

HISTORICAL ASPECTS OF JAPAN'S ACCESSION TO THE REFUGEE CONVENTION AND PROTOCOL

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Japan is a party to the Refugee Convention of 1951 which it implemented by amendment to its immigration control law. Few people have however been granted refugee status in Japan. This article considers some of the reasons for the limited effect of the Convention in Japan.

Depuis le 3 octobre 1981 et depuis le 1^{er} janvier 1982, le Japon a été successivement signataire de la Convention de 1951 relative au Statut des Réfugiés et du Protocole de 1967 sur le Statut des Réfugiés. Ces deux engagements internationaux ont été intégrés dans les dispositions de la loi japonaise sur le contrôle de l'immigration de 1951 et les textes subséquents. Toutefois, dans la pratique, ces dispositions restent rarement mises en œuvre par les autorités japonaises ou sont accompagnées de telles restrictions procédurales que les procédures judiciaires fondées sur ces textes sont généralement vouées à l'échec. De tels comportements sont régulièrement dénoncés et condamnés par la communauté internationale.

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I INTRODUCTION

Japan¹ acceded to 1951 Convention Relating to the Status of Refugees² on 3 October 1981 and to the 1967 Protocol Relating to the Status of Refugees³ on 1 January 1982. The Convention and Protocol were implemented through amendment of the Immigration Control Order 1951. Japan formed a statutory basis for refugee protection in the Immigration Control and Refugee Recognition Act (Amendment of the Immigration Control Order 1951).⁴ Regrettably, actual practice relating to implementation of the Convention can figuratively be described as "*Hotoke wo tsukutte tamashii irezu* (making the Buddhist image, and forgetting the soul)"; an equivalent English phrase is the expression "Ploughing the field, and forgetting the seed." Japan is often criticised because the number of persons who have been granted refugee status is limited.⁵ However, the issue of numbers may be a direct consequence, or even a feature of the refugee protection system. The most serious problems in Japan's refugee protection system can be classified as being in three fields, that is, in refugee determination procedures, in the application of the refugee definition, and refugee rights.

With respect to the procedural field, the Act stipulates who shall be the decision-maker of refugee status and the basic process of refugee status determination. According to the Act, the Minister of Justice is formally responsible for making decisions on refugee status both in the initial and review

1 Japan is a constitutional democracy with a parliamentary government. The Constitution of Japan 1946 envisages a parliamentary cabinet system based on separation of powers with the Emperor as the symbolic head of state without governmental powers. Supreme legislative power is vested in a bicameral legislature, the Diet. The Diet consists of the House of Representatives and the House of Councillors. The decisions of the House of Representatives prevail with respect to the choice of the Prime Minister, the budget and the ratification of treaties and can override those of the House of Councillors by a two-thirds majority with respect to other matters. The exception is constitutional amendments which require a two-thirds vote in both houses. Executive power is vested in the cabinet, consisting of the Prime Minister and other ministers of state. The Prime Minister is elected by the Diet, and is the head of the executive branch. The Japanese judiciary is independent of the other two branches of government and is given power of judicial review over the acts of the Diet and the cabinet. Japan's judicial institutions consist of the Supreme Court as a judicial apex, High Courts, District Courts, Family Courts and Summary Courts.

2 Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137; referred to in this article as the "Convention"; Japan's accession record: Treaty No 21 of 1982.

3 Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 267; referred to in this article as the "Protocol"; Japan's accession record: Treaty No 1 of 1982.

4 Referred to in this article as "the Act".

5 2,179 individuals had applied for refugee status in Japan as of the end of 2000. The cumulative number of persons who had been granted refugee status by the end of 2000 was 260. Among them, 152 people, all Indochinese, were granted status in the first three years following Japan's accession to the Convention and Protocol. Since then the number of grants has been small.

stages.⁶ Decisions made by the Minister may be appealed to the District Court and then to the High Court and the Supreme Court. Practice since the accession to the Convention and Protocol has revealed that the refugee determination procedure conflicts with any reasonable understanding of the notions of fair decision-makers⁷ and fair procedure.⁸

Concerning the refugee status (refugee definition), review of Japan's judicial and administrative performance shows that it has failed to consider the development of international practice, the history of the negotiation of the Convention and academic dicta. Consequently, some elements of the Convention term "refugee" are extremely narrowly circumscribed in judicial and administrative practice, and the refugee definition has not been rigorously debated in judicial cases.

With respect to the third field, refugee rights, it can be said that the attention paid to the circumstances of refugees following determination is minimal. The problems of refugee rights and freedoms such as freedom from discrimination and the right to wage-earning employment are rarely considered in Japanese society. Revealingly, the majority of refugees were excluded from public assistance until relatively recently.⁹

The Japanese refugee protection system was formed following discussions in the Diet during 1981 in response to the arrival of Indochinese boat people at the end of the 1970s. The problems identified above partially derive from failures in the design of that system.¹⁰ After describing the Japanese history of asylum after the Second World War, this article focuses on the debate in the Diet leading to accession to the Convention and Protocol. Japan's actions towards asylum seekers and refugees after the Second World War, in particular its experiences with the Indochinese boat people, and the form the debate took in the Diet, impacted on the design of a protection system. The experiences and attitudes of the past have had a lasting effect on the administration, legislation and jurisprudence of refugee protection.

6 In practice, it is rare for the Minister of Justice to be involved personally in the determination of individual refugee cases. Applications are usually processed by staff members of the Ministry. See, however, relevant developments in the "Conclusion" of this article.

7 The independence of the decision-makers in Japan's system has been questioned. The decision-makers in both the initial and review stages are employees of the Ministry of Justice which manages other tasks that are incompatible with the responsibility for refugee determination. The decision-makers are the same government officials responsible for border control and immigration policy, who are trained to exercise and realise institutional policy on a daily basis.

8 For instance, the applicants' opportunities to be heard and to confront adverse evidence are not assured.

9 Concerning recent developments, see the "Conclusion" of this article.

10 Concerning other factors, see the "Conclusion" of this article.

II ASYLUM IN JAPAN AFTER THE SECOND WORLD WAR

Japan was already encountering problems relating to granting territorial asylum in conjunction with requests for the extradition of political offenders by the second half of the 1800s.¹¹

However, after the Second World War cases of territorial asylum increased abruptly due to the grave political situation in surrounding states. The rapid development of transport technology also allowed asylum seekers to reach Japan more easily. Thus many individuals from East Asian states requested asylum in the years following the Second World War. Defections from the communist block were another new phenomenon in Japan's asylum experience. In these cases, Japan acted as a conduit to the United States for asylum seekers from the Soviet Union.

During this period, asylum essentially became a matter of government policy, and the government's basic position was not to facilitate asylum. There was no entity responsible for granting asylum and providing services for refugees. Until Japan's accession to the Convention and Protocol in 1981 specific asylum provisions did not exist and the general rules relating to border control under the Immigration Control Order 1951 were applied to asylum seekers. Practically, therefore, shelter was conferred upon asylum seekers at the discretion of the Minister of Justice to permit residence status under the Order.¹² In other cases, normal residence permits granted under the Order happened to result in protection for the individuals. In short, there was no law in Japan designed to provide refugees with protection based on the premise that they should be protected simply because they were refugees. In legal parlance, hence, there existed no person with refugee status for lack of fundamental provisions to provide such status.¹³

Some of these cases became judicial concerns. In the Japanese courts, a key argument in the asylum cases after the War was whether or not the principle of non-extradition of political offenders

11 For instance, in 1884, Japan granted asylum to Kim Ok-Kinn and his collaborator, who had unsuccessfully attempted a coup d'etat in Korea.

12 See art 12 and art 53-1 of the Immigration Control Order 1951.

13 Yoshio Kawashima "Nishi Doitsu ni okeru Nanmin Gainen no Keisei (1) (Formation of Refugee Concept in West Germany: Part 1)" (1975) 96 Osaka University Law Review 1, 1. The Immigration Control Order 1951 did not include the term "refugee".

was a general rule of customary international law.¹⁴ The conclusion to this argument influenced the range of individuals who could benefit from the principle. If it was found that the principle was based only in treaties or agreements with reciprocity, obligations would arise from treaties relating to the extradition of criminals.¹⁵ Suppose on the other hand the principle was an established rule of customary international law. The principle would then be incorporated domestically through article 98-2 of the Constitution of Japan.¹⁶ Thus any individual from any state could rely on the principle to avoid extradition so long as she/he could satisfy the necessary condition of being a political offender. In other words, it was an attempt to protect refugees by a substitute domestic regime, that is, the regime for the protection of political offenders.¹⁷

As the principle of non-extradition is only remotely related to refugees, the issue as disputed in the courts was largely off the point and insufficient to secure the rights of refugees. The principal targets were political offenders not refugees. Thus, the issue is irrelevant to the majority of refugees because firstly they do not fulfil the elements of political offender. Refugees are persons who face a risk of persecution. Normally they are not claimed by their states of origin as objects of extradition under that state's criminal codes for prosecution. Secondly, any benefit that political offenders may enjoy from the principle of non-extradition of political offenders does not always accord with the guarantee of a refugee's fundamental human rights. The most crucial defect in the fiction of protecting refugees under the principle of non-extradition is the absence of an essential ingredient of protection. That is, the principle does not prohibit expulsion or return of the subject to the frontiers of territories where

14 The case of Yoon Soo Kil is cited most frequently in this context. Yoon was a researcher at Tokyo University and was engaged in anti-Republic of Korea government activities in Japan. A deportation order was issued in 1962, and Yoon faced the risk of deportation to South Korea. Yoon argued that he was a political offender and a refugee because of his involvement in political activities for the unification of Korea. In its decision in 1969, the Tokyo District Court acknowledged the principle of non-extradition of political offenders as a rule of customary international law. The Court decided the case in favour of Yoon. In 1972, however, the Tokyo High Court overturned the decision of the District Court, directly opposing the conclusion of that Court. The Supreme Court decision in 1976 supported that of the High Court. Yet the deportation was not carried out as the Minister of Justice granted special residence status. The case is introduced in (1970) 14 JAIL 146.

15 Non-extradition of political offenders is provided for in art 2 of the Extradition of Criminals Act 1953. Since the 1964 amendment, the Act may apply to political offenders from states that are not parties of extradition treaties, subject to reciprocity. See Kazutoku Ookubo "Nihon no Nanmin Housei (Refugee Law in Japan)" (1996) 36 Konan Hougaku (Konan Law Review) 1, 10.

16 Article 98-2 stipulates that:

The treaties concluded by Japan and established laws of nations shall be faithfully observed.

17 Ryuji Mukae *Japan's Foreign Policy and Human Rights: The Case of Refugee Policy* (UMI Dissertation Services, A Bell & Howell Co, Michigan, 1998) 145-149.

she/he would be persecuted.¹⁸ It is also relevant to note that the limits on the powers of the Minister of Justice and criteria for refugee determination were not clarified in the judicial decisions. In a nutshell, the administrative and judicial system during this period did not work as a substitute for refugee protection.

III ACCESSION TO THE CONVENTION AND PROTOCOL

The necessity of joining the international refugee regime had been on the agenda at the Diet since 1962. Initially the Japanese government showed a negative attitude towards accession to the Convention. It gave as reasons the Convention's European origin and the obscureness of the definition of refugee.¹⁹ The government acted cautiously because of fear that joining the Convention would open the floodgates from neighbouring states which were politically and economically unstable.²⁰ It is also recorded that the government was not confident that new social relations between the Japanese population and refugees could be established.²¹ Nevertheless, the existence of the Convention influenced the discussion on refugee protection in the Japanese Diet, where the government declared its policy of respecting the principle of non-refoulement.²² However Japan did not join the international refugee regime until influenced by external factors which arose at the end of the 1970s and the beginning of the 1980s. Japan's accession to the Convention and Protocol in 1981 occurred mainly as a result of the magnitude of the "boat people" problem. The domestic legal framework for refugee protection was established in response to the accession.

18 Two reasons why the principle of non-extradition of political offenders became a central debate in the courts in spite of its inappropriateness can be identified. Without repeating the details, it is sufficient to say that there were no alternative domestic legal resources that directly served as a basis of legal argument for refugee protection on which asylum seekers and their lawyers were able to depend. Secondly, at the end of the 1960s, the principle of non-extradition of political offenders was a more realistic option for attorneys in Japan as a ground of argument than the principle of non-refoulement due to the fact that assertion of universality of the latter principle was uncommon.

19 Hiroshi Honma *Nanmin Mondai towa Nanika (What are Refugee Problems?)* (Iwanami Shoten, Japan, 1990) 145-146.

20 Honma, *Nanmin Mondai towa Nanika (What are Refugee Problems?)*, above, 146-147.

21 Honma, *Nanmin Mondai towa Nanika (What are Refugee Problems?)*, above, 147. Japan had relevant experience in shaping policy to govern the assimilation of minorities such as the Koreans. Yet, the nature of this policy and the limited experience of accepting aliens did not produce any confidence in the government's ability to positively influence new social relations between Japanese and alien settlers. The relevant discussion is set out by Mukae. He argues that Japan has been an emigration state, rather than an immigration state. This domestic structure of the "exit regime" has hindered the establishment of an "entrance regime" which would usually install a system to accommodate aliens into society: Ryuji Mukae *Japan's Foreign Policy and Human Rights: The Case of Refugee Policy* (UMI Dissertation Services, A Bell & Howell Co, Michigan, 1998) 210-212.

22 Honma, *Nanmin Mondai towa Nanika (What are Refugee Problems?)*, above, 146.

In 1975, about the time of the fall of the Saigon regime, the first group of 126 Vietnamese asylum seekers arrived in Japan. This encounter with boat people presented unprecedented difficulties for Japan. At the time, there was an optimistic view that the influx would soon cease. Given the lack of a legal mechanism to cope with the situation, the state tried to respond to the new environment within the existing immigration rules, and confine the distinct phenomenon within the general scheme. Two provisions of the Immigration Control Order 1951 were applied to the management of the boat people, that is, special permission for disembarking²³ and permission to disembark following disaster at sea.²⁴ People to whom the former provision applied were originally granted 15 days' residence. This was later extended to 30 days. People to whom the latter applied were granted between 15 to 30 days' residence. Using these provisions as a legal foothold, the Japanese government set several preconditions to the application of the law for temporary refuge. A formal request from the UNHCR to the Japanese government was required in order to disembark the Vietnamese asylum seekers concerned. Moreover, the UNHCR was required to undertake the burden of living and medical expenses. Concerning Vietnamese rescued at sea, permission was given only in cases where third states for resettlement had already been arranged. The restrictive terms of the 1951 Order were thus softened by policy to allow a degree of openness, yet strict resettlement criteria were set. The adherence to the existing legal framework symbolised Japan's hesitance in accepting boat people. Contrary to Japan's speculative hope, the mass movement from Indochinese states, which put pressure on neighbouring recipient states, did not cease. The number of boat people grew gradually towards the end of the 1970s. In 1977 alone, the number of boat people arrivals in Japan exceeded 800. In the three years from 1975 to 1977, almost 470 people were settled in Japan.²⁵

In light of this situation, the Japanese cabinet made decisions on changes to settlement policy. In 1978, the government decided to accept Vietnamese boat people for resettlement, however rigid criteria for acceptance were set. At first, settlement was limited to Vietnamese nationals who were already in Japan and who had Japanese spouses or family members or guarantors in Japan. The following year, the government extended the settlement categories extensively to include individuals not only from Vietnam but also from Laos and Cambodia. In addition, people not yet present in Japan, who temporarily resided in Southeast Asian states, were included in the categories.²⁶ In 1980, the number of arrivals reached more than 1,200. The cumulative number of those settled by the end of that year was nearly 1,900.²⁷ Between the end of the 1970s and the middle of the 1980s, whenever an

23 Immigration Control Order 1951, art 12.

24 Immigration Control Order 1951, art 18.

25 The statistics are compiled in Hiroshi Honma *Nanmin Mondai towa Nanika (What are Refugee Problems?)* (Iwanami Shoten, Japan, 1990) 148.

26 The original resettlement quota was 500. See also n 29.

27 The statistics are compiled in Honma, *Nanmin Mondai towa Nanika (What are Refugee Problems?)*, above, 148.

important international conference such as the world summit in Tokyo was held, Japan promised to increase the number of acceptances.²⁸

Commentators generally agree that there was a lack of consensus amongst Japanese nationals, but that the government changed its resettlement policy in response to pressure from Western states, particularly the United States.²⁹ It is noteworthy that Japan's accession to the Convention and Protocol was mobilised under these circumstances of resettlement policy change. In other words, Japan's accession to the Convention and Protocol did not result from careful consideration of issues relating to the human rights of refugees and social conditions in Japan for resettlement. To the contrary, one of the main reasons for the accession was to mollify international criticism.

However, over-emphasis on such external forces may misleadingly give the impression that Japan acceded to the Convention and the Protocol without making any autonomous decisions. As Ryuji Mukae has reported, rather, the Japanese government manipulated the international pressure for its own purpose, that is, the maintenance of favourable Japan-United States relations. There were also several domestic factors which promoted the accession. One of them was a desire to stabilise the legal status of Indochinese who were already in Japan. In addition, as a political calculation, joining the international refugee regime was an attractive move as it symbolised, internationally and domestically, Japan's commitment to humanitarian cooperation.³⁰ Thus Japan's accession occurred as a result of an interest convergence between external forces and internal desires.³¹ From whichever perspective however, it is clear that factors other than refugee protection concerns decisively affected Japan's decision to implement the international refugee regime.

It is however fair to note that the external and internal factors stimulated domestic players to advocate that humanitarian aspects should not be forgotten in the implementation of the Convention

28 Eventually in 1985, Japan declared a cumulative quota of 10,000 resettlement allocations. Honma, *Nanmin Mondai towa Nanika (What are Refugee Problems?)*, above, 149-150.

29 Concerning the general background relating to the international pressure on Japan, see Barry Wain *The Agony of the Indochinese Refugees: The Refused* (Simon and Schuster, New York, 1981) 183-184, 195 and 216; Tadamasu Fukiura *Nanmin: Sekai to Nihon (Refugees: The World and Japan)* (Nihon Kyoiku Shinbunsha, Japan, 1989) 42-46; Hiroshi Honma "Toonan Asia Nanmin to Kokusaihou: Nihon no Taisho to Mondaiten (Southeast Asian Refugees and International Law: Japan's Treatment and Problems)" (1991) 90:3 *Kokusaihou Gaiko Zasshi* (The Journal of International Law and Diplomacy) 63, 76-77; Forum on Refugee Studies *Nihon no Nanminintetetsuzuki: Kaizen heno Teigen (Refugee Recognition Procedures in Japan: Proposals for Reformation)* (Gendai Jinbunsha, Japan, 1996) 7.

30 The concept of international cooperation was emphasised throughout the Diet debates on the approval of accession to the Convention. See, for instance, Dai 94 Kai Kokkai Shuugiin Gaimuinkai Gijiroku Dai 17 Gou (Foreign Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 17, 28 May 1981) 1, 1-2.

31 Ryuji Mukae *Japan's Foreign Policy and Human Rights: The Case of Refugee Policy* (UMI Dissertation Services, A Bell & Howell Co, Michigan, 1998) 218-221.

and Protocol. The relevant discussion certainly embodied perspectives on refugees' human rights. Amongst Japanese society, however, such humanitarian based assertions did not invite deliberation deep enough to clarify the purpose of the Convention and Protocol and identify an appropriate implementation scheme for Japan. Thus argument over who would be protected under the Convention and the Protocol and how to implement these treaties in Japan was not very extensive at the time. Similarly, in the Diet, the dynamics of external pressure and political response meant that insufficient attention was paid to protection concerns yielding only short-sighted and superficial discussions on an appropriate domestic system.

IV DEBATE IN THE DIET ON THE IMMIGRATION CONTROL AND REFUGEE RECOGNITION ACT

In Japan, treaties are given privileged status. They have the force of law and override statutes enacted by the Diet.³² The Convention and Protocol were implemented through amendment of the Immigration Control Order 1951. Japan formed a statutory basis for refugee protection in the Immigration Control and Refugee Recognition Act (Amendment of the Immigration Control Order 1951). In 1981, the Houses of Councillors and Representatives discussed the amendment of the relevant laws 13 times. The discussion covered issues of determination procedure, refugee status and rights.

It was stated by an officer of the Ministry of Justice that:³³

[The legal framework of the Act] was established in 1981 in order to permit Japan to ratify the 1951 Convention and the Protocol after comprehensive studies on the history and interpretation of these international documents as well as the practice of many countries.

Yet, neither the contents nor the outcome of the "comprehensive studies" feature in records of the Diet's debate.

A Refugee Determination Procedure

There were few eloquent arguments in the House on a procedural structure to assure appropriate refugee determination. The outline of the refugee determination procedure was discussed in the Diet. The outline was based on the premise that the Minister of Justice would be the formal decision-making authority. It was also a core part of the outline that both the primary application and review of the administrative determination would be processed within the Ministry of Justice. The establishment of a new position of Refugee Inquirer in the Immigration Bureau of the Ministry of Justice was proposed. It was suggested that the Refugee Inquirer would support the applicant's

32 Yuji Iwasawa "International Human Rights Adjudication in Japan" in Conforti and Francioni (eds) *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff Publishers, The Hague, 1997) 223.

33 Susumu Yamagami "Determination of Refugee Status in Japan" (1995) 7:1 IJRL 60, 62.

testimony. Given the lack of convincing counter-argument during the Diet's debate, the outline was accepted in law.

There are several noteworthy features in the Diet's arguments. The first feature relates to the discussion on the nature of the refugee determination task. It reveals how the Japanese government viewed the difficulty and complexity of the refugee determination process. In the Diet, a question was raised as to whether the proposed system would ensure impartial determinations. In answering the question, the then Chief of the Immigration Control Section, who was a member of the Government Committee, said that, given the fact finding nature of refugee determination, the decision on a given application would be the same whether made by a third party or a governmental authority.³⁴

[R]efugee determination procedure is substantially an act of fact finding in order to declare whether or not an applicant is a refugee. And thus, anybody will reach an identical conclusion, irrespective of [the position or organisation of] the persons.

This deliberation may not be empirically justified. The persuasiveness of this viewpoint is also totally undermined by established procedure. First, whilst the determination task is basically a fact finding operation, this does not mean that the task is so clear and easy that everybody will reach the same conclusion. Just as in other judicial cases, fact finding may be so difficult that persons considering the same case may disagree. Fact finding in refugee determination is very difficult indeed. Second, refugee determination goes beyond fact finding - determination of refugee status requires complex factual and legal deliberations. The determination task involves normative judgement³⁵ when decision-makers hunt out the implications of definitional words. The pursuit of a coherent interpretation of the definition of refugee has been a particularly vexing problem both for practitioners and scholars of refugee law.³⁶ Third, the statement that "anybody will reach an identical conclusion" contradicted the Committee's own introduction of a review system. If refugee determination was so straightforward that inevitably any decision-maker would reach the same view of a set of facts, there would be no chance of a successful review, thus it was not logical to establish a review procedure.

The second feature of the Diet discussion is that it was constrained by the under-developed international experience with determination systems in the beginning of the 1980s. An opinion about the need for neutral, fair and impartial assessments of refugee applications was expressed during the

34 Houmiiinkai Gaimuiinkai Shakairoudoiinkai Rengoushinsakai (United Examination Board of the Committees of Legal Affairs, Foreign Affairs and Social Labour Affairs, Official Record of the Proceedings, in Legal Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 1, 27 May 1981) 1, 29; Dai 94 Kai Kokkai Sangiin Houmiiinkai Gijiroku Dai 11 Gou) (Legal Affairs Committee of the House of Councillors, Official Record of the Proceedings of the 94th session of the Diet (No 11, 4 June 1981) 1, 23.

35 New Zealand: Refugee Appeal No 2039/93 Re MN (12 February 1996) RSAA, 15. Australia: *Damouni v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 87 ALR 97, 101 French J.

36 See for instance works on refugee definition by Grahl-Madsen, Goodwin-Gill and Hathaway.

discussion. It was suggested that a third party body should be established for the determination task. It was submitted that the Ministry of Justice and UNHCR should participate. It was also submitted that NGOs should be involved.³⁷ The proposal was rejected. One of the reasons for rejecting the proposal was that at that time there was scarce international experience of independent administrative bodies to determine refugee status.³⁸

The third feature of the discussion is that the financial and administrative constraints of government were given as reasons making it difficult to establish a new administrative institution.³⁹ It was also asserted that an independent determination body could cause delayed conclusions.⁴⁰

The fourth feature of the discussion is the lack of attention to fairness or justice concerns in the refugee determination process. The relevant discussions were limited to the ability and appropriateness of the Ministry of Justice as a decision-making authority. An officer of the Ministry of Justice stated that:⁴¹

[the] Ministry of Justice is one of the least politicised organisations in the Cabinet, which is one of the major reasons that determination of refugee status was entrusted to it.

Yet the refugee determination process may clearly become politicised if it is conducted by the authority responsible for immigration control.

Furthermore, another reason for making the Ministry of Justice the responsible body, which was expressed during the Diet debate is problematic. A Government Committee member mentioned at the Diet:⁴²

37 Dai 94 Kai Kokkai Shuugiin Gaimuinkai Gijiroku Dai 17 Gou (Foreign Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 17, 28 May 1981) 1, 9; United Examination Board of the Committees of Legal Affairs, Foreign Affairs and Social Labour Affairs, Official Record of the Proceedings, in Legal Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet (No 1, 27 May 1981) 1, 28-29.

38 It was pointed out that the style of an independent determination body and participation of non-governmental individuals was rare in refugee determination among state parties of the Convention. Dai 94 Kai Kokkai Sangiin Houmuinkai Gijiroku Dai 11 Gou (Legal Affairs Committee of the House of Councillors, Official Record of the Proceedings of the 94th session of the Diet) (No 11, 4 June 1981) 1, 9.

39 Foreign Affairs Committee of the House of Representatives (No 17), above, 9.

40 Dai 94 Kai Kokkai Sangiin Gaimuinkai Gijiroku Dai 12 Gou (Foreign Affairs Committee of the House of Councillors, Official Record of the Proceedings of the 94th session of the Diet) (No 12, 4 June 1981) 1, 19; Legal Affairs Committee of the House of Councillors (No 11), above, 9.

41 Susumu Yamagami "Determination of Refugee Status in Japan" (1995) 7:1 IJRL 60, 63.

42 Houmuinkai Gaimuinkai Shakairoudouinkai Rengoushinsakai (United Examination Board of the Committees of Legal Affairs, Foreign Affairs and Social Labour Affairs, Official Record of the Proceedings, in Legal Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 1, 27 May 1981) 1, 29.

Having said that [determination is an act of fact finding], we consider that existing administrative authorities should take this [duty]. In the present case, as the Immigration Bureau [of the Ministry of Justice] is administratively by chance a point of contact [with aliens, including refugee applicants] it is most appropriate that the Ministry of Justice should carry out determination of the cases.

This reasoning for granting jurisdictional authority to the Ministry of Justice should be criticised for thoughtlessness. The Diet did not analyse the protection guaranteed to refugees under the Convention. The benefits of refugee protection are different from benefits granted to ordinary aliens crossing borders. Recognition of this would have resulted in refugee protection being totally separated from general immigration control. The nature of refugee protection should have been a threshold question, and then the question of the responsible authority should have been explored.

The lack of consideration of the procedural operation of the determination body is also relevant to the lack of argument over the appropriateness of the Ministry of Justice as the decision-making body. The Diet discussion did not provide any useful information on how the refugee determination procedure should be shaped and maintained in practice. Whilst the Government Committee outlined a review system,⁴³ it gave little explanation to assist comprehension. The Government Committee revealed that both primary application and review would be processed within the Ministry of Justice. However, the discussion failed to go further. Apart from settling on the formal decision-making authority, that is, the Minister of Justice,⁴⁴ there was no clear indication even as to who would actually make decisions on initial applications on behalf of the Minister and who would determine review applications.⁴⁵

In relation to the suitability of the Ministry of Justice as a determination body, it is worth referring to a circumstance which emerged prior to the Diet's considerations and presumably impacted upon the discussions there. A government officer recorded that there had been a "passive" jurisdictional power struggle over responsibility for refugee protection among governmental authorities since the arrival of the boat people. That is to say, the various ministerial bodies pressed each other to take responsibility since no one wanted it.⁴⁶

43 Dai 94 Kai Kokkai Sangiin Houmuinkai Gijiroku Dai 11 Gou (Legal Affairs Committee of the House of Councillors, Official Record of the Proceedings of the 94th session of the Diet) (No 11, 4 June 1981) 1, 9-11.

44 United Examination Board (No 1), above, 29.

45 Although a plan to divide sections for initial application and review was introduced, no further discussion was engaged in. See Legal Affairs Committee of the House of Councillors (No 11), above, 9.

46 See Tadamasu Kuroki "Shoukyokuteki Kengenaraso (Passive Jurisdictional Power Strife)" in Nanmin Jigyo Honbu (Refugee Assistance Headquarters) *Boat People Touchaku no Koro (The Period of Arrivals of Boat People)* (Japan, 1997) 9, 9-10.

The establishment of the new position of Refugee Inquirer in the Immigration Bureau was hinted at repeatedly. It was explained that the Minister of Justice would appoint an Inquirer from among immigration officers. The appointed immigration officer would concurrently hold the post of Refugee Inquirer.⁴⁷ The duties of the Refugee Inquirer would include finding objective evidence to support an applicant's testimony with respect to the inclusion, cessation and exclusion clauses of article 1 of the Convention.⁴⁸ Again, however, the Inquirer's function and power in the decision-making process remained unclear. More crucially, discussion as to how to gain knowledge and how to refine skills, given that the determination procedure would require wide-ranging investigations and unique legal techniques, was limited.⁴⁹ Most detrimentally, no convincing explanation was provided as to how to cultivate sensitivity within the Ministry, which had no experience of refugee protection, so as to minimise the risk of erroneous decisions in cases where errors would lead to irreparable consequences.⁵⁰ Refugee determination was placed within the arena of immigration control. Thus, despite the need for distinction between the nature of the refugee determination task and the duty of immigration control, there is no evidence of an attempt to find a workable device to deter decision-makers from making erroneous decisions. Thus in addition to the problems regarding the Ministry of Justice's suitability, no serious discussion of how to ensure fairness in refugee determination was made.

The last noteworthy feature of the Diet discussions is that argument over judicial recourse was insufficient. A member of the Government Committee suggested remedy through the courts. He insisted that judicial appeal would enhance fair determination. Yet the reality in Japan is that judicial appeal does not assure a fair outcome. Barriers are rooted in the limited skill and knowledge of all protection players from judges and administrative decision-makers, to practitioners and refugee supporters. These barriers substantially reduce the utility of judicial recourse. Unfortunately, reality also shows that the negative attitude of the courts means they do not provide any kind of reliable safety-net.

47 Dai 94 Kai Kokkai Shuugiin Houmuinkai Gijiroku Dai 17 Gou (Legal Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 17, 29 May 1981) 1, 17.

48 Legal Affairs Committee of the House of Representatives (No 17), above, 18.

49 Although necessity for training was recognised, its content was not elaborated on. See Legal Affairs Committee of the House of Councillors (No 11), above, 9-10.

50 The risk of inappropriate determination by immigration control-minded officers was noted at the Diet. However, this issue was not discussed further: Legal Affairs Committee of the House of Councillors (No 11), above, 9-10.

B Refugee Status

The Diet's discussions confirmed that the new Act imported the Convention definition of refugee directly.⁵¹ After discussing an overview of the definition of refugee, the Diet then discussed legal factors which would instruct fact finding such as evidence⁵² and burden of proof.⁵³ The basic points relating to the perception of persecution,⁵⁴ the relation between prosecution and persecution,⁵⁵ conscientious objectors,⁵⁶ well-founded fear,⁵⁷ reasons for persecution⁵⁸ and cessation as well as exclusion clauses⁵⁹ were referred to. The Diet also noted the absence of a consistent and rigid interpretation of refugee accepted in international law.⁶⁰

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- 51 Legal Affairs Committee of the House of Councillors (No 11), above, 14.
- 52 Dai 94 Kai Kokkai Shuugiin Houmiiinkai Gijiroku Dai 17 Gou (Legal Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 17, 29 May 1981) 1, 18, 22.
- 53 Legal Affairs Committee of the House of Representatives (No 17), above 18, 22; Dai 94 Kai Kokkai Shuugiin Houmiiinkai Gijiroku Dai 15 Gou (Legal Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 15, 22 May 1981) 1, 4.
- 54 Dai 94 Kai Kokkai Shuugiin Gaimuiinkai Gijiroku Dai 18 Gou (Foreign Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 18, 2 June 1981) 1, 12; Legal Affairs Committee of the House of Representatives (No 17), above, 6.
- 55 Dai 94 Kai Kokkai Shuugiin Gaimuiinkai Gijiroku Dai 17 Gou (Foreign Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 17, 28 May 1981) 1, 8-9.
- 56 Foreign Affairs Committee of the House of Representatives (No 17), above, 9-10. Foreign Affairs Committee of the House of Representatives (No 18), above, 11-12.
- 57 Foreign Affairs Committee of the House of Representatives (No 17), above, 10.
- 58 Dai 94 Kai Kokkai Shuugiin Gaimuiinkai Gijiroku Dai 14 Gou (Foreign Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 14, 14 May 1981) 1, 6-7; Foreign Affairs Committee of the House of Representatives (No 17), above, 7.
- 59 Foreign Affairs Committee of the House of Representatives (No 17), above, 20; Dai 94 Kai Kokkai Sangiin Houmiiinkai Gijiroku Dai 11 Gou (Legal Affairs Committee of the House of Councillors, Official Record of the Proceedings of the 94th session of the Diet) (No 11, 4 June 1981) 1, 24.
- 60 Foreign Affairs Committee of the House of Representatives, (No 17), above, 19. The argument was made in Office of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Office of the United Nations High Commissioner for Refugees, Geneva, 1979). A Government committee member explained that the above-mentioned UNHCR *Handbook* does not restrict the right of determination of state parties. He further mentioned that the UNHCR *Handbook* would be only a reference for consideration rather than a mandatory guide. See Legal Affairs Committee of the House of Councillors (No 11), above, 20.

Nonetheless, the Diet did not fully consider the essence of the definition of refugee.⁶¹ The Diet's cursory analysis of the definition revealed not only a failure to consider the available resources to illuminate the definition but also an institutionally crucial flaw. The Diet failed to define refugee in a way to assist refugee applicants, the administrative authority and the courts. Furthermore, the failure to examine the nature and scope of definitional terms has engendered a risk of allowing discretion in the interpretation and application of the Convention. As noted above, the absence of an accepted interpretation of the definition of refugee was recognised by the Diet. At the same time, the fact finding characteristic of refugee determination was repeatedly addressed. Logically, thus, without clarification of the criteria and standards for determination there was a risk that interpretation of the definition would be arbitrary.⁶² It would have been preferable for functional instruments to govern the interpretation task to have been considered in the Diet.

C Refugee Rights

The issue of rights was often discussed during the 94th session of the Diet. The focal point of the debate was the repeal of domestic statutes which restricted the availability of social welfare for non-Japanese, as was made necessary by accession to the Convention.⁶³

The content of the argument presents two features. First, the discussion on rights was narrowly focused, thus unbalanced. In the Diet, substantial argument was devoted to existing discriminatory laws and social welfare issues, that is, national pension, child welfare and national health insurance.⁶⁴ On the other hand, deliberation regarding other entitlements listed in the Convention such as non-refoulement, non-discrimination among refugees, freedom of movement and wage-earning employment was superficial or minimal. For example, a Government Committee member explained that the principle of non-refoulement, the most fundamental safeguard for refugees, would be aptly incorporated into the domestic law. However, in fact, and of grave concern, in enacting the non-refoulement principle the terms used in the Act differ from those used in the Convention. As a result, the range of exemptions to the principle is defined differently in the Act to in the Convention.

61 One expert has expressed dissatisfaction with the Diet's argument on the refugee definition. See Yoshio Kawashima "Nanmin Jouyaku he no Kanyuu to Toomen no Kadai (The Accession to the Refugee Convention and the Present Problems)" (1981) 747 *Jurist* 254.

62 The dictum is that of Atsuhiko Kubo "Nanminhogo ni Kansuru Genkon no Houteki Shomondai: Shikakunintei no Yokenron to Kokusaikyoryoku no Arikata (Legal Issues Relating to Refugee Protection)" (1984) 82:6 *Kokusaihou Gaiko Zasshi* (The Journal of International Law and Diplomacy) 641, 649.

63 Articles 20, 22(1), 23 and 24(1) of the Convention require the same treatment of refugees as nationals.

64 See for instance Dai 94 Kai Kokkai Shuugiin Houmuinkai Gijiroku Dai 9 Gou (Legal Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 9, 28 April 1981) 1, 12.

During the sessions, the Government Committee member referred to the problematic part of the drafted phrase several times.⁶⁵ Yet, this discrepancy was not noted by the Diet members.

Second, the Convention requirement of amending conflicting domestic statutes transferred the Diet's focus from consideration of the rights of refugees to the adjustment of non-refugees' rights. As the beneficiaries of changes to domestic statutes were largely Korean residents, Diet members devoted their attention not to rights of refugees but to those of Korean residents in Japan. The Diet members repeatedly referred to the suffering of the Koreans and Taiwanese and discrimination against them. They expressed historical justification for actions restoring their right.⁶⁶ Comparatively, discussion of socio-political conditions and policies for realisation of refugee rights in Japan was minimal in the Diet.

Due to the above mentioned features of the Diet discussion, the protection scheme for refugee rights became overly formalistic. Although the statutes were amended, consideration as to how to substantiate refugee rights was almost absent.

These features imply that, due to the specific situation of the Koreans' presence in Japan, the Diet had to pay greater attention to Japanese laws which conflicted with its obligations under the international treaty. Needless to say, the abolishment of discriminatory treatment of aliens under Japanese law should be highly valued. But it is incidental in terms of refugee rights and insufficient for refugee protection. It is problematic that the Diet was not very aware of refugee rights per se, and thus discussion on the issue was not exhaustive.

In addition to the discussion of the specific circumstances of the Koreans' presence in Japan, the historical context meant that discussion in the Diet again digressed from the rights of Convention refugees. While some limited attention was paid to refugee rights, it was focused on the settlement of displaced persons in Japanese society, given the situation of the Indochinese boat people who had been accepted in Japan. Because of the exclusive focus on the Indochinese in the history of the accession, the aspect of settlement of non-Indochinese was not reflected in the design of the protection framework

65 See for instance Dai 94 Kai Kokkai Sangiin Houmuinkai Gijiroku Dai 11 Gou (Legal Affairs Committee of the House of Councillors, Official Record of the Proceedings of the 94th session of the Diet) (No 11, 4 June 1981) 1, 18; Houmuinkai Gaimuinkai Shakairoudouinkai Rengoushinsakai (United Examination Board of the Committees of Legal Affairs, Foreign Affairs and Social Labour Affairs, Official Record of the Proceedings, in Legal Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 1, 27 May 1981) 1, 24.

66 See for instance Dai 94 Kai Kokkai Shuugiin Houmuinkai Gijiroku Dai 16 Gou (Legal Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th Session of the Diet) (No 16, 27 May 1981) 1, 1-14; Dai 94 Kai Kokkai Shuugiin Houmuinkai Gijiroku Dai 9 Gou (Legal Affairs Committee of the House of Representatives, Official Record of the Proceedings of the 94th session of the Diet) (No 9, 28 April 1981) 1, 12; United Examination Board (No 1), above, 3-5.

To respond to the boat people influx, a governmental agency, the Refugee Assistance Headquarters (RHQ) was established in 1979. RHQ exclusively served Indochinese refugees so that they could smoothly adapt to Japanese society. However, non-Indochinese refugees, who were granted the status under the Convention, did not fall within the jurisdiction of the RHQ.

V CONCLUSION

Japan's motivation to join the international refugee regime was determined at a point of convergence between diplomatic pressure and domestic political forces. At the public and social level, consideration of the nature of refugee protection was limited. The Diet's discussions reflected this climate, and thus the Diet did not go into substantial analysis of the important issues of determination procedure, status and rights. The shallowness of the thought given to the establishment of Japan's refugee protection scheme by the Diet turned out to be a time bomb for the protection system in the post Indochinese era. In the 1990s, the system came to be severely criticised by human rights experts.⁶⁷

The most stinging attack was a report published in 1993 by Amnesty International. The report severely criticised the Japanese practice of refugee protection and eventually invited controversy between Amnesty International and the Ministry of Justice. The report also stimulated arguments amongst Japanese interested in the issue of the appropriateness of the determination system.

However, the design failures at the time of the accession are only one aspect of the problems with Japan's refugee protection system. Among other factors, flaws which originate in the Convention and in ascertaining the intention of the drafters are critical from a human rights perspective. These flaws cause real obstacles to the achievement of refugee protection. The Convention itself fails to provide minimum standards for determination procedures, clarification of the definition of refugee, and a satisfactory level of rights. Refugee law and the Convention have cynically been described as a device to protect not refugees but rather states.⁶⁸ Given strict refugee policies applied all over the world, the practice in all state parties can be criticised as being more or less unsatisfactory due to states taking advantage of these flaws. In this sense, Japan is not isolated. Nevertheless, Japan has taken advantage of the state-centered character of the refugee regime since its very accession to the Convention and Protocol, and the formation of the protection system. Despite criticism, the system continued to exist without any major modifications in either the administrative or the legislative arenas for more than 20 years.

67 For instance, see Amnesty International Japan Branch *Nihon niokeru Nanminhogo: Kokuasitekina Gimu wo Hatasanae Nihonseifu* (Japan: Inadequate Protection for Refugees and Asylum Seekers) (Report of 22 January 1993, AI Index: ASA 22/01/93, Nihon Hyoronsha, Japan).

68 James C Hathaway "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31 Harv Int'l L J 129.

It was only very recently that some changes occurred in the fields of determination procedure and rights. In May 2004, the amendment of the Act was approved by the Diet. One of the purposes of the amendment was to improve the refugee determination procedure. The amendment does not fundamentally change the framework of the determination procedure. However, it includes important developments such as, for instance, in the review stage where legal or international affairs experts will be involved in the procedure as Refugee Adjudication Counselors and where it is stipulated that the Minister must hear the views of the Counselors when making her/his decisions. Also, in August 2002, the Japanese government decided to extend the responsibility of RHQ beyond matters relating to the Indochinese. As a result, Convention refugees may now access services from the RHQ which will assist them to realise their rights.

Although these actions are indicators of progress, the major and substantial issues that arose during the accession to the Convention and Protocol, as outlined in this article, remain to be addressed.