Fundamental Human Rights and the Law of Nations
—Essential Problems of Legal Status of the Korean Inhabitants (Minority) in Japan—

by Jae-Shick Pae*

The consideration of human rights starts from “humanity”, which has nowadays become a legal concept. Acccording to Kant's categorical imperative, man must never be treated as a means, but always as an end in himself.

It has been proved that the protection of human rights may not be effective until it be secured by means of international law. It is the Second World War that had decisively made the protection of human rights a matter of international concern, and today, universal respect for, and observance of, human rights are to be secured by general international law as an organic principle of the society of nations. The United Nations Charter, which has been recognized as general international law, explicitly recognizes that the maintenance of “international peace and security” and the protection of “human rights” are today interdependent, if not identical, purpose; announces the promotion of human rights as one of the major aims of the United Nations; and imposes upon both Member states and the Organization a clear legal obligation to promote the increased protection of human rights. This development in the sphere of international protection of human rights has been a justification of Kelsen's theoretical position that refused to accept the dualist thesis.

From these points of view, how should the legal status of the Korean inhabitants (minorities) in Japan (and Sakhalin) essentially be prescriibed? Will they in Japan be able to enjoy their human dignity and fundamental rights only with such a (right of) permanent residence as have been provided in the

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* Dean and Professor of Law College, Seoul National University.
Agreement between the R.O.K. and Japan? Are these not essentially the matters of international protection of fundamental human rights and freedoms?

At the conclusion of the World War I, an important step was taken in the direction of providing international protection for individuals in the enjoyment of rights against violation by their own governments. The qualified application of the principle of self-determination in the drawing of new state boundaries radically reduced the number and size of national minorities in Europe, but it by no means eliminated them. This would have been impossible without large-scale population transfers and exchanges. To improve the lot of the national minorities that remained, a number of states were required to accept the system of protection of minorities, which guaranteed to individuals belonging to religious, racial or linguistic minorities certain political and civil rights. It is, in particular, to be mentioned that a right to nationality (automatic acquisition, or just facilities for the acquisition, of nationality) for minorities, first of all, as a premise for the just and equal treatment of minorities, was stipulated by all the Minorities Treaties. The system of protection of minorities, however, attenuated by the interpretation given to it in practice, must be regarded as having justified itself, in its cumulative effect, as an instrument of international supervision in the interest alike of the elementary rights of the individual and of international peace. The principle of this system shall be referred to the problem of the essence of legal status of the Korean inhabitants in Japan (and Sakhalin).

During and after the World War II, a number of important international instruments such, for example, as the Atlantic Charter, Cario Declaration (which refers to the Korean independence and the Korean people enslaved under the Japanese government), the Declaration by the United Nations, the Potsdam Declaration, the Charter of the United Nations, the Declaration of Human Rights, and Peace. Treaties have emphasized and contained the respect for fundamental freedom and human rights that had been one of the principal ends of the War. In particular, one of the major purposes of the United Nations
has been to promote and encourage “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.” This has distinguished it from the League of Nations which preceded it, and generally from past efforts at international cooperation to further international peace and promote human welfare.

The Charter reflects a new approach to human rights and freedom born of the experience of the World War II and the years immediately preceding it, when flagrant violations of human rights and the denial of the basic dignity of man were the hallmarks of regimes challenging and violating international peace and security. This approach is a denial of the proposition the way in which a state treats its nationals is of no concern to the community of nations and therefore beyond the scope of activity of international agencies. And, “since the rights of man are placed under international guarantee by the Charter of the United Nations, it would no longer be possible for a state to brush aside international representations concerning a violation of those rights on the ground that the victims were its citizens and that international law leaves a state free to deal with its own as it wills. It should be repeated that the treatment by a state of its citizens is no longer a matter which, under Article 2, paragraph 7 of the Charter, is essentially within the domestic jurisdiction” (Jessup).

With a few exceptions, publicists and governments agree that the Universal Declaration of Human Rights is a non-binding pronouncement. Nevertheless, a complete denial of the legal relevance of the Declaration does not do justice to a document which was adopted without a dissenting vote by the governments forming the most representative body of the community of nations. The Declaration is no abstract statement of general principles; it is specific and detailed. Many of its provisions have now been embodied in national constitutions and have been used for purposes of judicial interpretation in different jurisdictions. It has received repeated confirmation in numerous international treaties. The doubts which were raised in 1948 about the effect of the Declaration have been
dispelled by the constant and consistant practice of the United Nations, which has imbued the Declaration with a status almost equal to that of the Charter. On the one hand, the Declaration derives its strength from being an authoritative or an official interpretation of the Charter. On the other hand, it strengthens the obligation of the Charter by giving a more precise meaning to the general phrases of the Charter. The Declaration does now represent in written form the basis for the law of nations, the law of humanity and the dictates of the public conscience as accepted in the twentieth century.

Thus, today, a breach of human rights constitutes a violation of international law and will justify international intervention (on the ground of humanity), particularly the collective intervention by the United Nations. And, it may also be submitted to the International Court of Justice by any state as “a question of international law” to be decided in accordance with Article 38, paragraph 1 of the Statute of I.C.J. (though the Court’s function is limited by lack of the general compulsory jurisdiction).

Now, the Korean residents in Japan, amount to approximately 675,000, who have been legally Japanese nationals (national minority) until the conclusion of the Peace Treaty with Japan (1952), are now under unreasonable discrimination and inferior social position as “foreigners” in legal sence. This is clearly a question of human rights in the law of nations.

It seems to be that the traditional Japanese prejudice toward the Korean residents remains strong, and may even have increased. And the continued policy of Japanese government based on assimilation and exclusion (or repatriation) seems have failed to solve the minority problem, and it even inflamed the Koreans and encouraged the growth of passion of nationalism and nationalistic organization. The Korean educational program tends to be in a nationalistic phase as a reaction to such a Japan’s policy of long-continued suppression of Korean schools. As a result, the hostility between the Koreans and Japanese people increased.

The purpose of the Agreement on Legal Status of Nationals of the Republic
of Korea residing in Japan is “to provide Korean residents with means to enjoy a stable life under the Japanese social order,” but it is lacking in the essential element which should be regarded as necessary for its purpose. It is international guarantee of their fundamental freedom and human rights. The Korean residents should be in position to enjoy human dignity and value as social being, and should not be left out in the cold.

The main content of the Agreement is that permanent residentship is to be granted by the permission of the government of Japan to nationals of the Republic of Korea who have continuously lived in Japan since August 15, 1945, and to their descendants who are born by 1970, if applications are made in their name within sixty days after their birth. According to this provision, approximately 350,000 Korean residents had applied for the permanent residence by the date of the close and most of them have been granted the status.

The Agreement also contains the clauses that the Japanese government retain the right to deport Koreans who are convicted of a certain crimes, and the government is to give appropriate consideration to the education, livelihood protection, and national health insurance coverage of the Koreans who qualify under the provisions of the Agreement.

The Korean residents who have had Japanese nationality since the annexation of Korea to Japan in 1910, however, should not have been in such a position as they have to apply for permanent resident status. They should, first of all, have been endowed with an option of nationality (a right of retaining the Japanese nationality or of acquisition of the nationality of the Republic of Korea) according to the international general practice that has been “customary” and the principle of fundamental human rights and freedom. Now, the legal status of those Koreans most of them belong to so-called Jochong-yon) who had not made an application for the permanent residence is still uncertain.

The government of Japan, however, has persistently denied it and has asserted that all the Koreans in Japan had automatically (and as a matter of course) been lost their Japanese nationality under (a) of Article 2 of the Peace Treaty
with Japan (1952), and this has been supported by a decision of the Supreme Court of Japan. It is, in a word, a dogmatism, because the Article contains nothing on the change of nationality but provides only the changes of territory.

The nationality of the residents or inhabitants following the change of territorial right is not a domestic matter (national policy) but a question in international law which should be provided in a treaty concerned.

It is to be mentioned here that both governments of Korea and Japan are now confronted with the problem of legal status of the third generations of Korean inhabitants in Japan which is reserved for negotiation between the both countries according to the Agreement. I hope that this problem will be settled in a new round of negotiation on the basis of human rights and international law, and that our discussion in this occasion will be able to find an appropriate clue to that effect.

In addition to these problems, I would like to refer to the case of Koreans in Sakhalin. The Koreans in Sakhalin which has been under the military occupation by the Soviet Russia since the end of the last war have still been enforced to retain. And they have been deprived of their nationality of Japan even before the Peace Treaty with Japan entered into force and have been denied the right to opt for the nationality of Japan or of the Republic of Korea: they were, in 1948, enforced to opt for the nationality of the North Korea or of Soviet Russia. And those who have not complied with it, have been treated as "Stateless" persons and slavery. This is obviously a model case which constitutes a systematic violation of human rights. Undoubtedly, the government of Japan that had drafted these Koreans (most of them are labors) is basically and wholly responsible for such situation of Koreans in Sakhalin. They should be on the position to be returned to Japan or to Republic of Korea under the responsibility of Japanese government and should be given a fundamental right and freedom to opt for nationality of Japan or of R.O.K. This is only way to protect and guarantee the human rights of those Koreans. These problem should be discussed in the General Assembly of the United Nations as

The respect for human rights is the foundation of peace among nations.