Credit :
UTokyo Online Education, Refugees and Migrants - International and Japanese Comparisons 2019 Allan Mackey

東京大学
THE UNIVERSITY OF TOKYO

University of Tokyo, Graduate Program on Human Security.
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Part 6. Comparative jurisprudential approaches

"Japanese and International Refugee Law

Comparative jurisprudence – An academic overview and discussion"

Comparisons with Japanese approaches

As the concluding part of the Courses we will, with your help, carry out a purely academic comparative jurisprudential discussion of recent Japanese Court judgements with what IARMJ judges/trainers would consider current customary international refugee law. We will look at some major concerning points first then go on to look more closely at 6 of 7 Japanese judgements (English translations of key sections) & international law, procedures, norms.

Comparisons with Japanese jurisprudence

Thanks and acknowledgement

At the outset we must acknowledge the abilities and help in finding a good range of recent judgements and with the English translations of parts of them. We set out in the schedule most of the judgements noted & those who have assisted us. (As almost every refugee claimant is aware, our comments and conclusions are based only on what is before us as a translation.)

Comparisons with Japanese jurisprudence

Comparison 1 . The procedural approach to appeals and/ or judicial review applications by Courts. As the first area for research we tried to clarify what are the actual jurisdictional approaches taken by the Japanese judges in appeals (or are they judicial reviews?), at all instances, and also the manner and topics presented by appellants' counsel in their submissions to the Courts ?

Comparison 1 with Japanese jurisprudence

Based on our own and IARMJ experience we found Japanese judges' approach appears to differ significantly from the 3 approaches taken internationally.

The Japanese appeals/JRs on refugee status appear to be treated by judges as domestic immigration appeals whereby they retrospectively assess the claims based on the same original evidence, (plus possibly some additional material from parties).

Comparison 1 with Japanese jurisprudence

The judges are thus looking to see if they can "create" or "refuse to create" refugee status based partly on their interpretation of CSR and some key elements like: "persecution", "well founded fear", "burden of proof". These appear to be taken from domestic Japanese Administrative law, used in civil suits.

Comparison 1 with Japanese Court approaches

1. Internationally there are three procedural approaches taken, which are all compatible with RSD being declaratory, as we discussed in Course 1. They are:

a. Pure JR where the Court finds manifest/ material error(s) of law in the 1st instance decision and either upholds the 1st instance, where there is no error, or remittal back with directions on the correct legal approach and rehearing of evidence. (*Used in EU*)

Comparison 1 with Japanese jurisprudence

1.b. **A full or *de novo* hearing** prospectively *(ex nunc)* assessed. The evidence from 1st instance can be used but is in no way binding on the fresh decision maker as at the date of hearing.*(as in NZ)*

1.c. **A mix of both of the above forms of appeal**. This involves, firstly finding(s) of manifest error(s) of law in the 1st (or 2nd) instance decision and then, if possible, by applying correct law to complete the decision, or if not, remittal with directions, eg, where the appellant's evidence must be reassessed.*(UK)*

From this this first comparison, we see:

All three international approaches recognise the declaratory point (see Course 1) and ensure that RSD is should be carried out in a fair and correct confirmation process to assess the prospective risks of being persecuted on return.

Reminder of the declaratory or confirmative nature

f. The act of recognition/confirmation made by assessors and/or judges, in refugee and/or complementary protection status claims, **is declaratory in nature and not constitutive.** Thus different decision-making principles are applicable, in assessing refugee claims, from those applied in immigration applications or appeals. (This is very important & why asylum seekers are "presumed" refugees and not returned (*refouler*)).

Comparison 1

The Japanese decisions comparatively don't appear to take the declaratory point or assess prospectively. They only reassess the historical evidence and risks. Thus they are not making assessments of future risk in the terms Art 1A(2) calls for. Simply put they are of questionable value(particularly if dated) and logically could lead to subsequent valid or abusive claims in the light of current circumstances.

Comparison 1

Three questions arise here:

1. Why is this happening? Is it purely ,as it seems, from applying domestic administrative law principles, as they would relate to “creating” a purely domestic status, & not confirming an international status?
   But if this is so:

Comparison 1

2. Why are asylum seekers, without valid visas, not immediately deported from Japan?

Of course this does not happen, as also in the rest of the world, because asylum/refugee claimants are correctly presumed to be “refugees” during the confirmation of their RSD claims (i.e. declaratory processing) and thus *non refoulement* etc obligations apply. AND…

Comparison 1

3. From a purely academic comparison viewpoint where is the logic in correctly applying international refugee law, as set out in the CSR, in the *non refoulement* aspects of RSD but not in the reviews or appeals against negative MOJ decisions on RSD?

Maybe the Tokyo High Ct Judgement in (what we will term:) ***BCD Sri Lanka 5 Dec 2018*** will help us?

First Comparison example of what happens:

Thus, even looking at a judgement such as: *Nagoya High Ct, 7 Sept, 2016, a Nepali,* where the reasoning and law applied, to an extent, follows established customary international refugee law, *there is still a problem.* Here the Court reassesses all evidence **up to 2011** and finds he "qualifies for refugee status" & "shall be recognised". **BUT The real issue should be: "what, objectively, is his prospective risk on return in Sept 2016**?"

First Comparison conclusion

It appears to us very concerning that the judgements of the Japanese courts thus, due to this retrospective assessment approach, do not actually decide if the claimant is in fact currently a refugee, i.e. as at the required date of the hearing/decision publication. Thus they overlook the fact RSD is declaratory and prospective? It seems a systemically flawed approach with major flow on affects? *We look forward to our discussions on this.* ***BUT first****…*

"International standards"

Over the years I have come to Japan I have noted , with growing concern, in many decisions, MOJ statements , academic and media articles comments like: " *The CSR leaves "recognition standards" up to all signatories*, and/or that: *"There are no international standards"* and Japan can thus make its own recognition rules (i.e. without any need for any international consistency , or VCLT obligations)

International standards

With great respect, before moving to look at some of the Japanese jurisprudence and the comparisons, I would like to try and dispel what appears to be a common and continuing misconception relating to these “international standards and jurisprudence” . In my view they exist and are now firmly part of customary international refugee law. Firstly let’s note that the CSR & other IHRL are “living instruments”…

International standards

Whilst until about 30 years ago, apart from the CSR itself , the UNHCR Handbook and a few academic publications* there was little other assistance in finding international standards, but now & over the past 25-30 years there has been an “explosion” of UNHCR & ExCom guidance, jurisprudence, regional Conventions/ Declarations/ Directives, academic and judicial publications, conferences & training .(*like Grahl Madsen)

International standards

This interpretative jurisprudence has built up from the highest regional (EU,Americas,Africa) and many country courts e,g. UK,De,Fr,Se,Ne,Be,Ca,SA,Ken,Aus,NZ,HK,Ph,etc and indeed the work of the IARMJ (>600 judges in 70+countries). Plus

The academic works are massive: Hathaway,Goodwin Gill,Kalin, Spijkerboer,Anker,Foster,McAdam,Gilbert,Guild,Blake, Storey,Dorig,Costello,Lambert, etc….

This has all lead now to a considerable commonality in the current IHRL based interpretation of CSR and particularly the core concepts of Art 1 A - F & customary refugee law.

Comparison 2 with Japanese jurisprudence

Judges' interpretations of core parts of the definition in the inclusion clause - Art1A(2) CSR (same as Art 2(1)-2 ICRRA.)These include: persecution or 'being persecuted', 'well-founded', 'fear', 'for reasons of' and the related credibility and standard & burden of proof issues,. Again we find these are markedly different to international jurisprudence*. Looking at "persecution" Art 1 A(2)…*

Comparison 2 with Japanese jurisprudence.

Recall the "Inclusion /definition clause "- Article 1A(2) states: ..a refugee is a person who"... ***owing to a well-founded fear of being persecuted for reasons of*** race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country…

Comparison 2 with Japanese jurisprudence

Almost all judgements show the judges' reasoning on "persecution" along the lines that are the same or similar to this quote from a Tokyo District Court 2017

Ethiopia 1 case : *"Thus it is reasonable to construe that the above mentioned persecution means assault or oppression causing sufferings as an ordinary person cannot endure, which is a depravation or oppression against life or physical freedom."*

Comparison 2 with Japanese jurisprudence

The concerns here are that there appears no sound logic or support for this statement. Firstly and importantly Art 1(2) says "being persecuted" NOT "persecution". This means the objectively, the personal, future predicament of the claimant **not** an assessment of general existence of persecution.

Next: Why is it "reasonable to construe" etc? In the Ethiopian decision and some others, it is stated this conclusion on the meaning of 'persecution' is also supported by reference to the wording Articles 31 and 33 CSR. Let's look at these …

Comparison 2 with Japanese jurisprudence

Art 31 refers to States not imposing penalties for illegal entry on ***refugees*** for illegal entry…where their *life or freedom* was threatened" .

Art 33 provides States "shall not return (*refouler*) ***a refugee*** … where his *life or freedom* would be threatened"

Comparison 2 with Japanese jurisprudence

Here the judge, quoting from these two Articles concludes, that it is "*reasonable(*Why?) *the persecution"* is thus "*a depravation or oppression against 'life or freedom",* and thus, "*freedom" here means freedom pertaining to life(survival) activities only".*

Comparatively, to us, this is a flawed approach given the two Articles refer to '***refugees'*** *(not asylum seekers)* who logically, in the context of the whole Convention, have already been defined in Art 1A(2). The judge thus is in error as s/he attempts to redefine a definition. What we called in Admin Law: *a No! No!*

Comparison 2 with Japanese jurisprudence

The “life or freedom” in Arts 31 and 33 is clearly a shorthand reference back to Art 1 (‘definition clause) & thus 1A(2) where refugees are *defined*, within the whole context of CSR, as is noted the Preamble*. As such “freedom” in Articles 31 & 33 is logically: “freedom from being persecuted” from violations of core human rights such as those set out in the UDHR 1948. It cannot be anything else. And thus it is universally comparatively assessed in this way.

*https://www.unhcr.org/3b66c2aa10

Comparison 3 with Japanese jurisprudence

Burden &/or Standard of proof comparisons

Several of Japanese judgements state that as no standards are defined in the CSR so: “it is construed these should be in accord with the legislative policies of the contracting state*.”

Hence not only is the burden stated(rightly) to be on the claimant to make his/her own case ***but also that they must submit objective evidence /materials to clearly demonstrate eligibility to qualify as a refugee….***

**** We will discuss important Tokyo HC rulings on this in BCD Sri Lanka case later.***

