2015 was 60,007. There are three major background conditions discussed by the precedence studies with regard to irregular entry, stay and activities. First, there is a structural problem of employment in manufacturing industries. Tanno (2009, 27-29) points out that foreign part-time workers hired at factories of manufacturing industries actually serve as a safety valve in employment. When the demand in domestic and international markets is high, manufacturing companies employ many part-time workers, including foreigners, for a short period to meet the demand; but, once the demand decreases, the companies discharge – or do not renew contract with – these part-time, fixed term workers. Some, if not many, of these workers remain in Japan and work without undertaking proper legal procedures. Second, economic disparity between Japan and irregular foreigners’ home countries is a large push factor for irregular foreigners to land, stay and work in Japan (Niwa 1989, 60-61; Ogawa 2004, 4-5; Ministry of Health, Labour and Welfare 2002, 7). Japan has been facing economic downturn for more than 20 years; yet, Japan is still among the world’s largest economies measured by various economic indicators, thus being a major destination country for irregular foreigners from other Asian countries. Third, there are international criminal networks and organizations, such as mafias, that commit illegal employment brokerage as well as trafficking and smuggling of persons across borders. These actors play a pivotal role behind the flow of irregular foreigners into Japan (Ministry of Health, Labour and Welfare 2002, 15-16; Mori 1989, 326-327; National Police Agency 1990).
membership in both the programs due to their lack of appropriate status of residence under the ICRR Act.\textsuperscript{18}

Public assistance is a scheme to provide livelihood protection benefits to the needy in Japan. Under the Public Assistance Act, the subjects of livelihood protection are “nationals” (Arts. 1 and 2). Yet, in practice, Japanese government allows the discretion of local governments with regard to the provision of necessary livelihood protection to foreigners holding a status of special permanent resident, long-term resident, recognized refugee and, for exceptional cases, other statuses of residence under the ICRR Act.\textsuperscript{19} For the case of irregular foreigners, they are denied their entitlement to public assistance, both, in law and in practice.\textsuperscript{20}

3.3. Summary

Irregular foreigners are put in a situation that even their very essential level of the rights to health, such as to access to emergency medical care, is not financially ensured on an equal footing with Japanese nationals. Irregular foreigners are prohibited, by law or practice, entitlement to public medical insurance coverage and to public assistance. There is not any other efficient alternative scheme that ensures irregular foreigners economic accessibility to emergency medical care.

4. CONCLUSIONS AND RECOMMENDATIONS

4.1. Treaty Obligations vs. Japan’s State Practice

As found in Section 2, Japan has core obligations to ensure irregular foreigners economic accessibility to emergency medical care on equal terms with Japanese nationals. In this respect, Japan has a special obligation to provide “necessary health insurance and health-care facilities” (CESCR 2000, para. 19) to irregular foreigners if they do not have sufficient means. Meanwhile, as found in Section 3, Japan prohibits, by law or administrative practice, the entitlement of irregular foreigners to public medical insurance coverage and public assistance – the two schemes ensuring

\textsuperscript{18} For the EHI program, irregular foreigners are not forbidden to join the program under the relevant regulations of the EHI. Yet, in practice, most of their employers do not make them join the EHI program under the circumstance that the employers are concerned about the exposure of their employment of irregular foreigners, which is subject to punishment under the ICRR Act, Art. 73.2. The relevant public organs and their personnel are obliged to report to the Immigration Bureau if they recognize the employment of irregular foreigners. Also, in the administrative practice of the EHI program carried out by prefectural governments, even if irregular foreigners are employed by the workplaces covered by the EHI program, they are considered as unqualified for membership. It is because, irregular foreigners are subject of forcible deportation at any time under the ICRR Act, Art. 24; and therefore they are not in an actual ‘regular employment relation’ which is a qualification for the membership. There is no provision for this qualification requirement under the relevant laws and regulations. The administrative practice is carried out based on an inner circular notice issued jointly by the relevant division chiefs of the Ministry of Health and Welfare and the Social Insurance Agency to the relevant division chiefs of prefectural governments on 6 June 1980. The validity of this inner circular notice is under legal discussions (Dai 2003; Okunuki 2013). For the NHI program, irregular foreigners are prohibited to enter the program due to their lack of an appropriate status of residence under the ICRR Act. Again, this qualification requirement is not prescribed by the relevant laws and regulations of the NHI. Municipalities conduct their administrative practice based on a circular notice issued by the relevant division chief of the Ministry of Health and Welfare to the relevant division chiefs of municipal governments on 31 March 1992.

\textsuperscript{19} The circular notice No. 382 of 18 June 1950 – issued by the director-general of the then Social Bureau of the Ministry of Health and Welfare to the relevant personnel and sections of local governments – and the administrative circular of 31 March 2009 – issued by the director of the Protection Section of the Social Welfare and War Victims’ Relief Bureau of the Ministry of Health, Labour and Welfare – have allowed the discretion concerned of local governments.

\textsuperscript{20} With regard to this, Shimoyama (2008) discusses irregular foreigners’ right to emergency medical care from the viewpoints of Japanese Constitution. He clarifies that irregular foreigners are denied entitlement to public assistance by the Supreme Court due to their lack of the rights-subjectivity to Article 25 of the Constitution and to the relevant provisions of the Public Assistance Act.
the population economic accessibility to emergency medical care. There is not any other efficient alternative schemes for irregular foreigners. Taking account of these conditions, this paper concludes that Japan’s restriction on irregular foreigners’ economic accessibility to emergency medical care is inconsistent with Japan’s obligations concerned under the ICESCR.

4.2. Policy Recommendations

To fulfil its obligations under the ICESCR, Japanese government may consider allowing irregular foreigners entitlement to public medical insurance coverage and to public assistance. Otherwise, the government must take immediate steps to provide irregular foreigners with alternative schemes which ensure them economic accessibility to emergency medical care, to the extent Japanese nationals are guaranteed.

An alternative scheme that can be thought of first is the reinforcement and expansion of existing subsidy programs carried out by national and prefectural governments – currently in a rather small scale – which subsidize hospitals and other medical institutions giving emergency treatment to irregular foreigners. The government may also consider establishing and operating clinics that provide free or low-cost health care services for irregular foreigners in cooperation with such partners as local governments, civil society organizations (CSOs), doctors’ associations, medical and nursing colleges, and community groups. If it is difficult for the national government to directly set up the said clinics, for the consistency between this scheme and the immigration control, the government can subsidize, on humanitarian grounds, the relevant initiatives undertaken by the aforementioned partners.

The government should fully keep it in mind that Japan has obligations to take steps “as expeditiously and effectively as possible towards” ensuring irregular foreigners economic accessibility to emergency medical care by “the full use of the maximum available resources” (CESCR, 1991, para. 9). After all, access to emergency medical care is directly concerned with the right to life which is among the most basic human rights of each and every individual that must be protected regardless of one’s status of any kind.

REFERENCES


21 The Ministry of Health, Labour and Welfare has been implementing such subsidy programs since 1996. Under the program, the national government, a prefectural government and a critical care center mutually bear one third of the total medical expenses for an emergency medical care of foreigners, regardless of their status, which has more than 300,000 Yen of outstanding expenses. Currently, the program targets only critical care centers. This scheme can be extended to general hospitals and clinics.

22 According to the Ministry of Health, Labour and Welfare (2014), there were 416 medical facilities running free or low-cost medical treatment projects, as of 1 October 2012. The projects target at low-income earners, homeless, victims of domestic violence and human trafficking, and the other needy under Article 2(3)(ix) of Social Welfare Act.
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