8. International Law

a. Public International Law

1. Case concerning a claim for confirmation of Japanese nationality by a Taiwanese – Lin Ching Ming Case.

Decision by the 14th Civil Affairs Department, the Tokyo High Court, on June 12, 1980. Case No. (*gyō ko*) 27 of 1977. Dismissed (Jokoku appeal). Koso appeal from Decision of Tokyo District Court on Apr. 27, 1977, Case No. (*gyō u*) 28 of 1973. 969 *Hanrei Jihō* 3.

[Issues]

1) Did the Taiwanese lose their Japanese nationality with the coming into force of the Treaty of Peace between Japan and the Republic of China?

2) Has the "principle of non-compulsory acquisition of nationality" already been established as customary international law?

[Reference: (San Francisco) Treaty of Peace with Japan, signed on Sep. 8, 1951, entered into force on Apr. 28, 1952, §2; Treaty of Peace between Japan and the Republic of China, signed on Apr. 28, 1952, entered into force on Aug. 5, 1952, §§2 and 10; Joint Communique of the Government of Japan and the Government of the People's Republic of China, para 3]

[Fact]

Lin Ching Ming, Koso appellant (plaintiff), was born in 1928 in Taiwan, then part of Japanese territory, to his father Lin Ta Ying and mother Lin Su Shih Sui who were Japanese, and had acquired Japanese nationality for him. But Japan (appellee), after World War II, took the view that the Taiwanese lost their Japanese nationality with the coming into force of the Treaty of Peace with Japan and the Treaty of Peace between Japan and the Republic of Chaina and thus, refused to recognize Lin's Japanese nationality. As a result, Lin had been held in a detention

camp twice due to the expiration of a special visa after his entry into Japan, and had always been exposed to the danger of being subjected to the execution of a compulsory deportation order.

Thereupon, Lin filed an action with the Tokyo District Court against the state of Japan demanding confirmation of his nationality as a Japanese and compensation for his mental suffering amounting to ¥1 million. The demand of the plaintiff was dismissed in the first instance. Dissatisfied with this, the plaintiff lodged a Koso appeal with the High Court.

[Opinions of the Court]

"This court judges that the claim of the appellant in question is unfounded. The reason for this judgment is virtually the same as the explanation given in the original decision.

1) "In the Treaty of Peace with Japan and the Treaty of Peace between Japan and the Republic of China, Japan waivered its territorial rights on Taiwan and the Pescadores, but there was no specific mention to which country these territories should belong. It can be assumed, however, that there was a tacit understanding among the signatories to the Treaty of Peace with Japan which was concluded on the basis of Japan's acceptance of the Potsdam Declaration that Taiwan and others should belong to the Republic of China as it was at the time of the Cairo Declaration. In the light that Japan has chosen the Republic of China and concluded a peace treaty, which includes confirmation of the above matter, it can justly be interpreted that Japan recognized that Taiwan and other territories belong to the Republic of China, the other party to the said treaty.

"Article 10 of the Treaty of Peace between Japan and the Republic of China provides that the residents of Taiwan and others shall be included among the nationals of the Republic of China by way of application of the treaty. As a corollary of this, it must be stated that, of the residents above, the Taiwanese having Japanese nationality lost their Japanese nationality at the time when the said treaty came into force.

"As mentioned above, it was not clearly described in the said treaty or the Treaty of Peace with Japan on which the former was based, when the people with Japanese nationality among the said residents lost their Japanese nationality. However, judging from the overall intent of the Cairo Declaration, the Potsdam Declaration and Articles 21 and 14 (a) 2 of the Treaty of Peace with Japan and in consideration of preventing them from becoming stateless persons as a result of their loss of Japanese nationality, it stands to reason that the date in question was established at the time when the Treaty of Peace between Japan and the Republic of China came into force, that is, on Aug. 5, 1952.

"...Japan signed the Japan-China Joint Communique on Sept. 29, 1972 recognizing that the People's Republic of China is the only lawful government of China. This naturally means that Japan has thus denied the existance of the government of the Republic of China. Then it should be interpreted that the Treaty of Peace between Japan and the Republic of China was terminated, having lost its raison d'etre by the normalization of Japanese-Chinese relations on the basis of the Japan-China Joint Communique...

"...However, Japan has remained consistent in recognizing that Taiwan has not been part of Japanese territory since the acceptance of the Potsdam Declaration. Japan consented to regard those with Japanese nationality among the residents in Taiwan and others as having the nationality of the Republic of China simply because Taiwan and others were not Japanese territory.

"Accordingly, aside from the question whether the residents of Taiwan and others who lost their Japanese nationality obtain immediately the nationality of the People's Republic of China on the basis of the Japan-China Joint Communique, it must be stated that the situation in which the said residents would reacquire Japanese nationality will never occur in the light of the absence of Japan's territorial right over Taiwan. ...In short, the Japan-China Joint Communique never affects the Japanese nationality which the appellant lost.

2) "The so-called principle of non-compulsory acquisition of nationality advocates that nationality should be changed on the basis of the free will of the individual, and that no one shall have his present nationality changed without his consent.

"As to what influence the change of State territory by cession will produce on the nationality of the residents in the ceded territory, it should be considered as a principle of international law that, as a result of the cession of territory, the residents of the renounced territory will, as a matter of course, acquire the nationality of the country to which the territory is ceded. Although the system of choosing nationality aimed at easing the application of the above principle has been in wide use in treaty precedents in recent years, it is still no more than a guidepost to be followed by states. It does not mean that customary international law has been established for the system of choosing nationality to the effect that even if there is no such provision in a treaty the residents of the renounced territory are naturally allowed to choose their nationality."

[Comment]

It is the consensus of opinions in the decisions made since the directive of the Director of the Justice Ministry's Civil Affairs Bureau issued on April 19, 1952 to interpret that the Japanese nationality of the people who were Taiwanese according to domestic law was lost as Japan renounced its territorial rights to Taiwan. There was a Supreme Court decision to that effect also (Decision by the Grand Bench, the Supreme Court, on Dec. 5, 1962, 16 *Keishū* 1661; Decision by the Second Petty Bench, the Supreme Court, on Apr. 5, 1963, 60 *Minshū* 437). Although the current decision follows suit, there has been considerable criticism against this stand.

In the first place, there was no specific mention in the Treaty of Peace with Japan as to what country Taiwan and other renounced territories belong, nor was there any description concerning the nationality of Taiwan residents. In addition, there is no provision in the Treaty of Peace between Japan and the Republic of China

that Taiwan be ceded to the latter, or a provision that the Taiwanese residents also be "ceded." According to the principle of law since the advent of Roman Law, expanded interpretation has not been admitted with regard to the deprivation of rights and status (*extensio admittenda in materia favorabili non vero in odiosa*). So, there should not be such a situation as depriving an individual of his important rights, status and freedom by interpretation, notwithstanding the fact that there are no such provisions in the treaty.

Furthermore, the interpretation that a nation's citizens can be deprived of their important status, that is, nationality in this instance, by the directive of an administrator, such as the Director of the Civil Affairs Bureau, without referring to any preceding laws, runs counter to what is required of the paramount principle of modern democratic states, that is, the principle of the "rule of law." In addition, it is unconceivable under the Japanese Constitution, in which sovereignty rests with the people, that when the territory were renounced, the people in that country could be deprived of their nationality in disregard of their will. (*See*, Shigeki Miyazaki, "The Nationality of the Inhabitants of a Renounced Territory: Formosa," 51 *Hōritsu Ronsō* 53).

In this sense, if we were to interpret that the nationality of Taiwanese residents had not been affected by the Treaty of Peace with Japan and the Japan-Republic of China Peace Treaty, and that the Joint Communique between Japan and the People's Republic of China in which there was also no provision as to the nationality of Taiwan residents never affected the Japanese nationality which the appellant had, it can be said that the Japanese nationality of the Taiwanese residents still remains unaffected.

2. In the light of the contention that a treaty provision not to recognize the right to choose nationality runs counter to international law, or that the right to choose nationality is given to residents as a natural consequence of the change of State territory without a provision to that effect in the treaty which causes the change, the system concerning the choice of nationality has not nec-

essarily been established at present as customary international law.

On the other hand, there is no customary international law in which the government of a renouncing country can automatically deprive the residents of the renounced territory of their nationality unilaterally in cases where there is no provision in the treaty. Rather, this court should have positively evaluated the system of choosing nationality in the existing international law, in the light of the practice of international law in which the right to choose nationality has generally been admitted to the residents of a renounced territory (Japan has so far admitted such right without exception) and taking into consideration the fact that Article 15 of the Universal Declaration of Human Rights prohibits the arbitrary deprivation of nationality, and that recent legal conviction and *opinio juris* among U.N. member countries about respect for the right of peoples to self-determination.

2. Wartime bonds in bearer form in possession of a Taiwanese resident and extinctive prescription. – Case demanding repayment on saving bonds.

Decision by the First Civil Affairs Department, Tokyo District Court, on Oct. 31, 1980. Case No. (*wa*) 12076 of 1977. Allowed in part. 984 *Hanrei Jihō* 47; 425 *Hanrei Taimuzu* 56.

[Issues]

Employment of the extinctive limitation against the exercise of the right of recourse concerning "wartime savings bonds with a premium" (bond certificates in bearer form) in the possession of a Taiwanese resident shall not be permitted in view of the principle of *bona fides*.

[Reference: Civil Code § § 1 (2), 145; Treaty of Peace between Japan and the Republic of China, signed on Apr. 28, 1952, entered into force on Aug. 5, 1952, § 3]

[Fact]

Defendant Y issued bonds during the war by order of the government in accordance with the provisions of the Extraordi-

nary Fund Raising Act. Plaintiff X (a Taiwanese resident) bought the bonds in Taiwan between 1942 and 1944. Upon receiving instructions from the government on the methods of floatation and contents each time, the bonds in question were issued. The money received was managed by the Deposit Department of the Finance Ministry. As such, the bonds in question were no different in substance from national bonds.

The terms and conditions of redemption of the bonds were described on the certificates, but Y, publishing a notice in the official gazette, set the redemption date at Oct. 15, 1952 upon receiving instructions the same year from the government which were different from the original regulation.

In accordance with Article 3 of the Japan-Republic of China Peace Treaty, Japan and the Republic of China agreed that the handling of the right of recourse of the Chinese government authorities and residents to Japan and the Japanese people be made a major item in the special arrangement between the two governments.

But, before the special arrangement was made, the peace treaty ceased to be effective by the Joint Communique issued between Japan and the People's Republic of China in September, 1972, and subsequently it became impossible to deal with the right of recourse by the special arrangement. Against such a background, X who had purchased the wartime savings bonds demanded that Y repay the bonds at current value.

[Opinions of the Court]

"The plaintiff insists as though the right of recourse had taken effect anew from the time the peace treaty lost its effectiveness and that the extinctive prescription of the said right had been interrupted while the treaty was in effect. Upon study, it is self-evident that the right of redemption in the current case corresponds to the 'right of recourse' prescribed in Article 3 of the Peace Treaty, but it cannot be said that there is acknowledgement of obligations which provides the reason for the interruption of extinctive prescription since the said article did not acknowledge separate, concrete obligations

of Japan or the Japanese people toward individual Taiwanese.

"The claim of the plaintiff can also be taken to mean that the progress of prescription does not begin until September, 1972 (suspension of prescription), but even if there was such a provision in the treaty, it cannot be interpreted that there occurred a legal hindrance for the plaintiff to exercise the right of redemption against the defendant in the current case because a treaty as a note of consent between states does not immediately affect the right and obligations of the people of the countries concerned. At any rate, the right of redemption in the current case should be considered as having lapsed on Oct. 15, 1972 by extinctive prescription.

"On the other hand, however, it is necessary to reconsider the employment of the said prescription by the defendant in connection with Article 3 of the Peace Treaty.

"As is stated above, on the ground that there was the said article, it should not be interpreted that legal hindrance occurs in the exercise of the right of redemption by the plaintiff against the defendant, but it can be easily understood that the plaintiff who is a Taiwanese had refrained from exercising his right of redemption in the hope that the special arrangement on the disposition of the 'right of recourse' between the two governments would be made on the basis of the said article.

"Under the circumstances, it was not unreasonable that he withheld the exercise of the said right. (There is a view that if there were such a provision in the treaty it would directly affect the rights and obligations of the people of the states concerned and that the exercise of the right of recourse by the people would be legally restricted.) The bonds in question were not like those normally issued to the Japanese private citizens. As stated above, the savings bonds in the current case had been issued by order of the government and the proceeds therefrom had been managed by the Finance Ministry. As such, they could be regarded as a sort of government bonds and it stands to reason that expectations were placed on the special arrangement to be made on the basis of the treaty.

"On the other hand, the defendant, too, had naturally expected that the special arrangement would be made between the two gov-

ernments as he had conducted the floatation and redemption of the savings bonds in the current case pursuant to the instructions of the government. As a matter of fact, it is inconceivable that the defendant would have agreed to repay immediately regardless of the treaty if there had been a claim for redemption during the period when the treaty was in effect.

"Considering the above circumstances, it was not possible for the plaintiff to realize the exercise of the right of redemption at the time when the peace treaty was in effect, and the defendant himself would not have complied with the demand for redemption. As such, it cannot be permitted for the defendant to employ the extinctive prescription in the current case now in the light of the principle of *bona fides*."

[Comment]

It is said that there are a considerable number of Taiwanese residents who have not been repaid for their government bonds and other bond certificates they purchased during the war. Actions claiming redemption were brought to the court one after the other during the year under review. (In addition to the current case, a decision was handed down at the Tokyo District Court, March 25, 1980. 974 *Hanrei Jihō* 102; 422 *Hanrei Taimuzu* 108. A decision by the Tokyo District Court on Nov. 17, 1980. 991 *Hanrei Jihō* 93) The decision by the Tokyo District Court on Mar. 25, 1980, for instance, ruled that with regard to the interpretation and application of Article 3 of the Peace Treaty between Japan and the Republic of China, the article called for the conclusion of a special arrangement between Japan and the Republic of China with the disposition of the right of recourse of Taiwan residents to Japan as the main item, but the article can only be considered as having clarified the policy on the disposition of the right of recourse of Taiwan residents in general.

The provision in the said article cannot be interpreted as having stipulated that Taiwan residents cannot exercise separate and concrete rights of recourse to Japan and the Japnanese people until such time when the special arrangement on the disposition of the

right of recourse is made between the two governments. Hence, it cannot be interpreted that the recognition of obligations as the cause of interruption of prescription was made concerning the separate and concrete obligations of Japan and the Japanese people to individual Taiwanese residents. The decision in the current case followed such a stand.

The decision, however, is worthy of considerable attention from the standpoint of protection of individuals, in that while admitting the establishment of the extinctive prescription it rejected application of the limitation on the ground that it violates the principle of *bona fides*, and thus allowed the claim of the plaintiff.

On the other hand, it cannot necessarily be said that "the treaty being a consent between states does not immediately affect the rights and obligations of the people of the states concerned." There are self-executing treaties aimed at regulating, directly, the rights and obligations of the people of the states concerned. Such treaties can be put into force with the same effect as domestic laws through public proclamation. (Decision by the Tokyo District Court, June 30, 1932; Decision by the Tokyo Court of Appeal, Feb. 20, 1953). Accordingly, whether the treaty in question is self-executing or not should be judged upon studying the terms of the treaty, the intents of the states concerned as well as preparatory work of the treaty.

With regard to Article 3 of the Japan-Republic of China peace treaty, it should be judged as having a non-self-executing character only after such a study has been made. But, none of the decisions above have shown the grounds on which they stood as they seem to have considered this point quite self-evident. Even if the treaty is non-self-executing, in case the rights and obligations of the peoples of one of state parties are actually affected by failure of the other state parties to implement the duties to take domestic steps provided by the treaty, it generally gives rise to an international responsibility of the other state parties for that failure and hence a way of relief can be opened by the right of diplomatic protection by the state concerned.

However, in the current case, failure to establish a special arrangement provided for by Article 3 of the Japan-Republic of China

Peace Treaty does not give rise to an international responsibility for reason of non-execution of the treaty obligations by the Japanese government, and the means of relief by right of diplomatic protection of the state in question have also been closed. That the current decision allowed the claim of the plaintiff on the basis of the principle of *bona fides* can be highly evaluated from the standpoint of protection of individuals, especially in connection with the question to what extent a state can protect and guarantee damages on lives, persons and properties war incurs upon individuals.

By Prof. TOKUSHIRO OHATA
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b. Private International Law

An international case calling for the protection of personal liberty. Habeas Corpus case.

Decision by the Osaka District Court on June 16, 1980. Case No. (*Hito*) 3 of 1980. Demand dismissed. 417 *Hanrei Taimuzu* 129.

[Issues]

In case a person detaining and a detainee both reside in Hawaii, the action filed by the real parents of the detainee (an infant) for protection of personal liberty is unlawful for lack of Japanese jurisdiction.

[Reference: Habeas Corpus Act §§11 (1), 16, and Habeas Corpus Rules §§2, 21 (1)(i), 37]

[Fact]

X_2 gave birth to a child (detainee Z) out of her relations with X_1 who had a wife and children. She consented to A that "she