objection of the trade union and union members which were party to the suit.

By Prof. AKIO SATO
KUNIYUKI MATSUO

8. International Law

a. Public International Law

Korean residents in Japan and Japanese nationality.

Decision by the Fifth Criminal Department of the Osaka High Court on Jan. 26, 1981. Case No. (*u*) 623 of 1979. A case involving violation of the Alien Registration Act. 1010 *Hanrei Jihō* 139. Have the Korean residents in Japan lost their Japanese nationality as a result of the Peace Treaty Article 2 (a) ? Decision affirmative.

[Reference: Peace Treaty with Japan, signed on Sept. 8, 1951, came into force on Apr. 28, 1952, Article 2 (a). Universal Declaration of Human Rights, adopted on Dec. 10, 1948, Article 15-2]

[Facts]

The defendant, a Korean resident in Japan, insisting that he had Japanese nationality, burned his alien registration certificate and remained in Japan without applying for the re-issuance of a registration certificate during the legal period of time therefor.

As a result, he was indicted on charges of violating the Alien Registration Act. The defendant contended that he still had Japanese nationality and therefore should not be subjected to the application of the Alien Registration Act.

In the first instance, the Kyoto District Court on Apr. 3, 1979 in its decision turned down the contention of the defendant and sentenced him to four months in jail with a stay of execution for a year on the ground that the defendant's action, as described a-

bove, correspondend to Articles 18-1-1, 7, and 11-1 of the Alien Registration Act. (Decision not recorded). Dissatisfied with the decision, the defendant and the prosecution both filed an appeal to a higher court.

[Opinions of the Court]

Both appeals were dismissed.

"Article 2 (a) of the Peace Treaty states that Japan, recognizing the independence of Korea, renounces all rights, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet. The decision of the Supreme Court on Apr. 5, 1961 (15 Minshu 657) says as follows: 'There is little doubt that this decision renounces sovereignty over the territory which ought to belong to Korea, and at the same time renounces sovereignty over the people who ought to belong to Korea. . . . . This means that the people who ought to belong to Korea will be deprived of their Japanese nationality. . . . . It stands to reason to interpret this as follows: the people who ought to belong to Korea are the people who had legal status as Koreans in Japan's domestic laws following Japan's annexation of Korea.' In this connection, there is little room for doubt concerning the above interpretation with regard to the nationality of the Koreans in general.

"Certainly there is no universally recognized principle in international law at present concerning the transfer of nationality as a result of a change in territory, but there are cases, such as that which occurred at the time of Burma's independence from Britain and the nullity of Germany's annexation of Austria, in which residents were given the right to choose their nationality or have their old nationality restored.

"In the Peace Treaty Japan pledged to make efforts to realize the aims of the Universal Declaration of Human Rights, which denies any arbitrary deprivation of nationality. Judging from the historical background and the present situation of Koreans in Japan, their loss of Japanese nationality under the Peace Treaty may at times be considered equivalent to a forcible deprivation of nationality.

"Thus viewed, it could have been proper to adopt a legal step to grant the Korean residents the right to adopt legal steps to allow the Korean residents to exercise the right to choose whether or not to maintain their Japanese nationality on the occasion of coming into force of the Peace Treaty, instead of depriving them of their Japanese nationality uniformly under Article 2 (a) of the Peace Treaty, or to restore, under specific requirements, their Japanese nationality which they had once lost within a given period of time following coming into force of the Peace Treaty.

"On the other hand, it can be interpreted that the primary purpose of Article 2. (a) of the Peace Treaty was to help Korea become free and independent by making the Korean people, then in a state of slavery, free from the yoke of Japanese nationality.

"Besides, what is called for in Article 15-2 of the Universal Declaration of Human Rights is not established as a concrete right in positive law. So, it is necessary to make clear in the first place what nationality the persons residing in Japan proper should have.

"Thus viewed, since there is no legal provision either in domestic law or the bilateral treaty concerned that recognizes the choice of nationality or its recovery with regard to the Korean residents in Japan, there is no alternative but to interpret that the Korean residents in Japan who ought to belong to Korea have lost their Japanese nationality under Article 2 (a) of the Peace Treaty."

[Comment]

With regard to the nationality of the Korean residents in Japan, there was a precedent set by the Supreme Court, as was pointed out by the current decision, to the effect that in accordance with Article 2 (a) of the Peace Treaty the Korean residents in Japan lost their nationality simultaneously with coming into force of the treaty. (Decision by the Grand Bench of the Supreme Court, on Apr. 5, 1961. 15 *Minshū* 657.)

Prevailing theories also hold the same stand as this decision. However, there have appeared of late strong opinions against such generally accepted views and decisions. (Yasuaki Ohnuma, "A Study on the Legal Status of Korean Residents in Japan," 96 and

97 *Hōgaku Kyōkai Zasshi* 266, 529, 911, 192, 279, 455.)

According to Ohnuma, the nationality issue of Korean residents should not be handled within the framework of "a change of nationality accompanying a change of territory" which maintains that man's legal status should belong to the domain that is to be transferred, but that it ought to be dealt with within the framework of the "principle of the self-determination of peoples" calling for the establishment of component members of the state accompanying its emergence as a new nation state.

In other words, the independent state must, first of all, decide on the status of its people and its former home country should respect that decision.

Under the Peace Treaty, Japan shouldering the obligation of recognizing the independence of Korea has likewise assumed the obligation to respect the right of Korea to decide on its own people.

Since the self-determination within the framework of the "principle of self-determination" ought to be realized by the subjective participation of individuals in the collective decision of the will, the subjective will of individuals to be guaranteed in the form of the choice of nationality has to be the major yardstick in settling the issue.

As a consequence, the tenor of Article 2 (a) of the Peace Treaty lies not in depriving the Koreans of their Japanese nationality on the basis of domestic laws (in this instance, the family registry) but in leaving the matter of their nationality in the settlement of its own people by Korea and ultimately in the choice of nationality by the subjective will of individuals.

In the current case, a Korean resident in Japan insisted on maintaining his Japanese nationality while denying the maintenance of Korean nationality. Generally accepted views and judicial precedents do not allow for such contention, but viewed from the opposing standpoint this contention has to be accepted.

At any rate, Article 2 (a) in question does not primarily make clear the contents of the obligation Japan has assumed, and the nationality of the Korean residents can be decided depending upon the interpretation.

Although there is no doubt that the current decision has followed the stand of the generally accepted views and judicial precedents, it has pointed out the propriety of providing the Korean residents with a chance to choose or recover their nationality and, at the same time, take stock to a certain extent of the arguments voiced by antagonists. On this score, the current decision is worthy of special attention.

[Reference: 768 *Jurisuto* 271, June 10, 1982, Kotera Akira's Comment on Major Decisions in 1981.]

By Prof. TOKUSHIRO OHATA
SATORU TAIRA

b. Private International Law

International jurisdiction and Malaysia Airlines case.

Decision by the Second Petty Bench of the Supreme Court on Oct. 16, 1981. Case No. (*o*) 130 of 1980. A case demanding compensation. 35 *Minshū* 1224. 1021 *Hanrei Jihō* 9. 452 *Hanrei Taimuzu* 77. Claim for compensation against a foreign juridical person whose business office is located in Japan, and international jurisdiction.

[Reference: Law of Civil Procedure § 4 (1), 4 (3), Law concerning Application of Laws in General § 7]

[Facts]

On Dec. 4, 1977 a Japanese A boarded an airplane operated by Y (defendant, appellee and *Jokoku* appellant) under the air passenger contract he concluded in Malaysia with Y, but he died when the plane crashed in Malaysia the same day.

X, his bereaved family living in Aki City, Aichi Prefecture, Japan, (plaintiff, appellant and *Jokoku* appellee) brought an action before the Nagoya District Court demanding more than